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Code of Federal Regulations

20

Part 500 to end

Revised as of April 1, 2000

Employees' Benefits

Containing a Codification of documents of general applicability and future effect

As of April 1, 2000

With Ancillaries

Published by
Office of the Federal Register
National Archives and Records
Administration

As a Special Edition of the Federal Register

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 2000

For sale by U.S. Government Printing Office
Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402–9328

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Cite this Code: CFR

To cite the regulations in this volume use title, part and section number. Thus, 20 CFR 501.1 *refers to title 20, part 501, section 1.*

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Title 1 through Title 16.....as of January 1
Title 17 through Title 27.....as of April 1
Title 28 through Title 41.....as of July 1
Title 42 through Title 50.....as of October 1

The appropriate revision date is printed on the cover of each volume.

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An index to the text of ''Title 3—The President'' is carried within that volume.

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RAYMOND A. MOSLEY,
Director,
Office of the Federal Register.

April 1, 2000.

THIS TITLE

Title 20—EMPLOYEES' BENEFITS is composed of three volumes. The first volume, containing parts 1–399, includes all current regulations issued by the Office of Workers' Compensation Programs, Department of Labor and the Railroad Retirement Board. The second volume, containing parts 400–499, includes all current regulations issued by the Social Security Administration. The third volume, containing part 500 to End, includes all current regulations issued by the Employees' Compensation Appeals Board, the Employment and Training Administration, the Employment Standards Administration, the Benefits Review Board, the Office of the Assistant Secretary for Veterans' Employment and Training (all of the Department of Labor) and the Joint Board for the Enrollment of Actuaries. The contents of these volumes represent all current regulations codified under this title of the CFR as of April 1, 2000.

Redesignation tables appear in the Finding Aids section of the first and second volumes and an Index to chapter III appears in the second volume.

For this volume, Shelley C. Featherson was Chief Editor. The Code of Federal Regulations publication program is under the direction of Frances D. McDonald, assisted by Alomha S. Morris.

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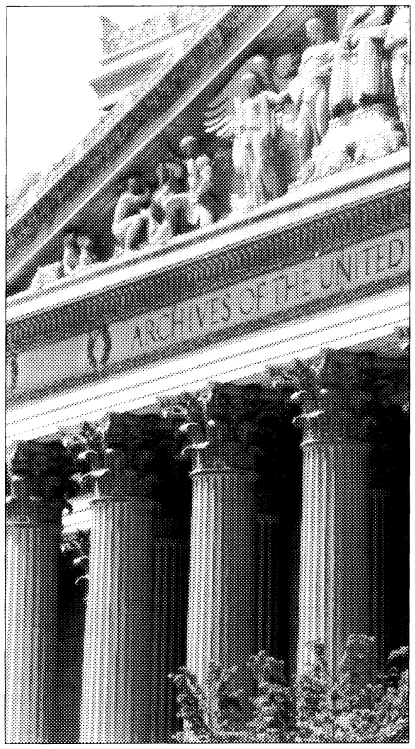

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Title 20—Employees' Benefits

(This book contains part 500 to end)

EDITORIAL NOTE: Other regulations issued by the Department of Labor appear in title 20, chapter I, title 29, subtitle A and chapters II, IV, V and XVII, title 41, chapters 50 and 60 and title 48, chapter 29.

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PART 501—RULES OF PROCEDURE

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AUTHORITY: Sec. 32, 39 Stat. 749, 5 U.S.C. 8145; sec. 3, Reorganization Plan No. 2 of 1946, 60 Stat. 1095; 3 CFR 1943–48 Comp., p. 1064; sec. 2, Reorganization Plan No. 19 of 1950, 64 Stat. 1272; 3 CFR 1949–53 Comp., p. 1010.

SOURCE: 27 FR 12186, Dec. 8, 1962, unless otherwise noted.

§ 501.1 Definitions.

(a) *Act* means the Federal Employees' Compensation Act and any statutory extension or application thereof.

(b) *Board* means the Employees' Compensation Appeals Board.

(c) *Office* means the Office of Workers' Compensation Programs and in the case of employees of the Canal Zone Government and of the Panama Canal Company, the Governor of the Canal Zone.

(d) *Director* means the Director of the Office and in the case of employees of the Canal Zone Government and of the Panama Canal Company, the Governor of the Canal Zone.

(e) *Party* means any person admitted and named as a party on the docket of the Board, including any intervenors.

(f) *Counsel* includes any person who is a member in good standing of the bar of the Supreme Court of the United States or the highest court of any State, territory, or the District of Columbia.

[27 FR 12186, Dec. 8, 1962, as amended at 29 FR 13519, Oct. 1, 1964]

§ 501.2 Scope and applicability of rules; composition and jurisdiction of the Board.

(a) The regulations in this part provide the rules of practice of the Board in hearing and deciding appeals from final decisions of the Office.

(b) The Board consists of three members appointed by the Secretary of Labor, one of whom is designated as Chairman of the Board and administrative officer.

(c) The Board has jurisdiction to consider and decide appeals from the final decision of the Office in any case arising under the Act. The Board may review all relevant questions of law, fact, and discretion in such cases. There shall be no appeal with respect to any interlocutory matter disposed of by the Office during the pendency of a case. The review of a case shall be limited to the evidence in the case record which was before the Office at the time of its final decision.

§ 501.3 Application for review.

(a) *Who may file.* Any person adversely affected by a final decision of the Director, or his duly authorized representative, may file an application for review of such decision by the Board.

(b) *Place of filing.* Any application for review shall be filed with the Clerk of the Board, Employees' Compensation Appeals Board, U.S. Department of Labor, Washington, DC 20210.

(c) *Form of application; contents.* An application for review should be filed with the Board upon Form AB–1 (Application for Review). Any application made without the use of the form shall contain the following information: The full name and address of the applicant, the name of the injured or deceased employee, the employing establishment, the case file number assigned to the case by the Office, a description of the particular injury involved, the date of the injury, the place of injury, and the date of the decision being appealed. If the applicant is being represented by another person in the proceeding, the name and address of such representative should be stated. Each application shall include a succinct statement indicating the contentions of the applicant and describing with particularity

any findings of fact, conclusions of law, or exercise of (or failure to exercise) discretion complained of. Any application containing incomplete information shall be returned to the applicant with a description of the additional information needed and a reasonable opportunity for furnishing any such information shall be allowed.

(d) *Time for filing.* (1) Except as provided in paragraph (d)(2) of this section, any application for review by a person residing within the United States or Canada must be filed within 90 days from the date of issuance of the final decision of the Director, and any application for review by a person residing outside the United States or Canada must be filed within 180 days from the date of issuance.

(2) For good cause shown, the Board may in its discretion waive a failure to file an application within the time limitations provided in paragraph (d)(1) of this section, but for no longer than one year from the date of issuance of the final decision of the Director.

(3) *Date of filing*—(i) *Date or receipt.* Except as otherwise provided in this section, a notice of appeal is considered to have been filed only as of the date it is received in the office of the clerk of the Board.

(ii) *Date of mailing.* If the notice is sent by mail and the fixing of the date of delivery as the date of filing would render the appeal untimely, it will be considered to have been filed as of the date of mailing. The date appearing on the postmark (when available and legible) shall be prima facie evidence of the date of mailing. If there is no postmark or it is not legible, other evidence, such as, but not limited to, certified mail receipts, certificate of service and affidavits, may be used to establish the date of mailing.

(e) *Briefs and supporting statements.* Any application for review may be accompanied by a brief or supporting statement.

[27 FR 12186, Dec. 8, 1982, as amended at 53 FR 49491, Dec. 7, 1988]

§ 501.4 Transmittal of record.

(a) The Board shall serve upon the Director a copy of each application for review and any brief or supporting statement accompanying it. Within 60 days from the date of such service, the Director, through his legal representative, the Solicitor of Labor, shall transmit to the Board the record of the proceeding to which the application refers and a statement in support of his decision, or other pleading, as appropriate, signed on his behalf by his legal representative.

(b) On application of the Director, the Board may in its discretion extend the 60-day time for submittal to the Board of the record of proceedings and accompanying statement or pleading.

[42 FR 62471, Dec. 13, 1977]

§ 501.5 Oral argument.

(a) *Notice.* Whenever any party requests an opportunity to present oral argument the Board shall schedule the case for argument. Each party shall be notified at least 10 days before the date of argument. The notice shall state the issues to be heard, as determined by the Board.

(b) *Time allowed.* Generally not more than 1 hour shall be allowed for oral argument by any party although in appropriate cases the Board may in its discretion extend or shorten the time allowed.

(c) *Failure to respond to notice.* Failure to respond to a notice of oral argument shall not prejudice the rights of any party to the proceeding. The Board in its discretion may set the case for further argument upon notice or it may proceed to dispose of the appeal pursuant to § 501.6.

§ 501.6 Decisions.

(a) The decision of the Board shall contain a written opinion setting forth the reasons for the action taken and an appropriate order. The decision may consist of affirmance, reversal, remand for further development of the evidence, or other appropriate action. A copy of the decision shall be sent by the Board to all parties in interest. The case record shall be returned to the Director with a copy of the decision.

(b) A decision of not less than two members shall be the decision of the Board.

(c) The decision of the Board shall be final as to the subject matter appealed and such decision shall not be subject to review, except by the Board.

(d) The decision of the Board shall be final upon the expiration of 30 days from the date of the filing of the order, unless the Board shall in its order fix a different period of time or reconsideration by the Board is granted.

§ 501.7 Petition for reconsideration.

(a) *Procedure for filing.* A petition for reconsideration of a decision of the Board may be filed with the Board within 30 days from the date of the order, or, if another period is specified in the order, then prior to the time when the order becomes final. The petition shall state the grounds relied upon, including any matters claimed to have been erroneously decided and shall specify the alleged errors. The petition may be in letter form.

(b) *Answer; procedure for disposition of petitions.* Upon the filing of a petition for reconsideration, each of the other parties to the proceeding may file an answer thereto within such time as may be fixed by the Board. If reconsideration should be granted, reargument upon reasonable notice may be allowed in the discretion of the Board. After reconsideration of a case the Board shall either grant or deny the petition.

§ 501.8 Docket of proceedings; inspection of docket and records.

(a) *Maintenance of docket.* A docket of all proceedings shall be maintained by the Board. Each proceeding shall be assigned a number in chronological order upon the date on which an application for review is received. Each proceeding shall be generally considered in the order in which it is docketed, although for good cause shown the Board may advance the order in which a particular case is to be considered. Correspondence or further applications in connection with any pending case shall refer to the docket number of that case.

(b) *Inspection of docket and records.* The docket of the Board shall be open to public inspection. The Board shall publish its decisions in such form as to be readily available for inspection, and shall allow the public inspection thereof at the permanent location of the Board. Inspection of the papers and documents included in the case record of any proceeding before the Board shall be permitted or denied in accordance with the standards provided in § 1.22 of this title. The Chairman of the Board shall exercise the functions prescribed in 29 CFR 70.74a.

[27 FR 12186, Dec. 8, 1962, as amended at 37 FR 26710, Dec. 15, 1972]

§ 501.9 Regulation of proceedings.

The proceedings shall be conducted under the supervision of the Chairman or Acting Chairman, who shall regulate such matters as the granting of continuances, acceptance of briefs and other procedural matters.

§ 501.10 Number of copies of pleadings and related documents; service; computation of time.

(a) Except as provided in paragraph (b) of this section, any application, pleading, petition, brief or other memorandum shall be filed in duplicate (original and 1 copy) with the Board; the Board shall serve the copy upon the other party.

(b) Instead of filing the duplicate of any such document with the Board, the party submitting it may serve the duplicate or copy directly upon the Director and make a notation to that effect upon the copy filed with the Board.

(c) Any notice or order required under this part to be given or served shall be by certified or registered mail or by personal service.

(d) *Computation of Time.* (1) In computing any period of time prescribed or allowed by these rules or by direction of the Board, the first day counted shall be the day after the event from which the time period begins to run, and the last day for filing shall be included in the computation. If the last day for filing falls on a Saturday, Sunday, or Federal holiday, the first working day thereafter shall be the last day for timely filing. For purposes of computing the time for filing a notice of appeal or a petition for reconsideration, the event which commences the running of the time period shall be construed as occurring on the date the relevant decision is issued, and not the date the decision is actually received.

(2) Whenever a paper is served on the Board by mail, paragraph (d)(1) of this section will be deemed complied with if the envelope containing the paper is

postmarked within the time period allowed, computed as in paragraph (d)(1) of this section. If there is no postmark, or it is not legible, other evidence, such as, but not limited to, certified mail receipts, certificate of service and affidavits, may be used to establish the date of mailing.

(3) A waiver or an extension of the time limitations for filing a paper, other than a notice of appeal or a petition for reconsideration, may be requested by motion.

[27 FR 12186, Dec. 8, 1962, as amended at 53 FR 49491, Dec. 7, 1988]

§ 501.11 Appearances.

(a) *Representation.* In any proceeding before the Board, a party may appear in person, or by counsel or any other duly authorized person, including any accredited representative of an employee organization. No person shall be recognized as representing an appellant or intervenor unless there shall be filed with the Board a statement in writing, signed by the party to be represented, authorizing such representation. Such representative when accepted shall continue to be recognized unless he should abandon such capacity, withdraw, or the appellant or intervenor directs otherwise.

(b) *Former members of the Board; other employees of the Department of Labor.* A former member of the Board shall not be allowed to participate as counsel or other representative before the Board in any proceeding until two years from the termination of his status as a Board member. The practice of other former employees of the Department of Labor are governed by 29 CFR 2.2 and 2.3.

(c) *Debarment of counsel or other representative.* Whenever in any proceeding the Board finds that a person acting as counsel or other representative for any party to the proceeding is guilty of unethical or unprofessional conduct, the Board may order that such person be excluded from further acting as counsel or other representative in such proceeding. An appeal may be taken to the Secretary of Labor from such an order, but the proceeding shall not be delayed or suspended pending disposition of the appeal, although the Board may suspend the proceeding for a reasonable time for the purpose of enabling the party to obtain different counsel or other representative. Whenever the Board has issued an order precluding a person from further acting as counsel or other representative in a proceeding, the Board shall within a reasonable time thereafter submit to the Secretary of Labor a report of the facts and circumstances surrounding the issuance of the order, and shall recommend what action the Secretary of Labor should take in regard to the appearance of such person as counsel or other representative in other proceedings before the Board. Before any action is taken debarring such person as counsel or representative from other proceedings, he shall be furnished notice and opportunity to be heard on the matter.

(d) *Fees.* No claim for legal or other service rendered in respect to a proceeding before the Board to or on account of any person, shall be valid unless approved by the Board or by a member thereof. No contract for a stipulated fee or for a fee upon a contingent basis shall be recognized by the Board, and no fee for service shall be approved except upon an application to the Board supported by a sufficient statement of the extent and character of the necessary work done before the Board on behalf of the interested party. Except where such representation is gratuitous, the fee approved by the Board, or by a member thereof, shall be reasonably commensurate with the actual necessary work performed by such representative, taking into account the capacity in which the representative has appeared, the amount of the compensation involved, and the circumstances of the appellant.

§ 501.12 Intervention.

The Board may permit any person whose rights may be affected by any proceeding before the Board to intervene therein whenever such person shows in a written petition to intervene that such rights are so affected. The petition should state with precision and particularity (a) the rights affected; and (b) the nature of any argument he intends to make.

§ 501.13 Place of proceedings.

The Board shall sit in Washington, DC.

CHAPTER V—EMPLOYMENT AND TRAINING ADMINISTRATION, DEPARTMENT OF LABOR

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PART 601—ADMINISTRATIVE PROCEDURE

Subpart A—Approval, Certification and Findings With Respect to State Laws and Plans of Operation for Normal and Additional Tax Credit and Grant Purposes

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AUTHORITY: 5 U.S.C. 301; 26 U.S.C. Chapter 23; 29 U.S.C. 49k; 38 U.S.C. Chapters 41 and 42; 39 U.S.C. 3202(a)(1)(E) and 3202 note; 42 U.S.C. 1302; and Secretary of Labor's Order No. 4–75, 40 FR 18515.

SOURCE: 15 FR 5886, Aug. 31, 1950; 23 FR 1267, Mar. 1, 1958, unless otherwise noted.

Subpart A—Approval, Certification and Findings With Respect to State Laws and Plans of Operation for Normal and Additional Tax Credit and Grant Purposes

§ 601.1 General.

(a) State unemployment compensation laws are approved and certified as provided in section 3304 of the Internal Revenue Code of 1954; findings are made regarding reduced rates permitted by a State law (section 3303(a) of the Internal Revenue Code of 1954) and such laws are certified as provided in section 3303(b) of the Internal Revenue Code of 1954; findings are made regarding the inclusion of specified provisions (section 303(a) of the Social Security Act) in State laws approved under section 3304(a) of the Internal Revenue Code of 1954; findings are made whether the States have accepted the provisions of the Wagner-Peyser Act and whether their plans of operation for public employment offices comply with the provisions of said Act.

(b) Normal and additional tax credit is given to taxpayers against taxes imposed by section 3301 of the Internal Revenue Code of 1954.

(c) Grants of funds are made to States for administration of their employment security laws if their unemployment compensation laws and their plans of operation for public employment offices meet required conditions of Federal law. (Section 303(a) of the Social Security Act; section 3304(a) of the Internal Revenue Code of 1954; sections 6, 7, and 8 of the Wagner-Peyser Act.)

(d) As used throughout this Part, the terms ''Secretary'' or ''Secretary of Labor'' shall refer to the Secretary of Labor, U.S. Department of Labor, or his or her designee.

[15 FR 5886, Aug. 31, 1950; 23 FR 1267, Mar. 1, 1958, as amended at 61 FR 19983, May 3, 1996]

§ 601.2 Approval of State unemployment compensation laws.

States may at their option submit their unemployment compensation laws for approval (section 3304(a) of the Internal Revenue Code of 1954).

(a) *Submission.* The States submit to the Regional Administrator, Employment and Training Administration (RAETA) two copies of the State unemployment compensation law properly certified by an authorized State official to be true and complete, together with a written request for approval.

(b) *Review of State law.* The RAETA reviews the State law and forwards one copy to the central office of the Employment and Training Administration with his comments. The central office reviews the RAETA's comments and analyzes the State law from the standpoint of the requirements of section 3304(a) of the Internal Revenue Code of 1954.

(c) *Approval.* The Secretary of Labor determines whether the State law contains the provisions required by section 3304(a) of the Internal Revenue Code of 1954. If the State law is approved, the Secretary notifies the Governor of the State within 30 days of the submission of such law.

(d) *Certification.* On December 31 of each taxable year the Secretary of

Labor certifies, for the purposes of normal tax credit (section 3302(a)(1) of the Internal Revenue Code of 1954), to the Secretary of the Treasury each State the law of which he has previously approved. (See also § 601.5.)

(Approved by the Office of Management and Budget under control number 1205–0222)

[15 FR 5886, Aug. 31, 1950; 23 FR 1267, Mar. 1, 1958, as amended at 49 FR 18295, Apr. 30, 1984; 50 FR 51241, Dec. 16, 1985]

§ 601.3 Findings with respect to State laws and plans of operation.

For purposes of grants, findings are made regarding the inclusion in State unemployment compensation laws, approved under section 3304(a) of the Internal Revenue Code of 1954, of provisions required by section 303(a) of the Social Security Act (see § 601.2); findings are also made whether a State has accepted the provisions of the Wagner-Peyser Act and whether its plan of operation for public employment offices complies with the provisions of said act. For purposes of additional tax credit, findings are made regarding reduced rates of contributions permitted by the State law (section 3303(a) (1) of the Internal Revenue Code of 1954).

So that the Secretary of Labor may be enabled to determine the status of State laws and plans of operation, all relevant State materials, such as statutes, executive and administrative orders, legal opinions, rules, regulations, interpretations, court decisions, etc., are required to be submitted currently.

(a) *Submission.* The States submit currently to the RAETA two copies of relevant State material, properly certified by an authorized State official to be true and complete.

(b) *Review.* The RAETA reviews the State material and forwards one copy to the central office with his comments. The central office reviews the material from the standpoint of its conformity with section 303(a) of the Social Security Act, section 3303(a) of the Internal Revenue Code of 1954, or the Wagner-Peyser Act, as the case may be.

(c) *Findings.* The Secretary makes findings as provided in the cited sections of the Federal law. In the event that the Secretary is unable to make the findings required for certification for payment or for certification of the law for purposes of additional tax credit, further discussions with State officials are undertaken.

(Approved by the Office of Management and Budget under control number 1205–0222)

[15 FR 5886, Aug. 31, 1950; 23 FR 1267, Mar. 1, 1958, as amended at 49 FR 18295, Apr. 30, 1984; 50 FR 51241, Dec. 16, 1985]

§ 601.4 Certification for tax credit.

(a) Within 30 days after submittal of a State unemployment compensation law for such purpose, the Secretary certifies to the State agency, in accordance with the provisions of section 3303(b)(3) of the Internal Revenue Code of 1954, his findings regarding reduced rates of contributions allowable under such law. On December 31 of each taxable year the Secretary certifies to the Secretary of the Treasury the law of each State, certified with respect to such year under section 3304 of the Internal Revenue Code of 1954 (see § 601.2), which he finds allows reduced rates with respect to such taxable year only in accordance with the provisions of section 3303(a) of the Internal Revenue Code of 1954.

(b) With regard to certification for payment, see § 601.6.

§ 601.5 Withholding payments and certifications.

(a) *When withheld.* Payment of funds to States or yearend certification of State laws, or both, are withheld when the Secretary finds, after reasonable notice and opportunity for hearing:

(1) That any provision required by section 303(a) of the Social Security Act is no longer included in the State unemployment compensation law; or

(2) That the State unemployment compensation law has been so changed as no longer to meet the conditions required by section 3303(a) of the Internal Revenue Code of 1954 (section 3303(b)(3) of the Internal Revenue Code); or

(3) That the State unemployment compensation law has been so amended as no longer to contain the provisions specified in section 3304(a) or has failed to comply substantially with any such provision and such finding has become effective (section 3304(c) of the Internal Revenue Code of 1954); or

(4) That in the administration of the State unemployment compensation law there has been a failure to comply substantially with required provisions of such law (section 303(b)(2) of the Social Security Act and section 3303(b)(3) of the Internal Revenue Code of 1954); or

(5) That in the administration of the State unemployment compensation law there has been a denial, in a substantial number of cases, of benefits due under such law, except that there may be no such finding until the question of entitlement has been decided by the highest judicial authority given jurisdiction under such State law (section 303(b)(1) of the Social Security Act); or

(6) That a State fails to make its unemployment compensation records available to the Railroad Retirement Board or fails to cooperate with Federal agencies charged with the administration of unemployment compensation laws (section 303(c) of the Social Security Act); or

(7) That a State no longer has a plan of operation for public employment offices complying with the provisions of the Wagner-Peyser Act; or

(8) That a State agency has not properly expended, in accordance with an approved plan of operation, the Federal monies paid it for administration of its public employment service.

(b) *Informal discussion.* Such hearings are generally not called, however, until after every reasonable effort has been made by regional and central office representatives to resolve the question involved by conference and discussion with State officials. Formal notification of the date and place of a hearing does not foreclose further negotiations with State officials.

(c) *Notice of noncertification.* If, at any time during the taxable year, the Secretary of Labor has reason to believe that a State whose unemployment compensation law he has previously approved may not be certified, he promptly notifies the Governor of the State to that effect (section 3304(d) of the Internal Revenue Code of 1954).

(d) *Notice of hearing.* Notice of hearing is sent by the Secretary of Labor to the State employment security agency. The notice sets forth the purpose of the hearing, the time, date, and place at which the hearing will be held, and the rules of procedure which will be followed. At a hearing the State is given an opportunity to present arguments and all relevant evidence, written or oral. The Secretary makes the necessary determination or findings, on the basis of the record of such hearings. A notice of the Secretary's determination or finding is sent to the State employment security agency.

(e) *Civil Rights Act issues.* To the extent that any proposed withholding of funds involves circumstances within the scope of title VI of the Civil Rights Act of 1964 and the regulations promulgated thereunder, the procedure set forth in 29 CFR part 31 shall be applicable.

(f) *Tax credit reductions.* (1) Section 3302(c)(2) of the Internal Revenue Code of 1954 prescribes the conditions under which the total credits otherwise allowable under section 3302 for a taxable year in the case of a taxpayer subject to the unemployment compensation law of a State shall be reduced on account of an outstanding balance of advances made to the State pursuant to title XII of the Social Security Act. As amended by section 110(a) of the Emergency Compensation and Special Unemployment Assistance Extension Act of 1975 (Pub. L. 94–45, approved June 30, 1975; 89 Stat. 236, 239), and as further amended by title II of the Emergency Unemployment Compensation Extension Act of 1977 (Pub. L. 95–19, approved April 12, 1977; 91 Stat. 39, 43), the incremental reductions in total credits will not apply to a State with respect to the taxable years beginning on January 1, 1975, January 1, 1976, January 1, 1977, January 1, 1978, and January 1, 1979, if the Secretary of Labor finds as to each such year that the State has studied and taken appropriate action with respect to the financing of its unemployment compensation program so as substantially to accomplish the purpose of restoring the fiscal soundness of the State's unemployment account in the Unemployment Trust Fund and permitting the repayment within a reasonable time of any advances made to the State's account pursuant to title XII of the Social Security Act.

(2) The Secretary of Labor's finding with respect to a State as to any of the taxable years 1975, 1976, 1977, 1978, and 1979 will be based on his determination as to whether the State has taken appropriate action resulting in:

(i) Amendment of its unemployment compensation law, effective in or prior to the taxable year with respect to which the finding is made, or effective at the beginning of the succeeding taxable year, increasing the State's unemployment tax rate, increasing the State's unemployment tax base, or changing the State's experience rating formula, or a combination of such changes, so as to be estimated by the Secretary to achieve for the taxable year with respect to which the finding is made or for the period following the effective date of the amendment:

(A) An average employer tax rate, computed as a percentage of the total wages in employment covered by the State's unemployment compensation law, which exceeds the State's average annual benefit cost rate, computed as a percentage of the total wages in employment covered by the State's unemployment compensation law, for the ten calendar years immediately preceding the year with respect to which the finding is made; and

(B) An effective minimum employer tax rate which is not less than 1.0 percent of the wages of any employer which are subject to tax under the Federal Unemployment Tax Act for the same year; and

(C) An effective maximum employer tax rate which exceeds 2.7 percent of the wages of any employer which are subject to tax under the Federal Unemployment Tax Act for the same year, or provision for no reduced rate of contributions for any employer subject to the State unemployment compensation law; or

(ii)(A) Amendment of its unemployment compensation law increasing the State's unemployment tax rate, increasing the State's unemployment tax base, or changing the State's experience rating formula, or a combination of such changes, so as to be estimated by the Secretary of Labor to result in increasing contributions to the State's unemployment fund, for the taxable year with respect to which the finding is made, and the allocation from such increased contributions of a sum sufficient to make the repayment in the amount and within the time limit prescribed in paragraph (f)(2)(ii)(B) of this section; and

(B) Repayment to the Treasury of the United States, for credit to the Federal unemployment account in the Unemployment Trust Fund, prior to November 10 of the taxable year with respect to which the finding is made, of an amount equal to the amount of the additional tax which would be payable by all taxpayers subject to the unemployment compensation law of the State for that taxable year if (*1*) for any year prior to 1978, the reduction in total credits prescribed by section 3302(c)(2)(A) of the Internal Revenue Code of 1954 for that taxable year was applied without regard to the amendment added by section 110(a) of the Emergency Compensation and Special Unemployment Assistance Extension Act of 1975, and (*2*) for any year after 1977, the reduction in total credits prescribed by the applicable provisions of section 3302(c)(2) of the Internal Revenue Code of 1954 for that taxable year was applied without regard to the amendment added by section 110(a) of the Emergency Compensation and Special Unemployment Assistance Extension Act of 1975; and

(C) Determination by the Secretary that unemployment reserves and income from contributions in the State unemployment fund will be adequate to meet benefit payment obligations without title XII advances during the 6–month period beginning November 1 of the year in which such determination is made.

(3)(i) An application for deferral under this paragraph (f) must be requested and filed with the Secretary of Labor by the Governor of a State no later than July 1 of the taxable year for which such deferral is requested. Such application shall be in such form, and shall be accompanied by such documentation, as the Secretary of Labor shall prescribe.

(ii) A finding by the Secretary of Labor with respect to a State shall be made as of November 10 of the taxable year with respect to which the finding

is made, and such finding shall be published in the FEDERAL REGISTER together with the reasons for the finding.

[30 FR 6942, May 22, 1965, as amended at 43 FR 13828, Mar. 31, 1978]

Subpart B—Grants, Advances and Audits

§ 601.6 Grants for administration of unemployment insurance and employment service.

Grants of funds for administration of State unemployment insurance and public employment service programs are made to States under section 302(a) of the Social Security Act, the Wagner-Peyser Act, and the Appropriation Acts.

(a) *Requests for funds.* The forms and instructions used by State agencies in requesting funds are available upon request from the Employment and Training Administration, Department of Labor, Washington, DC 20210, and at the regional offices. The forms and instructions call for detailed information for each budgetary period concerning the specific amounts requested for personal services and other current expenses of State agencies, supported by workload and unit-cost estimates. Supplementary budget requests are processed in the same manner as regular requests. The Administration's representatives in the regional offices furnish assistance to the State agencies in preparing requests for funds.

(b) *Processing of requests.* State agencies send their requests for funds to the RAETA who reviews the requests and forwards them to the ETA National Office with his recommendation as to the amounts necessary for proper and efficient administration of the State unemployment compensation law and employment service program.

The ETA National Office appraises the requests and the recommendations of the regional representatives from a nationwide point of view, examining each State's request in the light of the experience of other States to insure equitable treatment among the States in the allocation of funds made available by Congress for the administration of State unemployment compensation laws and public employment service programs.

(c) *Action by ETA National Office.* If the ETA National Office approves the State's budget request, the State agency is notified; and, provided the conditions precedent to grants continue during the budgetary period, certifications for payment, under the approved budget, stating the amounts, are made by the ETA National Office to the Secretary of the Treasury quarterly. Upon denial of a request, in whole or in part, the State agency is notified and the RAETA is instructed to negotiate with the State with a view to removing the basis for denial.

(Approved by the Office of Management and Budget under control number 1205–0132)

[15 FR 5886, Aug. 31, 1950, as amended at 42 FR 4724, Jan. 25, 1977; 49 FR 18295, Apr. 30, 1984]

§ 601.7 [Reserved]

§ 601.8 Agreement with Postmaster General.

The Secretary of Labor and the Postmaster General have been directed by the Congress (title II of the Labor-Federal Security Agency Appropriation Act, 1950) to prescribe a mutually satisfactory procedure whereby official State employment security postal matter will be handled without the prepayment of postage. In lieu of such prepayments, the Secretary periodically certifies to the Secretary of the Treasury for payment to the U.S. Postal Service the amount necessary to cover the cost of State agency mailings. The amount of payment is based on a formula agreed upon by the Secretary of Labor and the U.S. Postal Service.

[15 FR 5886, Aug. 31, 1950, as amended at 42 FR 4724, Jan. 25, 1977]

§ 601.9 Audits.

The Department of Labor's audit regulations at 41 CFR 29–70.207–2(h) and (i), 41 CFR 29–70.207–3, and 41 CFR 29–70.207–4 shall apply with respect to employment service and unemployment insurance programs.

[46 FR 7766, Jan. 23, 1981]

PART 602—QUALITY CONTROL IN THE FEDERAL-STATE UNEMPLOYMENT INSURANCE SYSTEM

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APPENDIX A TO PART 602—STANDARD FOR CLAIM DETERMINATIONS—SEPARATION INFORMATION

AUTHORITY: 42 U.S.C. 1302.

SOURCE: 52 FR 33528, Sept. 3, 1987, unless otherwise noted.

Subpart A—General Provisions

§ 602.1 Purpose.

The purpose of this part is to prescribe a Quality Control (QC) program for the Federal-State unemployment insurance (UI) system, which is applicable to the State UI programs and the Federal unemployment benefit and allowance programs administered by the State Employment Security Agencies (SESA) under agreements between the States and the Secretary of Labor (Secretary). QC will be a major tool to assess the timeliness and accuracy of State administration of the UI program. It is designed to identify errors in claims processes and revenue collections (including payments in lieu of contributions and Extended Unemployment Compensation Account collections), analyze causes, and support the initiation of corrective action.

§ 602.2 Scope.

This part applies to all State laws approved by the Secretary under the Federal Unemployment Tax Act (section 3304 of the Internal Revenue Code of 1954, 26 U.S.C. section 3304), to the administration of the State laws, and to any Federal unemployment benefit and allowance program administered by the SESAs under agreements between the States and the Secretary. QC is a requirement for all States, initially being applicable to the largest permanently authorized programs (regular UI including Combined-Wage-Claims) and federally-funded programs (Unemployment Compensation for Ex-Servicemen and Unemployment Compensation for Federal Employees). Other elements of the QC program (e.g., interstate, extended benefit programs, benefit denials, and revenue collections) will be phased in under a schedule determined by the Department in consultation with State agencies.

Subpart B—Federal Requirements

§ 602.10 Federal law requirements.

(a) Section 303(a)(1) of the Social Security Act (SSA), 42 U.S.C. 503(a)(1), requires that a State law include provision for:

> Such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due.

(b) Section 303(a)(6), SSA, 42 U.S.C. 505(a)(6), requires that a State law include provision for:

> The making of such reports, in such form and containing such information, as the Secretary of Labor may from time to time require, and compliance with such provisions as the Secretary of Labor may from time to time find necessary to assure the correctness and verification of such reports.

(c) Section 303(b), SSA, 42 U.S.C. 503(b), provides in part that:

Whenever the Secretary of Labor, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law, finds that in the administration of the law there is—

* * * * *

(2) a failure to comply substantially with any provision specified in subsection (a);

the Secretary of Labor shall notify such State agency that further payments will not be made to the State until the Secretary of Labor is satisfied that there is no longer any such denial or failure to comply. Until he is so satisfied, he shall make no further certification to the Secretary of the Treasury with respect to such State . . . .

(d) Certification of payment of granted funds to a State is withheld only when the Secretary finds, after reasonable notice and opportunity for hearing to the State agency—

(1) That any provision required by section 303(a) of the Social Security Act is no longer included in the State unemployment compensation law, or

(2) That in the administration of the State unemployment compensation law there has been a failure to comply substantially with any required provision of such law.

§ 602.11 Secretary's interpretation.

(a) The Secretary interprets section 303(a)(1), SSA, to require that a State law provide for such methods of administration as will reasonably ensure the prompt and full payment of unemployment benefits to eligible claimants, and collection and handling of income for the State unemployment fund (particularly taxes and reimbursements), with the greatest accuracy feasible.

(b) The Secretary interprets sections 303(a)(1) and 303(a)(6), SSA, to authorize the Department of Labor to prescribe standard definitions, methods and procedures, and reporting requirements for the QC program and to ensure accuracy and verification of QC findings.

(c) The Secretary interprets section 303(b)(2), SSA to require that, in the administration of a State law, there shall be substantial compliance with the provisions required by sections 303(a) (1) and (6). Further, conformity of the State law with those requirements is required by section 303(a) and § 601.5(a) of this chapter.

(d) To satisfy the requirements of sections 303(a) (1) and (6), a State law must contain a provision requiring, or which is construed to require, the establishment and maintenance of a QC program in accordance with the requirements of this part. The establishment and maintenance of such a QC program in accordance with this part shall not require any change in State law concerning authority to undertake redeterminations of claims or liabilities or the finality of any determination, redetermination or decision.

Subpart C—State Responsibilities

§ 602.20 Organization.

Each State shall establish a QC unit independent of, and not accountable to, any unit performing functions subject to evaluation by the QC unit. The organizational location of this unit shall be positioned to maximize its objectivity, to facilitate its access to information necessary to carry out its responsibilities, and to minimize organizational conflict of interest.

§ 602.21 Standard methods and procedures.

Each State shall:

(a) Perform the requirements of this section in accordance with instructions issued by the Department, pursuant to § 602.30(a) of this part, to ensure standardization of methods and procedures in a manner consistent with this part;

(b) Select representative samples for QC study of at least a minimum size specified by the Department to ensure statistical validity (for benefit payments, a minimum of 400 cases of weeks paid per State per year);

(c) Complete prompt and in-depth case investigations to determine the degree of accuracy and timeliness in the administration of the State UI law and Federal programs with respect to benefit determinations, benefit payments, and revenue collections; and conduct other measurements and studies necessary or appropriate for carrying out the purposes of this part; and in conducting investigations each State shall:

(1) Inform claimants in writing that the information obtained from a QC investigation may affect their eligibility

for benefits and inform employers in writing that the information obtained from a QC investigation of revenue may affect their tax liability,

(2) Use a questionnaire, prescribed by the Department, which is designed to obtain such data as the Department deems necessary for the operation of the QC program; require completion of the questionnaire by claimants in accordance with the eligibility and reporting authority under State law,

(3) Collect data identified by the Department as necessary for the operation of the QC program; however, the collection of demographic data will be limited to those data which relate to an individual's eligibility for UI benefits and necessary to conduct proportions tests to validate the selection of representative samples (the demographic data elements necessary to conduct proportions tests are claimants' date of birth, sex, and ethnic classification); and

(4) Conclude all findings of inaccuracy as detected through QC investigations with appropriate official actions, in accordance with the applicable State and Federal laws; make any determinations with respect to individual benefit claims in accordance with the Secretary's ''Standard for Claim Determinations—Separation Information'' in the *Employment Security Manual,* part V, sections 6010–6015 (appendix A of this part);

(d) Classify benefit case findings resulting from QC investigations as:

(1) Proper payments, underpayments, or overpayments in benefit payment cases, or

(2) Proper denials or underpayments in benefit denial cases;

(e) Make and maintain records pertaining to the QC program, and make all such records available in a timely manner for inspection, examination, and audit by such Federal officials as the Secretary may designate or as may be required or authorized by law;

(f) Furnish information and reports to the Department, including weekly transmissions of case data entered into the automated QC system and annual reports, without, in any manner, identifying individuals to whom such data pertain; and

(g) Release the results of the QC program at the same time each year, providing calendar year results using a standardized format to present the data as prescribed by the Department; States will have the opportunity to release this information prior to any release by the Department.

(Approved by the Office of Management and Budget under Control Number 1205–0245)

§ 602.22 Exceptions.

If the Department determines that the QC program, or any constituent part of the QC program, is not necessary for the proper and efficient administration of a State law or in the Department's view is not cost effective, the Department shall use established procedures to advise the State that it is partially or totally excepted from the specified requirements of this part. Any determination under this section shall be made only after consultations with the State agency.

Subpart D—Federal Responsibilities

§ 602.30 Management.

(a) The Department shall establish required methods and procedures (as specified in § 602.21 of this part); and provide technical assistance as needed on the QC process.

(b) The Department shall consider and explore alternatives to the prescribed sampling, study, recordkeeping, and reporting methodologies. This shall include, but not be limited to, testing the obtaining of information needed for QC by telephone and mail rather than in face-to-face interviews.

(c) The Department shall maintain a computerized data base of QC case data which is transmitted to the Department under § 602.21, which will be combined with other data for statistical and other analysis such as assessing the impact of economic cycles, funding levels, and workload levels on program accuracy and timeliness.

§ 602.31 Oversight.

The Department shall review QC operational procedures and samples, and validate QC methodology to ensure uniformity in the administration of the

QC program and to ensure compliance with the requirements of this part. The Department shall, for purposes of determining eligibility for grants described in §602.40, annually review the adequacy of the administration of a State's QC program.

Subpart E—Quality Control Grants to States

§602.40 Funding.

(a) The Department shall use established procedures to notify States of the availability of funds for the operation of QC programs in accordance with this part.

(b) The Department may allocate additional resources, if available, to States for analysis of date generated by the QC program, to increase the number of claims sampled in areas where more information is needed, for pilot studies for the purpose of expanding the QC program, and for corrective action.

§602.41 Proper expenditure of Quality Control granted funds.

The Secretary may, after reasonable notice and opportunity for hearing to the State agency, take exception to and require repayment of an expenditure for the operation of a QC program if it is found by the Secretary that such expenditure is not necessary for the proper and efficient administration of the QC program in the State. See sections 303(a)(8), 303(a)(9) and 303(b)(2), SSA, and 20 CFR 601.5. For purposes of this section, an expenditure will be found not necessary for proper and efficient administration if such expenditure fails to comply with the requirements of subpart C of this part.

[52 FR 33528, Sept. 3, 1987, as amended at 52 FR 34343, Sept. 10, 1987]

§602.42 Effect of failure to implement Quality Control program.

Any State which the Secretary finds, after reasonable notice and opportunity for hearing, has not implemented or maintained a QC program in accordance with this part will not be eligible for any grants under title III of the Social Security Act until such time as the Secretary is satisfied that there is no longer any failure to conform or to comply substantially with any provision specified in this part. See sections 303(a)(1), 303(a)(6), and 303(b)(2), SSA, and 20 CFR 601.5.

§602.43 No incentives or sanctions based on specific error rates.

Neither sanctions nor funding incentives shall be used by the Department to influence the achievement of specified error rates in State UI programs.

APPENDIX A TO PART 602—STANDARD FOR CLAIM DETERMINATIONS—SEPARATION INFORMATION

Employment Security Manual (Part V, Sections 6010–6015)

6010 *Federal Law Requirements.* Section 303(a)(1) of the Social Security Act requires that a State law include provision for:

''Such methods of administration . . . as are found by the Secretary to be reasonably calculated to insure full payment of unemployment compensation when due.''

Section 303(a)(3) of the Social Security Act requires that a State law include provision for:

''Opportunity for a fair hearing before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied.''

Section 3304(a)(4) of the Federal Unemployment Tax Act and section 303(a)(5) of the Social Security Act require that a State law include provision for:

''Expenditure of all money withdrawn from an unemployment fund of such State, in the payment of unemployment compensation. . . .

Section 3306(h) of the Federal Unemployment Tax Act defines ''compensation'' as ''cash benefits payable to individuals with respect to their unemployment.''

6011 *Secretary's Interpretation of Federal Law Requirements.* The Secretary interprets the above sections to require that a State law include provisions which will insure that:

A. Individuals who may be entitled to unemployment compensation are furnished such information as will reasonably afford them an opportunity to know, establish, and protect their rights under the unemployment compensation law of such State, and

B. The State agency obtains and records in time for the prompt determination and review of benefit claims such information as will reasonably insure the payment of benefits to individuals to whom benefits are due.

6012 *Criteria for Review of State Law Conformity with Federal Requirements:*

In determining the conformity of a State law with the above requirements of the Federal Unemployment Tax Act and the Social Security Act as interpreted by the Secretary, the following criteria will be applied:

A. Is it required that individuals who may be entitled to unemployment compensation be furnished such information of their potential rights to benefits, including the manner and places of filing claims, the reasons for determinations, and their rights of appeal, as will insure them a reasonable opportunity to know, establish, and protect their rights under the law of the State?

B. Is the State agency required to obtain, in time for prompt determination of rights to benefits such information as will reasonably insure the payment of benefits to individuals to whom benefits are due?

C. Is the State agency required to keep records of the facts considered in reaching determinations of rights to benefits?

6013 *Claim Determinations Requirements Designed To Meet Department of Labor Criteria:*

A. *Investigation of claims.* The State agency is required to obtain promptly and prior to a determination of an individual's right to benefits, such facts pertaining thereto as will be sufficient reasonably to insure the payment of benefits when due.

This requirement embraces five separate elements:

1. It is the responsibility of the agency to take the initiative in the discovery of information. This responsibility may not be passed on to the claimant or the employer. In addition to the agency's own records, this information may be obtained from the worker, the employer, or other sources. If the information obtained in the first instance discloses no essential disagreement and provides a sufficient basis for a fair determination, no further investigation is necessary. If the information obtained from other sources differs essentially from that furnished by the claimant, the agency, in order to meet its responsibility, is required to inform the claimant of such information from other sources and to afford the claimant an opportunity to furnish any further facts he may have.

2. Evidentiary facts must be obtained as distinguished from ultimate facts or conclusions. That a worker was discharged for misconduct is an ultimate fact or conclusion; that he destroyed a machine upon which he was working is a primary or evidentiary fact, and the sort of fact that the requirement refers to.

3. The information obtained must be sufficient reasonably to insure the payment of benefits when due. In general, the investigation made by the agency must be complete enough to provide information upon which the agency may act with reasonable assurance that its decision is consistent with the unemployment compensation law. On the other hand, the investigation should not be so exhaustive and time-consuming as unduly to delay the payment of benefits and to result in excessive costs.

4. Information must be obtained promptly so that the payment of benefits is not unduly delayed.

5. If the State agency requires any particular evidence from the worker, it must give him a reasonable opportunity to obtain such evidence.

B. *Recording of facts.* The agency must keep a written record of the facts considered in reaching its determinations.

C. *Determination notices.*

1. The agency must give each claimant a written notice of:

a. Any monetary determination with respect to his benefit year;

b. Any determination with respect to purging a disqualification if, under the State law, a condition or qualification must be satisfied with respect to each week of disqualification; but in lieu of giving written notice of each determination for each week in which it is determined that the claimant has met the requirements for purging, the agency may inform the claimant that he has purged the disqualification for a week by notation of his applicant identification card or otherwise in writing.

c. Any other determination which adversely affects[1] his rights to benefits, except that written notice of determination need not be given with respect to:

(1) A week in a benefit year for which the claimant's weekly benefit amount is reduced in whole or in part by earnings if, the first time in the benefit year that there is such a reduction, he is required to be furnished a booklet or leaflet containing the information set forth below in paragraph 2f(1). However, a written notice of determination is required if: (a) there is a dispute concerning the reduction with respect to any week (e.g.,

[1] A determination ''adversely affects'' claimant's right to benefits if it (1) results in a denial to him of benefits (including a cancellation of benefits or wage credits or any reduction in whole or in part below the weekly or maximum amount established by his monetary determination) for any week or other period; or (2) denies credit for a waiting week; or (3) applies any disqualification or penalty; or (4) determines that he has not satisfied a condition of eligibility, requalification for benefits, or purging a disqualification; or (5) determines that an overpayment has been made or orders repayment or recoupment of any sum paid to him; or (6) applies a previously determined overpayment, penalty, or order for repayment or recoupment; or (7) in any other way denies claimant a right to benefits under the State law.

as to the amount computed as the appropriate reduction, etc.); or (b) there is a change in the State law (or in the application thereof) affecting the reduction; or

(2) Any week in a benefit year subsequent to the first week in such benefit year in which benefits were denied, or reduced in whole or in part for reasons other than earnings, if denial or reduction for such subsequent week is based on the same reason and the same facts as for the first week, and if written notice of determination is required to be given to the claimant with respect to such first week, and with such notice of determination, he is required to be given a booklet or pamphlet containing the information set forth below in paragraphs 2f(2) and 2h. However, a written notice of determination is required if: (a) there is a dispute concerning the denial or reduction of benefits with respect to such week; or (b) there is a change in the State law (or in the application thereof) affecting the denial or reduction; or (c) there is a change in the amount of the reduction except as to the balance covered by the last reduction in a series of reductions.

NOTE: This procedure may be applied to determinations made with respect to any subsequent weeks for the same reason and on the basis of the same facts: (a) that claimant is unable to work, unavailable for work, or is disqualified under the labor dispute provision; and (b) reducing claimant's weekly benefit amount because of income other than earnings or offset by reason of overpayment.

2. The agency must include in written notices of determinations furnished to claimants sufficient information to enable them to understand the determinations, the reasons therefor, and their rights to protest, request reconsideration, or appeal.

The written notice of monetary determination must contain the information specified in the following items (except h) unless an item is specifically not applicable. A written notice of any other determination must contain the information specified in as many of the following items as are necessary to enable the claimant to understand the determination and to inform him of his appeal rights. Information specifically applicable to the individual claimant must be contained in the written notice of determination. Information of general application such as (but not limited to) the explanation of benefits for partial unemployment, information as to deductions, seasonality factors, and information as to the manner and place of taking an appeal, extension of the appeal period, and where to obtain information and assistance may be contained in a booklet or leaflet which is given the claimant with his monetary determination.

a. *Base period wages.* The statement concerning base-period wages must be in sufficient detail to show the basis of computation of eligibility and weekly and maximum benefit amounts. (If maximum benefits are allowed, it may not be necessary to show details of earnings.)

b. *Employer name.* The name of the employer who reported the wages is necessary so that the worker may check the wage transcript and know whether it is correct. If the worker is given only the employer number, he may not be able to check the accuracy of the wage transcript.

c. *Explanation of benefit formula—weekly and maximum benefit amounts.* Sufficient information must be given the worker so that he will understand how his weekly benefit amount, including allowances for dependents, and his maximum benefit amount were figured. If benefits are computed by means of a table contained in the law, the table must be furnished with the notice of determination whether benefits are granted or denied.

The written notice of determination must show clearly the weekly benefit amount and the maximum potential benefits to which the claimant is entitled.

The notice to a claimant found ineligible by reason of insufficient earnings in the base period must inform him clearly of the reason for ineligibility. An explanation of the benefit formula contained in a booklet or pamphlet should be given to each claimant at or prior to the time he receives written notice of a monetary determination.

d. *Benefit year.* An explanation of what is meant by the benefit year and identification of the claimant's benefit year must be included in the notice of determination.

e. *Information as to benefits for partial unemployment.* There must be included either in the written notice of determination or in a booklet or pamphlet accompanying the notice an explanation of the claimant's rights to partial benefits for any week with respect to which he is working less than his normal customary full-time workweek because of lack of work and for which he earns less than his weekly benefit amount or weekly benefit amount plus earnings, whichever is provided by the State law. If the explanation is contained in the notice of determination, reference to the item in the notice in which his weekly benefit amount is entered should be made.

f. *Deductions from weekly benefits.*

(1) *Earnings.* Although written notice of determinations deducting earnings from a claimant's weekly benefit amount is generally not required (see paragraph 1 c (1) above), where written notice of determination is required (or given) it shall set forth the amount of earnings, the method of computing the deduction in sufficient detail to enable the claimant to verify the accuracy of the deduction, and his right to protest, request redetermination, and appeal. Where a written notice of determination is given to the claimant because there has been a

change in the State law or in the application of the law, an explanation of the change shall be included.

Where claimant is not required to receive a written notice of determination, he must be given a booklet or pamphlet the first time in his benefit year that there is a deduction for earnings which shall include the following information:

(a) The method of computing deductions for earnings in sufficient detail to enable the claimant to verify the accuracy of the deduction;

(b) That he will not automatically be given a written notice of determination for a week with respect to which there is a deduction for earnings (unless there is a dispute concerning the reduction with respect to a week or there has been a change in the State law or in the application of the law affecting the deduction) but that he may obtain such a written notice upon request; and

(c) A clear statement of his right to protest, request a redetermination, and appeal from any determination deducting earnings from his weekly benefit amount even though he does not automatically receive a written notice of determination; and if the State law requires written notice of determination in order to effectuate a protest, redetermination, or appeal, he must be so advised and advised also that he must request a written notice of determination before he takes any such action.

(2) *Other deductions.*

(a) A written notice of determination is required with respect to the first week in claimant's benefit year in which there is a reduction from his benefits for a reason other than earnings. This notice must describe the deduction made from claimant's weekly benefit amount, the reason for the deduction, the method of computing it in sufficient detail to enable him to verify the accuracy of such deduction, and his right to protest, request redetermination, or appeal.

(b) A written notice of determination is not required for subsequent weeks that a deduction is made for the same reason and on the basis of the same facts, if the notice of determination pursuant to (2)(a), or a booklet or pamphlet given him with such notice explains (i) the several kinds of deductions which may be made under the State law (e.g., retirement pensions, vacation pay, and overpayments); (ii) the method of computing each kind of deduction in sufficient detail that claimant will be able to verify the accuracy of deductions made from his weekly benefit payments; (iii) any limitation on the amount of any deduction or the time in which any deduction may be made; (iv) that he will not automatically be given a written notice of determination for subsequent weeks with respect to which there is a deduction for the same reason and on the basis of the same facts, but that he may obtain a written notice of determination upon request; (v) his right to protest, request redetermination, or appeal with respect to subsequent weeks for which there is a reduction from his benefits for the same reason, and on the basis of the same facts even though he does not automatically receive a written notice of determination; and (vi) that if the State law requires written notice of determination in order to effectuate a protest, redetermination, or appeal, he must be so advised and advised also that he must request a written notice of determination before he takes any such action.

g. *Seasonality factors.* If the individual's determination is affected by seasonality factors under the State law, an adequate explanation must be made. General explanation of seasonality factors which may affect determinations for subsequent weeks may be included in a booklet or pamphlet given claimant with his notice of monetary determination.

h. *Disqualification or ineligibility.* If a disqualification is imposed, or if the claimant is declared ineligible for one or more weeks, he must be given not only a statement of the period of disqualification or ineligibility and the amount of wage-credit reductions, if any, but also an explanation of the reason for the ineligibility or disqualification. This explanation must be sufficiently detailed so that he will understand why he is ineligible or why he has been disqualified, and what he must do in order to requalify for benefits or purge the disqualification. The statement must be individualized to indicate the facts upon which the determination was based, e.g., state, ''It is found that you left your work with Blank Company because you were tired of working; the separation was voluntary, and the reason does not constitute good cause,'' rather than merely the phrase ''voluntary quit.'' Checking a box as to the reason for the disqualification is not a sufficiently detailed explanation. However, this statement of the reason for the disqualification need not be a restatement of all facts considered in arriving at the determination.

i. *Appeal rights.* The claimant must be given information with respect to his appeal rights.

(1) The following information shall be included in the notice of determination:

(a) A statement that he may appeal or, if the State law requires or permits a protest or redetermination before an appeal, that he may protest or request a redetermination.

(b) The period within which an appeal, protest, or request for redetermination must be filed. The number of days provided by statute must be shown as well as either the beginning date or ending date of the period. (It is recommended that the ending date of the appeal period be shown, as this is the more understandable of the alternatives.)

(2) The following information must be included either in the notice of determination or in separate informational material referred to in the notice:

(a) The manner in which the appeal, protest, or request for redetermination must be filed, e.g., by signed letter, written statement, or on a prescribed form, and the place or places to which the appeal, protest, or request for redetermination may be mailed or hand-delivered.

(b) An explanation of any circumstances (such as nonworkdays, good cause, etc.) which will extend the period for the appeal, protest, or request for redetermination beyond the date stated or identified in the notice of determination.

(c) That any further information claimant may need or desire can be obtained together with assistance in filing his appeal, protest, or request for redetermination from the local office.

If the information is given in separate material, the notice of determination would adequately refer to such material if it said, for example, ''For other information about your (appeal), (protest), (redetermination) rights, see pages ___ to ___ of the _____ (name of pamphlet or booklet) heretofore furnished to you.''

6014 *Separation Information Requirements Designed To Meet Department of Labor Criteria:*

A. *Information to agency.* Where workers are separated, employers are required to furnish the agency promptly, either upon agency request or upon such separation, a notice describing the reasons for and the circumstances of the separation and any additional information which might affect a claimant's right to benefits. Where workers are working less than full time, employers are required to furnish the agency promptly, upon agency request, information concerning a claimant's hours of work and his wages during the claim periods involved, and other facts which might affect a claimant's eligibility for benefits during such periods.

When workers are separated and the notices are obtained on a request basis, or when workers are working less than full time and the agency requests information, it is essential to the prompt processing of claims that the request be sent out promptly after the claim is filed and the employer be given a specific period within which to return the notice, preferably within 2 working days.

When workers are separated and notices are obtained upon separation, it is essential that the employer be required to send the notice to the agency with sufficient promptness to insure that, if a claim is filed, it may be processed promptly. Normally, it is desirable that such a notice be sent to the central office of the agency, since the employer may not know in which local office the workers will file his claim. The usual procedure is for the employer to give the worker a copy of the notice sent by the employer to the agency.

B. *Information to worker.*

1. *Information required to be given.* Employers are required to give their employees information and instructions concerning the employees' potential rights to benefits and concerning registration for work and filing claims for benefits.

The information furnished to employees under such a requirement need not be elaborate; it need only be adequate to insure that the worker who is separated or who is working less than full time knows he is potentially eligible for benefits and is informed as to what he is to do or where he is to go to file his claim and register for work. When he files his claim, he can obtain more detailed information.

In States that do not require employers to furnish periodically to the State agency detailed reports of the wages paid to their employees, each employer is required to furnish to his employees information as to (a) the name under which he is registered by the State agency, (b) the address where he maintains his payroll records, and (c) the workers' need for this information if and when they file claims for benefits.

2. *Methods for giving information.* The information and instructions required above may be given in any of the following ways:

a. *Posters prominently displayed in the employer's establishment.* The State agency should supply employers with a sufficient number of posters for distribution throughout their places of business and should see that the posters are conspicuously displayed at all times.

b. *Leaflets.* Leaflets distributed either periodically or at the time of separation or reduction of hours. The State agency should supply employers with a sufficient number of leaflets.

c. *Individual notices.* Individual notices given to each employee at the time of separation or reduction in hours.

It is recommended that the State agency's publicity program be used to supplement the employer-information requirements. Such a program should stress the availability and location of claim-filing offices and the importance of visiting those offices whenever the worker is unemployed, wishes to apply for benefits, and to seek a job.

6015 *Evaluation of Alternative State Provisions with Respect to Claim Determinations and Separation Information.* If the State law provisions do not conform to the suggested requirements set forth in sections 6013 and 6014, but the State law contains alternative provisions, the Bureau of Employment Security, in collaboration with the State agency, will study the actual or anticipated effects of

the alternative provisions. If the Administrator of the Bureau concludes that the alternative provisions satisfy the criteria in section 6012, he will so notify the State agency. If the Administrator of the Bureau does not so conclude, he will submit the matter to the Secretary. If the Secretary concludes that the alternative provisions satisfy the criteria in section 6012, the State agency will be so notified. If the Secretary concludes that there is a question as to whether the alternative provisions satisfy the criteria, the State agency will be advised that unless the State law provisions are appropriately revised, a notice of hearing will be issued as required by the Code of Federal Regulations, title 20, section 601.5.

PART 603—INCOME AND ELIGIBILITY VERIFICATION SYSTEM

Sec.

603.1 Purpose.

Subpart A—Income and Eligibility Verification System

603.2 Definitions.
603.3 Eligibility condition for claimants.
603.4 Notification to claimants.
603.5 Disclosure of information.
603.6 Agreement between State unemployment compensation agency and requesting agency.
603.7 Protection of confidentiality.
603.8 Obtaining information from other agencies and crossmatching with wage information.
603.9 Effective date of rule.

Subpart B—Quarterly Wage Reporting

603.20 Effective date of rule.
603.21 Alternative system.

AUTHORITY: Sec. 1102, Social Security Act, ch. 531, 49 Stat. 647, as amended (42 U.S.C 1302); Reorganization Plan No. 2 of 1949, 63 Stat. 1065, 14 FR 5225.

SOURCE: 51 FR 7207, Feb. 28, 1986, unless otherwise noted.

§ 603.1 Purpose.

(a) Section 2651 of Public Law 98–369 (the Deficit Reduction Act of 1984) amended title XI of the Social Security Act to include a requirement that States have an income and eligibility verification system in effect which would be used in verifying eligibility for, and the amount of, benefits available under several Federally assisted programs including the Federal-State unemployment compensation program. The Act requires that employers in each State make quarterly wage reports to a State agency, which may be the State unemployment compensation agency, and that wage information and benefit information obtained from other agencies be used in verifying eligibility for benefits. The requirement of quarterly wage reporting may be waived if the Secretary of Labor (in consultation with the Secretary of Health and Human Services and the Secretary of Agriculture) determines the State has in effect an alternative system which is as effective and timely as quarterly wage reporting for the purposes of providing employment related income and eligibility data.

(b) Section 2651(d) of Public Law 98–396 added a new section 303(f) of the Social Security Act (42 U.S.C. 503(f)), to provide that the agency charged with the administration of the State unemployment compensation law shall provide that information shall be requested and exchanged for purposes of income and eligibility verification in accordance with a State system which meets the requirements of section 1137 of the Social Security Act, as added by Public Law 98–369. The regulations in this part are issued to implement this requirement.

Subpart A—Income and Eligibility Verification System

§ 603.2 Definitions.

For the purposes of this part:

(a) *State unemployment compensation agency* means the agency charged with the administration of the unemployment compensation law approved by the Secretary of Labor under section 3304 of the Internal Revenue Code of 1954 (26 U.S.C. 3304).

(b) *Wage information* means information about wages as defined in the State's unemployment compensation law and includes the Social Security Number (or numbers, if more than one) and quarterly wages of an employee, and the name, address, State, and (when known) Federal employer identification number of an employer reporting wages under a State unemployment compensation law, except that in a State in which wages are not required

to be reported under the unemployment compensation law, ''wage information'' means:

(1) That wage information which is reported under provisions of State law which fulfill the requirements of section 1137 of the Social Security Act; or

(2) That information which is obtained through an alternative system which fulfills the requirements of section 1137 of the Social Security Act.

(c) *Claim information* means information regarding:

(1) Whether an individual is receiving, has received or has applied for unemployment compensation;

(2) The amount of compensation the individual is receiving or is entitled to receive;

(3) The individual's current (or most recent) home address; and

(4) Whether the individual has refused an offer of work and, if so, a description of the job offered including the terms, conditions, and rate of pay.

(5) Any other information contained in the records of the State unemployment compensation agency which is needed by the requesting agency to verify eligiblity for, and the amount of, benefits.

(d) *Requesting agency* means:

(1) Any State or local agency charged with the responsibility of enforcing the provisions of the Aid to Families with Dependent Children program under a State plan approved under part A of title IV of the Social Security Act;

(2) Any State or local agency charged with the responsibility of enforcing the provisions of the Medicaid program under a State plan approved under title XIX of the Social Security Act;

(3) Any State or local agency charged with the responsibility of enforcing the provisions of the Food Stamp program under the Food Stamp Act of 1977;

(4) Any State or local agency charged with the responsibility of enforcing a program under a plan approved under title I, X, XIV, or XVI of the Social Security Act;

(5) Any State or local child support enforcement agency charged with the responsibility of enforcing child support obligations under a plan approved under part D of title IV of the Social Security Act; and

(6) The Secretary of Health and Human Services in establishing or verifying eligibility or benefit amounts under titles II and XVI of the Social Security Act (section 1137(a)).

§ 603.3 Eligibility condition for claimants.

(a) The State unemployment compensation agency shall require, as a condition of eligibility for unemployment benefits, that each claimant for benefits furnish to the agency his/her social security number (or numbers if he/she has more than one such number), and the agency shall utilize such numbers in the administration of the unemployment compensation program so as to associate the agency's records pertaining to each claimant with the claimant's social security number(s).

(b) If the State agency determines that a claimant has refused or failed to provide a Social Security Number, then that individual shall be ineligible to participate in the unemployment compensation program.

(c) Any claimant held ineligible for not supplying a social security number may become eligible upon providing the State agency with such number retroactive to the extent permitted under State law. (Section 1137(a)(1)).

§ 603.4 Notification to claimants.

Claimants shall be notified at the time of filing an initial claim for benefits through a written statement on or provided with the initial claim form and periodically thereafter that information available through the income and eligibility verification system will be requested and utilized by requesting agencies as defined in § 603.2(d) (section 1137(a)(6)). Provisions of a printed notice on or attached to any subsequent additional claims will satisfy the requirement for periodic notice thereafter.

§ 603.5 Disclosure of information.

The State unemployment compensation agency will disclose to authorized requesting agencies, as defined in § 603.2(d), which have entered into an agreement in accordance with this part, wage and claim information as defined herein contained in the records of such State agency as is deemed by

the requesting agency to be needed in verifying eligibility for, and the amount of, benefits. Standardized formats established by the Secretary of Health and Human Services (in consultation with the Secretary of Agriculture) will be adhered to by the State unemployment compensation agency. (Section 1137(a)(4)).

§ 603.6 Agreement between State unemployment compensation agency and requesting agency.

(a) The State unemployment compensation agency will enter into specific written agreements with any requesting agency as defined in this part.

(b) The agreements will include, but need not be limited, to the following:

(1) The purposes for which requests will be made and the specific information needed;

(2) Identification of all agency officials, by position, with authority to request information;

(3) Methods and timing of the requests for information, including the format to be used, and the period of time needed to furnish the requested information;

(4) Basis for establishing the reporting periods for which information will be provided;

(5) Provisions for determining appropriate reimbursement from the requesting agency for the costs incurred in providing data, including any new developmental costs associated with furnishing data to the requesting agency and calculated in accordance with the provisions of OMB Circular A–87;

(6) Safeguards to ensure that information obtained from the State unemployment compensation agency will be protected against unauthorized access or disclosure. At a minimum, such procedures will comply with the requirements of § 603.7.

(c) The requirements in paragraphs (a) and (b) of this section shall also apply to requesting agencies receiving information from a State unemployment compensation agency in another State and shall be administered by the State unemployment compensation agency disclosing the information (section 1137(a)(4) and (a)(7)).

§ 603.7 Protection of confidentiality.

(a) State unemployment compensation agencies shall require requesting agencies receiving information under this part to comply with the following measures to protect the confidentiality of the information against unauthorized access or disclosure:

(1) The information shall be used only to the extent necessary to assist in the valid administrative needs of the program receiving such information and shall be disclosed only for these purposes as defined in this agreement;

(2) The requesting agency shall not use the information for any purposes not specifically authorized under an agreement that meets the requirements of § 603.6;

(3) The information shall be stored in a place physically secure from access by unauthorized persons;

(4) Information in electronic format, such as magnetic tapes or discs, shall be stored and processed in such a way that unauthorized persons cannot retrieve the information by means of computer, remote terminal or other means;

(5) Precautions shall be taken to ensure that only authorized personnel are given access to on-line files;

(6)(i) The requesting agency shall instruct all personnel with access to the information regarding the confidential nature of the information, the requirements of this part, and the sanctions specified in State unemployment compensation laws against unauthorized disclosure of information covered by this part, and any other relevant State statutes, and

(ii) The head of each State agency shall sign an acknowledgment on behalf of the entire agency attesting to the agency's policies and procedures regarding confidentiality.

(b) Any requesting agency is authorized to redisclose the information only as follows:

(1) Any wage or claim information may be given to the individual who is the subject of the information;

(2) Information about an individual may be given to an attorney or other duly authorized agent representing the individual if the individual has given written consent and the information is needed in connection with a claim for

benefits against the requesting agency; and

(3) Any wage or claim information may be given to another requesting agency as defined in this part or to any criminal or civil prosecuting authorities acting for or on behalf of the requesting agency if provision for such redisclosure is contained in the agreement between the requesting agency and the State unemployment compensation agency.

(c) The requesting agency shall permit the State unemployment compensation agency to make onsite inspections to ensure that the requirements of State unemployment compensation laws and Federal statutes and regulations are being met (section 1137(a)(5)(B).

§ 603.8 Obtaining information from other agencies and crossmatching with wage information.

(a) The State unemployment compensation agency shall obtain such information from the Social Security administration and any requesting agency as may be needed in verifying eligibility for, and the amount of, benefits.

(b) To the extent that such information shall be determined likely to be productive in identifying ineligibility for benefits and preventing incorrect payments, the State unemployment compensation agency shall crossmatch quarterly wage information with unemployment benefit payment information (section 1137(a)(2)).

(c) To the extent necessary, the United States Department of Labor may amplify on the requirements for state compliance with this section in instructions issued and published for comment in the FEDERAL REGISTER under the provisions of section 1137(a)(2) of the Social Security Act.

§ 603.9 Effective date of rule.

The effective date of this subpart A rule is May 29, 1986, after consultation with the Secretary of Health and Human Services and the Secretary of Agriculture, may by waiver grant a delay in this effective date if the State submits within 90 days of publication of this rule in final form a plan describing a good faith effort to comply with the requirements of section 1137 (a) and (b) of the Social Security Act through but not beyond September 30, 1986.

Subpart B—Quarterly Wage Reporting

§ 603.20 Effective date of rule.

The requirement that employers in a State report quarterly wage information to a State agency (which may be the State unemployment compensation agency), is effective September 30, 1988 (section 1137(a)(3)).

§ 603.21 Alternative system.

The Secretary of Labor (in consultation with the Secretary of Health and Human Services and the Secretary of Agriculture) may waive the provision that employers in a State are required to make quarterly wage reports to a State agency if the Secretary determines that the State has in effect an alternative system which is as effective and timely for purposes of providing employment related income and eligibility data for the purposes described in section 1137 of the Social Security Act. Criteria for such waiver and the date for submitting requests for such waiver will be issued, if necessary, by the United States Department of Labor and published for comment in the FEDERAL REGISTER.

PART 606—TAX CREDITS UNDER THE FEDERAL UNEMPLOYMENT TAX ACT; ADVANCES UNDER TITLE XII OF THE SOCIAL SECURITY ACT

Subpart A—General

Sec.

606.1 Purpose and scope.
606.2 Total credits allowable.
606.3 Definitions.
606.4 Redelegation of authority.
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Subpart B—Tax Credit Reduction [Reserved]

Subpart C—Relief from Tax Credit Reduction

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606.24 Application for avoidance.
606.25 Waiver of and substitution for additional tax credit reduction.
606.26 Application for waiver and substitution.

Subpart D—Interest on Advances

606.30 Interest rates on advances.
606.31 Due dates for payment of interest. [Reserved]
606.32 Types of advances subject to interest.
606.33 No payment of interest from unemployment fund. [Reserved]
606.34 Reports of interest payable. [Reserved]
606.35 Order of application for repayments. [Reserved]

Subpart E—Relief from Interest Payment

606.40 May/September delay.
606.41 High unemployment deferral.
606.42 High unemployment delay.
606.43 Maintenance of solvency effort.
606.44 Notification of determinations.

AUTHORITY: 42 U.S.C. 1102; 26 U.S.C. 7805(a); Secretary's Order No. 4–75 (40 FR 18515).

SOURCE: 53 FR 37429, Sept. 26, 1988, unless otherwise noted.

Subpart A—General

§ 606.1 Purpose and scope.

(a) *In general.* The regulations in this part 606 are issued to implement the tax credit provisions of the Federal Unemployment Tax Act, and the loan provisions of title XII of the Social Security Act. The regulations on tax credits cover all of the subjects of 3302 of the Federal Unemployment Tax Act (FUTA), except subsections (c)(3) and (e). The regulations on loans cover all of the subjects in title XII of the Social Security Act.

(b) *Scope.* This part 606 covers general matters relating to this part in this subpart A, and in the following subparts includes specific subjects described in general terms as follows:

(1) Subpart B describes the tax credit reductions under the Federal Unemployment Tax Act, which relate to outstanding balances of advances made under title XII of the Social Security Act.

(2) Subpart C describes the various forms of relief from tax credit reductions, and the criteria and standards for grant of such relief in the form of—

(i) A cap on tax credit reduction,

(ii) Avoidance of tax credit reduction, and

(iii) Waiver of and substitution for additional tax credit reduction.

(3) Subpart D describes the interest rates on advances made under title XII of the Social Security Act, dues dates for payment of interest, and other related matters.

(4) Subpart E describes the various forms of relief from payment of interest, and the criteria and standards for grant of such relief in the form of—

(i) May/September delay of interest payments,

(ii) High unemployment deferral of interest payments,

(iii) High unemployment delay of interest payments, and

(iv) Maintenance of solvency effort required to retain a deferral previously granted.

§ 606.2 Total credits allowable.

The total credits allowed to an employer subject to the tax imposed by section 3301 of the Federal Unemployment Tax Act shall not exceed 5.4 percent with respect to taxable years beginning after December 31, 1984.

§ 606.3 Definitions.

For the purposes of the Acts cited and this part—

(a) *Act* means as appropriate the Federal Unemployment Tax Act (26 U.S.C. 3301–3311), or title XII of the Social Security Act (42 U.S.C. 1321–1324).

(b) *Advance* means a transfer of funds to a State unemployment fund, for the purpose of paying unemployment compensation, from the Federal unemployment account in the Unemployment Trust Fund, pursuant to section 1202 of the Social Security Act.

(c) *Benefit-cost ratio* for cap purposes for a calendar year is the percentage obtained by dividing—

(1) The total dollar sum of—

(i) All compensation actually paid under the State law during such calendar year, including in such total sum all regular, additional, and extended compensation, as defined in section 205 of the Federal-State Extended Unemployment Compensation Act of 1970, and excluding from such total sum—

(A) Any such compensation paid for which the State is entitled to reimbursement or was reimbursed under the provisions of any Federal Law, and

(B) Any such compensation paid which is attributable to services performed for a reimbursing employer, and which is not included in the total dollar amount reported under paragraph (c)(1)(i)(A) of this section, and

(ii) Any interest paid during such calendar year on any advance, by

(2) The total wages (as defined in § 606–3(l)) with respect to such calendard year. If any percentage determined by this computation for a calendar year is not a multiple of 0.1 percent, such percentage shall be reduced to the nearest multiple of 0.1 percent.

(d) *Contributions* means payments required by a State law to be made into an unemployment fund by any person on account of having individuals in his employ, to the extent that such payments are made by him without being deducted or deductible from the remuneration of individuals in his employ.

(e) *Federal unemployment tax* means the excise tax imposed under section 3301 of the Federal Unemployment Tax Act on employers with respect to having individuals in their employ.

(f) *Fiscal year* means the Federal fiscal year which begins on October 1 of a year and ends on September 30, of the next succeeding year.

(g) *FUTA* referes to the Federal Unemployment Tax Act.

(h) *State unemployment fund* or *unemployment fund* means a special fund established under a State law for the payment of unemployment compensation to unemployed individuals, and which is an ''unemployment fund'' as defined in section 3306(f) of the Federal Unemployment Tax Act.

(i) *Taxable year* means the calendar year.

(j) *Unemployment tax rate* means, for any taxable year and with respect to any State, the percentage obtained by dividing the total amount of contributions paid into the State unemployment fund with respect to such taxable year by total wages as defined in § 606.3(l).

(k) *Wages, taxable* means the total sum of remuneration which is subject to contributions under a State law.

(l) *Wages, total* means the total sum of all remuneration covered by a State law, disregarding any dollar limitation on the amount of remuneration which is subject to contributions under the State law.

§ 606.4 Redelegation of authority.

(a) *Redelegation to UIS Director.* The Director, Unemployment Insurance Service (hereinafter ''UIS Director''), is redelegated authority to make the determinations required under this part. This redelegation is contained in Employment and Training Order No. 1–84, published in the FEDERAL REGISTER on November 14, 1983 (48 FR 51870).

(b) *Delegation by Governor.* The Governor of a State, as used in this part, refers to the highest executive official of a State. Wherever in this part an action is required by or of the Governor of a State, such action may be taken by the Governor or may be taken by a delegatee of the Governor if the Department is furnished appropriate proof of an authoritative delegation of authority.

§ 606.5 Verification of estimates and review of determinations.

The Department of Labor (hereinafter ''Department'') shall verify all information and data provided by a State under this part, and the State shall comply with such provisions as the Department considers necessary to assure the correctness and verification of such information and data. The State agency of a State affected by a determination made by the UIS director under this part may seek review of such determination by a higher level official of the Employment and Training Administration.

§ 606.6 Information, reports, and studies.

A State shall furnish to the Secretary of Labor such information and reports and conduct such studies as the Secretary determines are necessary or appropriate for carrying out the purposes of this part, including any additional information or data the UIS Director may require for the purposes of making determinations under subparts C and E of this part. This collection has been approved by the Office of

Management and Budget under control number 1205–0205.

Subpart B—Tax Credit Reduction [Reserved]

Subpart C—Relief from Tax Credit Reduction

§ 606.20 Cap on tax credit reduction.

(a) *Applicability.* Subsection (f) of section 3302 of FUTA authorizes a limitation (cap) on the reduction of tax credits by reason of an outstanding balance of advances, if the UIS Director determines with respect to a State, on or before November 10 of a taxable year, that—

(1) No action was taken by the State during the 12-month period ending on September 30 of such taxable year which has resulted, or will result, in a reduction in the State's unemployment tax effort, as defined in § 606.21(a);

(2) No action was taken by the State during the 12-month period ending on September 30 of such taxable year which has resulted, or will result, in a net decrease in the solvency of the State unemployment compensation system, as defined in § 606.21(b);

(3) The State unemployment tax rate (as defined in § 606.3(j)) for the taxable year equals or exceeds the average benefit-cost ratio (as defined in § 606.3(c)) for the calendar years in the five-calendar year period ending with the calendar year immediately preceding the taxable year for which the cap is requested, under the rules specified in § 606.21 (c) and (d); and

(4) The outstanding balance of advances to the State on September 30 of the taxable year was not greater than the outstanding balance of advances to the State on September 30 of the third preceding taxable year.

(b) *Maximum tax credit reduction.* If a State qualifies for a cap, the maximum tax credit reduction for the taxable year shall not exceed 0.6 percent, or, if higher, the tax credit reduction that was in effect for the taxable year preceding the taxable year for which the cap is requested.

(c) *Year not taken into account.* If a State qualifies for a cap for any year, the year and January 1 of the year to which the cap applies will not be taken into account for purposes of determining reduction of tax credit for subsequent taxable years.

(d) *Partial caps.* Partial caps obtained under subsection (f)(8) are no longer available. Nevertheless, for the purposes of applying section 3302(c)(2) to subsequent taxable years, partial cap credits earned will be taken into account for purposes of determining reduction of tax credits. Also, the taxable year to which the partial cap applied (and January 1 thereof) will be taken into account for purposes of determining reduction of tax credits for subsequent taxable years.

§ 606.21 Criteria for cap.

(a) *Reduction in unemployment tax effort.* (1) For purposes of paragraph (a)(1) of § 606.20, a reduction in a State's unemployment tax effort will have occurred with respect to a taxable year if any action is or was taken (legislative, judicial, or administrative,) that is effective during the 12-month period ending on September 30 of such taxable year, which has resulted in or will result in a reduction of the amount of contributions paid or payable or the amounts that were or would have been paid or payable but for such action.

(2) Actions that will result in a reduction in tax effort include, but are not limited to, a reduction in the taxable wage base, the tax rate schedule, tax rates, or taxes payable (including surtaxes) that would not have gone into effect but for the legislative, judicial, or administrative action taken. Notwithstanding the foregoing criterion, a reduction in unemployment tax effort resulting from any provision of the State law enacted prior to August 13, 1981, will not be taken into account as a reduction in the State's unemployment tax effort for the purposes of this section.

(b) *Net decrease in solvency.* For purposes of paragraph (a)(2) of § 606.20, a net decrease in the solvency of the State's unemployment compensation system will have occurred with respect to a taxable year if any action is or was taken (legislative, judicial, or administrative), that is effective during the 12-month period ending on September 30 of such taxable year, which

has resulted in or will result in an increase in benefits without at least an equal increase in taxes, or a decrease in taxes without at least an equal decrease in benefits. Notwithstanding the foregoing criterion, a decrease in solvency resulting from any provision of the State law enacted prior to August 13, 1981, will not be taken into account as a reduction in solvency of the State's unemployment compensation system for the purposes of this section.

(c) *State unemployment tax rate.* For purposes of paragraph (a)(3) of § 606.20, the State unemployment tax rate is defined in § 606.3(j). If such percentage is not a multiple of 0.1 percent, the percentage shall remain unrounded.

(d) *State five-year average benefit cost ratio.* For purposes of paragraph (a)(3) of § 606.20, the average benefit cost ratio for the five preceding calendar years is the percentage determined by dividing the sum of the benefit cost ratios for the five years by five. If such percentage is not a multiple of 0.1 percent, the percentage shall remain unrounded.

§ 606.22 Application for cap.

(a) *Application.* (1) The Governor of the State shall make application, addressed to the Secretary of Labor, no later than July 1 of a taxable year with respect to which a State requests a cap on tax credit reduction. The Governor is required to notify the Department on or before October 15 of such taxable year of any action occurring after the date of the initial application and effective prior to October 1 of such year that would impact upon the State's application.

(2) The UIS Director will make a determination on the application on or before November 10 of such taxable year, will notify the applicant and the Secretary of the Treasury of such determination, and will cause notice of such determination to be published in the FEDERAL REGISTER.

(b) *Anticipated impact statement.* In support of the application by the Governor, there shall be submitted with the application (on or before October 15), for the purposes of the criteria described in §§ 606.20(a) (1) and (2) and 606.21 (a) and (b), a description of all statutory provisions enacted or amended, regulations adopted or revised, administrative policies and procedures adopted or revised, and judicial decisions given effect, which are effective during the 12-month period ending on September 30 of the taxable year for which a cap on tax credit reduction is requested, and an anticipated impact statement (AIS) for each such program action in the following respect—

(1) The estimated dollar effect on each program action upon expenditures for compensation from the State unemployment fund and for the amounts of contributions paid or payable in such 12-month period, including the effect of interaction among program actions, and with respect to program actions for which dollar impact cannot be estimated or is minor or negligible, indicate whether the impact is positive or negative;

(2) If a program action has no such dollar effect, an explanation of why there is or will be no such effect;

(3) A description of assumptions and methodology used and the basis for the financial estimate of the impact of each program action described in paragraphs (b)(1) and (b)(2) of this section; and

(4) A comparision of the program actions described in paragraphs (b)(1) and (b)(2) of this section with the program actions prior to the Federal fiscal year (as defined in § 606.3(f)) which ends on such September 30.

(c) *Unemployment tax rate.* With respect to the unemployment tax rate criterion described in §§ 606.20(a)(3) and 606.21(c), the application shall include an estimate for the taxable year with respect to which a cap on tax credit reduction is requested and actual data for the prior two years as follows:

(1) The amount of taxable wages as defined in § 606.3(k);

(2) The amount of total wages as defined in § 606.3(l); and

(3) The estimated distribution of taxable wages, as defined in § 606.3(k), by tax rate under the State law.

(d) *Benefit cost ratio.* With respect to the benefit cost ratio criterion described in §§ 606.20(a)(3) and 606.21(d), the application shall include for each of the five calendar years prior to the taxable year for which a cap on tax

credit reduction is requested, the following data:

(1) The total dollar sum of compensation actually paid under the State law during the calendar year, including in such total sum all regular, additional, and extended compensation as defined in section 205 of the Federal-State Extended Unemployment Compensation Act of 1970, but excluding from such total sum—

(i) The total dollar amount of such compensation paid for which the State is entitled to reimbursement or was reimbursed under the provisions of any Federal law;

(ii) The total dollar amount of such compensation paid which is attributable to services performed for a reimbursing employer, and which is not included in the total amount reported under paragraph (d)(1)(i) of this section;

(2) The total dollar amount of interest paid during the calendar year on any advance; and

(3) The total dollar amount of wages (as defined in §606.3(l)) with respect to such calendar year.

(e) *Documentation required.* Copies of the sources of or authority for each program action described in paragraph (b) of this section shall be submitted with each application for a cap on tax credit reduction. In addition, a notation shall be made on each AIS of where all figures referred to are contained in reports required by the Department or in other data sources.

(f) *State contact person.* The Department may request additional information or clarification of information submitted bearing upon an application for a cap on tax credit reduction. To expedite requests for such information, the name and telephone number of an appropriate State official shall be included in the application by the Governor.

§ 606.23 Avoidance of tax credit reduction.

(a) *Applicability.* Subsection (g) of section 3302 of FUTA authorizes a State to avoid a tax credit reduction for a taxable year by meeting the three requirements of subsection (g). These requirements are met if the UIS Director determines that:

(1) Advances were repaid by the State during the one-year period ending on November 9 of the taxable year in an amount not less than the sum of—

(i) The potential additional taxes (as estimated by the UIS Director) that would be payable by the State's employers if paragraph (2) of section 3302(c) of FUTA were applied for such taxable year (as estimated with regard to the cap on tax credit reduction for which the State qualifies under §§606.20 to 606.22 with respect to such taxable year), and

(ii) Any advances made to such State during such one-year period under title XII of the Social Security Act;

(2) There will be adequate funds in the State unemployment fund (as estimated by the UIS Director) sufficient to pay all benefits when due and payable under the State law during the three-month period beginning on November 1 of such taxable year without receiving any advance under title XII of the Social Security Act; and

(3) There is a net increase (as estimated by the UIS Director) in the solvency of the State unemployment compensation system for the taxable year and such net increase equals or exceeds the potential additional taxes for such taxable year as estimated under paragraph (a)(1)(i) of this section.

(b) *Net increase in solvency.* (1) The net increase in solvency for a taxable year, as determined for the purposes of paragraph (a)(3) of this section, must be attributable to legislative changes made in the State law after the later of—

(i) September 3, 1982, or

(ii) The date on which the first advance is taken into account in determining the amount of the potential additional taxes.

(2) The UIS Director shall determine the net increase in solvency by first estimating the difference between revenue receipts and benefit outlays under the law in effect for the year for which avoidance is requested, as if the relevant changes in State law referred to in paragraph (b)(1) of this section were not in effect for such year. The UIS Director shall then estimate the difference between revenue receipts and benefit outlays under the law in effect for the year for which the avoidance is

requested, taking into account the relevant changes in State law referred to in paragraph (b)(1) of this section. The amount (if any) by which the second estimated difference exceeds the first estimated difference shall constitute the net increase in solvency for the purposes of this section.

(c) *Year taken into account.* If a State qualifies for avoidance for any year, that year and January 1 of that year to which the avoidance applies will be taken into account for purposes of determining reduction of tax credits for subsequent taxable years.

§ 606.24 Application for avoidance.

(a) *Application.* (1) The Governor of the State shall make application, addressed to the Secretary of Labor, no later than July 1 of a taxable year with respect to which a State requests avoidance of tax credit reduction. The Governor is required to notify the Department on or before October 15 of such taxable year of any action impacting upon the State's application occurring subsequent to the date of the initial application and on or before November 10.

(2) The UIS Director will make a determination on the application as of November 10 of such taxable year, will notify the applicant and the Secretary of the Treasury of such determination, and will cause notice of such determination to be published in the FEDERAL REGISTER.

(b) *Information.* (1) The application shall include a statement of the amount of advances repaid and to be repaid during the one-year period ending on November 9 of the taxable year for which avoidance is requested. If the amount repaid as of the date of the application is less than the amount required to satisfy the provisions of § 606.23(a)(1), the Governor shall provide a report later of the additional repayments that have been made in the remainder of the one-year period ending on November 9 of the taxable year, for the purposes of meeting the provisions of § 606.23(a)(1).

(2) The application also shall include estimates of revenue receipts, benefit outlays, and end-of-month fund balance for each month in the period beginning with September of the taxable year for which avoidance is requested through the subsequent January. Actual data for the comparable period of the preceding year also shall be included in the application in order to determine the reasonableness of such estimates.

(3) The application also shall include a description of State law changes, effective for the taxable year for which the avoidance is requested, which resulted in a net increase in the solvency of the State unemployment compensation system, and documentation which supports the State's estimate of the net increase in solvency for such taxable year.

§ 606.25 Waiver of and substitution for additional tax credit reduction.

A provision of subsection (c)(2) of section 3302 of FUTA provides that, for a State that qualifies, the additional tax credit reduction applicable under subparagraph (C), beginning in the fifth consecutive year of a balance of outstanding advances, shall be waived and the additional tax credit reduction applicable under subparagraph (B) shall be substituted. The waiver and substitution are granted if the UIS Director determines that the State has taken no action, effective during the 12-month period ending on September 30 of the year for which the waiver and substitution are requested, which has resulted or will result in a net decrease in the solvency of the State unemployment compensation system as determined for the purposes of §§ 606.20(a)(2) and 606.21(b).

§ 606.26 Application for waiver and substitution.

(a) *Application.* The Governor of the State shall make application addressed to the Secretary of Labor, no later than July 1 of a taxable year with respect to which a State requests waiver and substitution. Any such application shall contain the supportive data and information required by § 606.22(b) for the purposes of §§ 606.20(a)(2) and 606.21(b). The Governor is required to notify the Department on or before October 15 of such taxable year of action occurring after the date of the initial application and effective prior to October 1 of such year that would impact upon the State's application.

(b) *Notification of determination.* The UIS Director will make a determination on the application as of November 10 of the taxable year, will notify the applicant and the Secretary of the Treasury of the resulting tax credit reduction to be applied, and will cause notice of such determination to be published in the FEDERAL REGISTER.

Subpart D—Interest on Advances

§ 606.30 Interest rates on advances.

Advances made to States pursuant to title XII of the Social Security Act on or after April 1, 1982, shall be subject to interest payable on the due dates specified in § 606.31.[1] The interest rate for each calendar year will be 10 percent or, if less, the rate determined by the Secretary of the Treasury and announced to the States by the Department.

§ 606.31 Due dates for payment of interest. [Reserved]

§ 606.32 Types of advances subject to interest.

(a) *Payment of interest.* Except as otherwise provided in paragraph (b) of this section each State shall pay interest on any advance made to such State under title XII of the Social Security Act.

(b) *Cash flow loans.* Advances repaid in full prior to October 1 of the calendar year in which made are deemed cash flow loans and shall be free of interest; provided, that the State does not receive an additional advance after September 30 of the same calendar year. If such additional advance is received by the State, interest on the completely repaid earlier advance(s) shall be due and payable not later than the day following the date of the first such additional advance. The administrator of the State agency shall notify the Secretary of Labor no later than September 10 of those loans deemed to be cash flow loans and not subject to interest. This notification shall include the date and amount of each loan made in January through September and a copy of documentation sent to the Secretary of the Treasury requesting loan repayment transfer(s) from the State's account in the Unemployment Trust Fund to the Federal unemployment account in such Fund.

§ 606.33 No payment of interest from unemployment fund. [Reserved]

§ 606.34 Reports of interest payable. [Reserved]

§ 606.35 Order of application for repayments. [Reserved]

Subpart E—Relief from Interest Payment

§ 606.40 May/September delay.

Subsection (b)(3)(B) of section 1202 of the Social Security Act permits a State to delay payment of interest accrued on advances made during the last five months of the Federal fiscal year (May, June, July, August, and September) to no later than December 31 of the next succeeding calendar year. If the payment is delayed, interest on the delayed payment will accrue from the normal due date (i.e., September 30) and in the same manner as if the interest due on the advance(s) was an advance made on such due date. The Governor of a State which has decided to delay such interest payment shall notify the Secretary of Labor no later than September 1 of the year with respect to which the delay is applicable.

§ 606.41 High unemployment deferral.

(a) *Applicability.* Subsection (b)(3)(C) of section 1202 of the Social Security Act permits a State to defer payment of, and extend the payment for, 75 percent of interest charges otherwise due prior to October 1 of a year if the UIS Director determines that high unemployment conditions existed in the State.

(b) *High unemployment defined.* For purposes of this section, high unemployment conditions existed in the State if the State's rate of insured unemployment (as determined for purposes of 20 CFR 615.12) under the State law with respect to the period consisting of the first six months of the preceding calendar year equalled or exceeded 7.5 percent; this means that in

[1] (EDITORIAL NOTE: This section will be added at a later date.)

weeks 1 (that week which includes January 1 of the year) through 26 of such preceding calendar year, the rate of insured unemployment reported by the State and accepted by the Department under 20 CFR part 615 must have averaged a percentage equalling or exceeding 7.5 percent.

(c) *Schedule of deferred payments.* The State must pay prior to October 1 one-fourth of the interest due, and must pay a minimum of one-third of the deferred amount prior to October 1 in each of the three years following the year in which deferral was granted; at the State's option payment of deferred interest may be accelerated.

(d) *Related criteria.* Timely payment of one-fourth of the interest due prior to October 1 is a precondition to obtaining deferral of payment of 75 percent of the interest due. No interest shall accrue on such deferred interest.

(e) *Application for deferral and determination.* (1) The Governor of a State which has decided to request such deferral of interest payment shall apply to the Secretary of Labor no later than July 1 of the taxable year for which the deferral is requested.

(2) The UIS Director will determine whether deferral is or is not granted on the basis of the Department's records of reports of the rates of insured unemployment and information obtained from the Department of the Treasury as to the timely and full payment of one-fourth of the interest due.

§ 606.42 High unemployment delay.

(a) *Applicability.* Paragraph (9) of section 1202 (b) of the Social Security Act permits a State to delay for a period not exceeding nine months the interest payment due prior to October 1 if, for the most recent 12-month period prior to such October 1 for which data are available, the State had an average total unemployment rate of 13.5 percent or greater.

(b) *Delayed due date.* An interest payment delayed under paragraph (9) must be paid in full not later than the last official Federal business day prior to the following July 1; at the State's option payment of delayed interest may be accelerated. No interest shall accrue on such delayed payment.

(c) *Application for delay in payment and determination.* (1) The Governor of a State which has decided to request delay in payment of interest under paragraph (9) shall apply to the Secretary of Labor no later than July 1 of the taxable year for which the delay is requested.

(2) The UIS Director will determine whether delay is or is not granted on the basis of seasonally unadjusted civilian total unemployment rate data published by the Department's Bureau of Labor Statistics.

§ 606.43 Maintenance of solvency effort.

(a) *Applicability.* Legislative-action interest deferrals obtained under subsection (b)(8) (A) through (C) of section 1202 of the Social Security Act are no longer available. Nevertheless, States must maintain their solvency effort with respect to any such deferrals approved in 1983, 1984, and 1985 in order for the deferral to continue to apply in each subsequent year of deferral.

(b) *Determination regarding maintenance of solvency effort.* (1) The UIS Director shall determine if there is a net reduction in solvency effort by first estimating revenue receipts and benefit outlays under the law in effect in the 12-month period ending on September 30 of the year for which continuation of deferral is requested as if it were effective in the base year (12-month period for which the first deferral was granted).

(2) The UIS Director shall then compare revenue receipts and benefit outlays for the base year (previously estimated at the time of the original deferral) with revenue receipts and benefit outlays estimated in paragraph (b)(1) of this section.

(3) If the sum of—

(i) The percentage increase in revenue receipts from the base year to the year for which the continuation of deferral is requested (as estimated in paragraph (b)(1) of this section), and

(ii) The percentage decrease in benefit outlays from the base year to the year for which the continuation of deferral is requested (as estimated in paragraph (b)(1) of this section),

is equal to or greater than the sum of such percentages achieved for the 12-

month period ending on September 30 of the year for which the latest deferral was obtained, the State will have maintained its solvency effort, but if less, then a reduction in solvency effort will have occurred.

(4) Notwithstanding the results of the calculation in paragraph (b)(3) of this section, if there is no increase in revenue receipts or no decrease in benefit outlays between the base year and the year for which continuation of deferral is requested, then a reduction in solvency effort will have occurred.

(c) *Effect of determination.* (1) If the UIS Director determines that a State has maintained its solvency effort, continuation of deferral will be granted, and the State will be required to timely pay the deferred interest payable prior to October 1 of the year with respect to which such determination is made.

(2) If the UIS Director determines that a State failed to maintain its solvency effort, all deferred interest shall be due and payable prior to October 1 of the year with respect to which such determination is made.

(d) *Application and information.* (1) The Governor of a State which has decided to request continuation of a previously approved deferral of interest payments shall apply to the Secretary of Labor no later than July 1 of the year for which continuation is requested. The Governor is required to notify the Department on or before September 1 of such taxable year of any action impacting upon the State's application which has occurred or will occur subsequent to the date of the initial application and on or before September 30.

(2) In support of the application by the Governor, there shall be submitted for the purposes of the estimates required in paragraph (b) of this section documentation as specified in §606.22 (b)(1) through (4), (c) and (f) and bearing upon the application for continuation of deferral, in terms of the relevant comparison between revenue receipts and benefit outlays.

§606.44 Notification of determinations.

The UIS Director will make determinations under §§606.41, 606.42, and 606.43 on or before September 10 of the taxable year, will promptly notify the applicants and the Secretary of the Treasury of such determinations, and will cause notice of such determinations to be published in the FEDERAL REGISTER. The UIS Director also will inform the Secretary of the Treasury and cause notice to be published in the FEDERAL REGISTER of information with respect to delayed payment of interest as provided in §606.40.

PART 609—UNEMPLOYMENT COMPENSATION FOR FEDERAL CIVILIAN EMPLOYEES

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AUTHORITY: 5 U.S.C. 8508; Secretary's Order No. 4–75, 40 FR 18515; (5 U.S.C. 301). Interpret and apply secs. 8501–8508 of title 5, United States Code.

SOURCE: 47 FR 54687, Dec. 3, 1982, unless otherwise noted.

Subpart A—General Provisions

§ 609.1 Purpose and application.

(a) *Purpose.* Subchapter I of chapter 85, title 5 of the United States Code, as amended by Pub. L. 94–566, 90 Stat. 2667, 5 U.S.C. 8501–8508, provides for a permanent program of unemployment compensation for unemployed Federal civilian employees. The unemployment compensation provided for in subchapter I is hereinafter referred to as unemployment compensation for Federal employees, or UCFE. The regulations in this part are issued to implement the UCFE Program.

(b) *First rule of construction.* The Act and the implementing regulations in this part shall be construed liberally so as to carry out the purposes of the Act.

(c) *Second rule of construction.* The Act and the implementing regulations in this part shall be construed so as to assure insofar as possible the uniform interpretation and application of the Act throughout the United States.

(d) *Effectuating purpose and rules of construction.* (1) In order to effectuate the provisions of this section, each State agency shall forward to the United States Department of Labor (hereafter Department), not later than 10 days after issuance, a copy of each judicial or administrative decision ruling on an individual's entitlement to payment of UCFE or to credit for a waiting period. On request of the Department, a State agency shall forward to the Department a copy of any determination or redetermination ruling on an individual's entitlement to UCFE or waiting period credit.

(2) If the Department believes that a determination, redetermination, or decision is inconsistent with the Department's interpretation of the Act or this part, the Department may at any time notify the State agency of the Department's view. Thereafter the State agency shall issue a redetermination or appeal if possible, and shall not follow such determination, redetermination, or decision as a precedent; and, in any subsequent proceedings which involve such determination, redetermination, or decision, or wherein such determination, redetermination, or decision is cited as precedent or otherwise relied upon, the State agency shall inform the claims deputy or hearing officer or court of the Department's view and shall make all reasonable efforts, including appeal or other proceedings in an appropriate forum, to obtain modification, limitation, or overruling of the determination, redetermination, or decision.

(3) If the Department believes that a determination, redetermination, or decision is patently and flagrantly violative of the Act or this part, the Department may at any time notify the State agency of the Department's view. If the determination, redetermination, or decision in question denies UCFE to a claimant, the steps outlined in paragraph (d)(2) of this section shall be followed by the State agency. If the determination, redetermination, or decision in question awards UCFE to a claimant, the benefits are ''due'' within the meaning of section 303(a)(1) of the Social Security Act, 42 U.S.C. 503(a)(1), and therefore must be paid promptly to the claimant. However, the State agency shall take the steps outlined in paragraph (d)(2) of this section, and payments to the claimant may be temporarily delayed if redetermination or appeal action is taken not more than one business day following the day on which the first payment otherwise would be issued to the claimant; and the redetermination action is taken or appeal is filed to obtain a reversal of the award of UCFE and a ruling consistent with the Department's view; and the redetermination action or appeal seeks an expedited redetermination or appeal within not more than two weeks after the redetermination action is taken or the appeal is filed. If redetermination action is not taken or appeal is not filed within the above time limit, or a redetermination or decision is not obtained within the two-week limit, or any redetermination or decision or order is issued which affirms the determination, redetermination, or decision awarding UCFE or allows it to stand in whole or in part, the benefits awarded must be paid promptly to the claimant.

(4)(i) If any determination, redetermination, or decision, referred to in paragraph (d)(2) or paragraph (d)(3) of this section, is treated as a precedent for any future UCFE claim or claim

under the UCX Program (part 614 of this chapter), the Secretary will decide whether the Agreement with the State entered into under the Act shall be terminated.

(ii) In the case of any determination, redetermination, or decision that is not legally warranted under the Act or this part, including any determination, redetermination, or decision referred to in paragraph (d)(3) of this section, the Secretary will decide whether the State shall be required to restore the funds of the United States for any sums paid under such a determination, redetermination, or decision, and whether, in the absence of such restoration, the Agreement with the State shall be terminated and whether other action shall be taken to recover such sums for the United States.

(5) A State agency may request reconsideration of a notice issued pursuant to paragraph (d)(2) of paragraph (d)(3) of this section, and shall be given an opportunity to present views and arguments if desired.

(6) Concurrence of the Department in a determination, redetermination, or decision shall not be presumed from the absence of a notice issued pursuant to this section.

§ 609.2 Definitions of terms.

For the purposes of the Act and this part:

(a) *Act* means subchapter I of chapter 85, title 5, United States Code, 5 U.S.C. 8501–8508.

(b) *Agreement* means the agreement entered into pursuant to the Act between a State and the Secretary under which the State agency of the State agrees to make payments of unemployment compensation in accordance with the Act and the regulations and procedures thereunder prescribed by the Department.

(c) *Based period* means the base period as defined by the applicable State law for the benefit year.

(d) *Benefit year* means the benefit year as defined by the applicable State law, and if not so defined the term means the period prescribed in the agreement with the State or, in the absence of an Agreement, the period prescribed by the Department.

(e) *Federal agency* means any department, agency, or governmental body of the United States, including any instrumentality wholly or partially owned by the United States, in any branch of the Government of the United States, which employs any individual in Federal civilian service.

(f) *Federal civilian service* means service performed in the employ of any Federal agency, except service performed—

(1) By an elective official in the executive or legislative branches of the Government of the United States;

(2) As a member of the Armed Forces or the Commissioned Corps of the National Oceanic and Atmospheric Administration;

(3) By Foreign Service personnel for whom special separation allowances are provided under chapter 14 of title 22 of the United States Code;

(4) Outside the 50 States, the Commonwealth of Puerto Rico, the Virgin Islands, and the District of Columbia, by an individual who is not a citizen of the United States;

(5) By an individual excluded by regulations of the Office of Personnel Management from civil service retirement coverage provided by subchapter III of chapter 83 of title 5 of the United States Code because the individual is paid on a contract or fee basis;

(6) By an individual receiving nominal pay and allowances of $12 or less a year;

(7) In a hospital, home, or other institution of the United States by a patient or inmate thereof;

(8) By a student-employee as defined by 5 U.S.C. 5351; that is: (i) A student nurse, medical or dental intern, resident-in-training, student dietitian, student physical therapist, or student occupational therapist, assigned or attached to a hospital, clinic, or medical or dental laboratory operated by an agency as defined in section 5351; or

(ii) Any other student-employee, assigned or attached primarily for training purposes to such a hospital, clinic, or medical or dental laboratory operated by such an agency, who is designated by the head of the agency with the approval of the Office of Personnel Management;

(9) By an individual serving on a temporary basis in case of fire, storm, earthquake, flood, or other similar emergency;

(10) By an individual employed under a Federal relief program to relieve the individual from unemployment;

(11) As a member of a State, county, or community committee under the Agricultural Stabilization and Conservation Service or of any other board, council, committee, or other similar body, unless such body is composed exclusively of individuals otherwise in the full-time employ of the United States;

(12) By an officer or member of the crew on or in connection with an American vessel which is: (i) Owned by or bareboat chartered to the United States, and

(ii) The business of which is conducted by a general agent of the Secretary of Commerce; and

(iii) If contributions on account of such service are required under section 3305(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3305(g)) to be made to an unemployment fund under a State law;

(13) By an individual excluded by any other Federal law from coverage under the UCFE Program; or

(14) By an individual whose service is covered by the UCX Program to which part 614 of this chapter applies.

(g) *Federal employee* means an individual who has performed Federal civilian service.

(h) *Federal findings* means the facts reported by a Federal agency pertaining to an individual as to: (1) Whether or not the individual has performed Federal civilian service for such an agency;

(2) The period or periods of such Federal civilian service;

(3) The individual's Federal wages; and

(4) The reasons for termination of the individual's Federal civilian service.

(i) *Federal wages* means all pay and allowances, in cash and in kind, for Federal civilian service.

(j) *First claim* means an initial claim for unemployment compensation under the UCFE Program, the UCX Program (part 614 of this chapter), a State law, or some combination thereof, whereby a benefit year is established under an applicable State law.

(k) *Official station* means the State (or country, if outside the United States) designated on a Federal employee's notification of personnel action terminating the individual's Federal civilian service (Standard Form 50 or its equivalent) as the individual's ''duty station.'' If the form of notification does not specify the Federal employee's ''duty station'', the individual's official station shall be the State or country designated under ''name and location of employing office'' on such form or designated as the individual's place of employment on an equivalent form.

(l) *Secretary* means the Secretary of Labor of the United States.

(m) *State* means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(n) *State agency* means the agency of the State which administers the applicable State law and is administering the UCFE Program in the State pursuant to an Agreement with the Secretary.

(o)(1) *State law* means the unemployment compensation law of a State approved by the Secretary under section 3304 of the Internal Revenue Code of 1954, 26 U.S.C. 3304, if the State is certified under section 3304(c) of the Internal Revenue Code of 1954, 26 U.S.C. 3304(c).

(2) *Applicable State law* means the State law made applicable to a UCFE claimant by § 609.8.

(p)(1) *Unemployment compensation* means cash benefits (including dependents' allowances) payable to individuals with respect to their unemployment, and includes regular, additional, emergency, and extended compensation.

(2) *Regular compensation* means unemployment compensation payable to an individual under any State law, but not including additional compensation or extended compensation.

(3) *Additional compensation* means unemployment compensation totally financed by a State and payable under a State law by reason of conditions of high unemployment or by reason of other special factors.

(4) *Emergency compensation* means supplementary unemployment compensation payable under a temporary Federal law after exhaustion of regular and extended compensation.

(5) *Extended compensation* means unemployment compensation payable to an individual for weeks of unemployment in an extended benefit period, under those provisions of a State law which satisfy the requirements of the Federal-State Extended Unemployment Compensation Act of 1970, as amended, 26 U.S.C. 3304 note, and part 615 of this chapter, with respect to the payment of extended compensation.

(q) *Week* means, for purposes of eligibility for and payment of UCFE, a week as defined in the applicable State law.

(r) *Week of unemployment* means a week of total, part-total, or partial unemployment as defined in the applicable State law, which shall be applied in the same manner and to the same extent to all employment and earnings, and in the same manner and to the same extent for the purposes of the UCFE Program, as if the individual filing for UCFE were filing a claim for State unemployment compensation.

Subpart B—Administration of UCFE Program

§ 609.3 Eligibility requirements for UCFE.

An individual shall be eligible to receive a payment of UCFE or to waiting period credit with respect to a week of unemployment if:

(a) The individual has Federal civilian service and Federal wages in the base period under the applicable State law;

(b) The individual meets the qualifying employment and wage requirements of the applicable State law, either on the basis of Federal civilian service and Federal wages alone or in combination with service and wages covered under a State law or under the UCX Program (part 614 of this chapter);

(c) The individual has filed an initial claim for UCFE and, as appropriate, has filed a timely claim for waiting period credit or a payment of UCFE with respect to that week of unemployment; and

(d) The individual is totally, part-totally, or partially unemployed, and is able to work, available for work, and seeking work within the meaning of or as required by the applicable State law, and is not subject to disqualification under this part or the applicable State law, with respect to that week of unemployment.

§ 609.4 Weekly and maximum benefit amounts.

(a) *Total unemployment.* The weekly amount of UCFE payable to an eligible individual for a week of total unemployment shall be the amount that would be payable to the individual as unemployment compensation for a week of total unemployment as determined under the applicable State law.

(b) *Partial and part-total unemployment.* The weekly amount of UCFE payable for a week of partial or part-total unemployment shall be the amount that would be payable to the individual as unemployment compensation for a week of partial or part-total unemployment as determined under the applicable State law.

(c) *Maximum amount.* The maximum amount of UCFE which shall be payable to an eligible individual during and subsequent to the individual's benefit year shall be the maximum amount of all unemployment compensation that would be payable to the individual as determined under the applicable State law.

(d) *Computation rules.* (1) The weekly and maximum amounts of UCFE payable to an individual under the UCFE Program shall be determined under the applicable State law to be in the same amount, on the same terms, and subject to the same conditions as the State unemployment compensation which would be payable to the individual under the applicable State law if the individual's Federal civilian service and Federal wages assigned or transferred under this part to the State had been included as employment and wages covered by that State law.

(2) All Federal civilian service and Federal wages for all Federal agencies shall be considered employment with a single employer for purposes of the UCFE Program.

§ 609.5 Claims for UCFE.

(a) *First claims.* A first claim for UCFE shall be filed by an individual in any State agency of any State (or Canada) according to the applicable State law, and on a form prescribed by the Department which shall be furnished to the individual by the State agency where the claim is filed.

(b) *Weekly claims.* Claims for waiting week credit and payments of UCFE for weeks of unemployment shall be filed in any State agency (or Canada) at the times and in the manner as claims for State unemployment compensation are filed under the applicable State law, and on forms prescribed by the Department which shall be furnished to the individual by the State agency where the claim is filed.

(c) *Secretary's standard.* The procedure for reporting and filing claims for UCFE and waiting period credit shall be consistent with this part 609 and the Secretary's ''Standard for Claim Filing, Claimant Reporting, Job Finding and Employment Services'' (*Employment Security Manual,* part V, sections 5000 *et seq.*).

§ 609.6 Determinations of entitlement; notices to individual.

(a) *Determination of first claim.* The State agency whose State law applies to an individual under § 609.8 shall, promptly upon the filing of a first claim for UCFE, determine whether the individual is eligible and whether a disqualification applies, and, if the individual is found to be eligible, the individual's benefit year and the weekly and maximum amounts of UCFE payable to the individual.

(b) *Determinations of weekly claims.* The State agency promptly shall, upon the filing of a claim for payment of UCFE or waiting period credit with respect to a week, determine whether the individual is entitled to a payment of UCFE or waiting period credit with respect to such week, and, if entitled, the amount of UCFE or waiting period credit to which the individual is entitled.

(c) *Redetermination.* The provisions of the applicable State law concerning the right to request, or authority to undertake, reconsideration of a determination pertaining to State unemployment compensation under the applicable State law shall apply to determinations pertaining to UCFE.

(d) *Notices to individual.* The State agency promptly shall give notice in writing to the individual of any determination or redetermination of a first claim, and, except as may be authorized under paragraph (g) of this section, of any determination or redetermination of any weekly claim which denies UCFE or waiting period credit or reduces the weekly amount or maximum amount initially determined to be payable. Each notice of determination or redetermination shall include such information regarding the determination or redetermination and notice of right to reconsideration or appeal, or both, as is furnished with written notices of determinations and redeterminations with respect to claims for State unemployment compensation; and where information furnished by a Federal agency was considered in making the determination, or redetermination, the notice thereof shall include an explanation of the right of the individual to seek additional information pursuant to § 609.23 and/or a reconsideration of Federal findings pursuant to § 609.24.

(e) *Obtaining information for claim determinations.* (1) Information required for the determination of claims for UCFE shall be obtained by the State agency from claimants, employers, and others, in the same manner as information is obtained for claim purposes under the applicable State law, but information (including additional and reconsidered Federal findings) shall be obtained from the Federal agency that employed the UCFE claimant as prescribed in §§ 609.21 through 609.25. On request by a UCFE claimant, the State agency shall seek additional information pursuant to § 609.23 and reconsideration of Federal findings pursuant to § 609.24.

(2) If Federal findings have not been received from a Federal agency within 12 days after the request for information was submitted to the Federal agency, the State agency shall determine the individual's entitlement to UCFE on the basis of an affidavit completed by the individual on a form prescribed by the Department. In addition,

the individual shall submit for examination by the State agency any documents issued by the Fedeal agency (for example, Standard Form 50 or W–2) verifying that the individual performed services for and received wages from such Federal agency.

(3) If Federal findings received by a State agency after a determination has been made under this section contain information which would result in a change in the individual's eligibility for or entitlement to UCFE, the State agency promptly shall make a redetermination and notify the individual, as provided in this section. All payments of UCFE made prior to or after such redetermination shall be adjusted in accordance therewith.

(f) *Promptness.* Full payment of UCFE when due shall be consistent with this part 609 and shall be made with the greatest promptness that is administratively feasible, but the provisions of part 640 of this chapter (relating to promptness of benefit payments) shall not be applicable to the UCFE Program.

(g) *Secretary's standard.* The procedures for making determinations and redeterminations, and furnishing written notices of determinations, redeterminations, and rights of appeal to individuals applying for UCFE, shall be consistent with this part 609 and with the Secretary's ''Standard for Claim Determinations—Separation Information'' *(Employment Security Manual,* part V, sections 6010 *et seq.).*

§ 609.7 Appeal and review.

(a) *Applicable State law.* The provisions of the applicable State law concerning the right of appeal and fair hearing from a determination or redetermination of entitlement to State unemployment compensation shall apply to determinations and redeterminations of eligibility for or entitlement to UCFE and waiting period credit. Any such determination or redetermination shall be subject to appeal and review only in the manner and to the extent provided in the applicable State law with respect to determinations and redeterminations of entitlement to State unemployment compensation.

(b) *Rights of appeal and fair hearing.* The provisions on right to appeal and opportunity for a fair hearing with respect to claims for UCFE shall be consistent with this part and with sections 303(a)(1) and 303(a)(3) of the Social Security Act, 42 U.S.C. 503(a)(1) and 503(a)(3).

(c) *Promptness on appeals.* (1) Decisions on appeals under the UCFE Program shall accord with the Secretary's ''Standard for Appeals Promptness—Unemployment Compensation'' in part 650 of this chapter, and with § 609.1(d).

(2) Any provision of an applicable State law for advancement or priority of unemployment compensation cases on judicial calenders, or otherwise intended to provide for the prompt payment of unemployent compensation when due, shall apply to proceedings involving claims for UCFE.

(d) *Appeal and review by Federal agency.* If a Federal agency believes that a State agency's determination or redetermination of an individual's eligibility for or entitlement to UCFE is incorrect, the Federal agency may seek appeal and review of such determination or redetermination in the same manner as an interested employer may seek appeal and review under the applicable State law.

§ 609.8 The applicable State for an individual.

(a) *The applicable State.* The applicable State for an individual shall be the State to which the individual's Federal civilian service and Federal wages are assigned or transferred under this section. The applicable State law for the individual shall be the State law of such State.

(b) *Assignment of service and wages.* (1) An individual's Federal civilian service and Federal wages shall be assigned to the State in which the individual had his or her last official station prior to filing a first claim unless:

(i) At the time a first claim is filed the individual resides in another State in which, after separation from Federal civilian service, the individual performed service covered under the State law, in which case all of the individual's Federal civilian service and wages shall be assigned to the latter State; or

(ii) Prior to filing a first claim an individual's last official station was outside the States, in which case all of the

individual's Federal civilian service and Federal wages shall be assigned to the State in which the individual resides at the time the individual files a first claim, provided the individual is personally present in a State when the individual files the first claim.

(2) Federal civilian service and wages assigned to a State in error shall be reassigned for use by the proper State agency. An appropriate record of a reassignment shall be made by the State agency which makes the reassignment.

(3) Federal civilian service and Federal wages assigned to a State shall be transferred to another State where such transfer is necessary for the purposes of a combined-wage claim filed by an individual.

(c) *Assignment deemed complete.* All of an individual's Federal civilian service and Federal wages shall be deemed to have been assigned to a State upon the filing of a first claim. Federal civilian service and Federal wages shall be assigned to a State only in accordance with paragraph (b) of this section.

(d) *Use of assigned service and wages.* All assigned Federal civilian service and Federal wages shall be used only by the State to which assigned or transferred in accordance with paragraph (b) of this section.

§ 609.9 Provisions of State law applicable to UCFE claims.

(a) *Particular provisions applicable.* Except where the result would be inconsistent with the provisions of the Act or this part or the procedures thereunder prescribed by the Department, the terms and conditions of the applicable State law which apply to claims for, and the payment of, State unemployment compensation shall apply to claims for, and the payment of, UCFE and claims for waiting period credit. The provisions of the applicable State law which shall apply include, but are not limited to:

(1) Claim filing and reporting;

(2) Information to individuals, as appropriate;

(3) Notices to individuals and Federal agencies, as appropriate, including notice to each individual of each determination and redetermination of eligibility for or entitlement to UCFE;

(4) Determinations and redeterminations;

(5) Ability to work, availability for work, and search for work; and

(6) Disqualifications.

(b) *IBPP.* The *Interstate Benefit Payment Plan* shall apply, where appropriate, to individuals filing claims for UCFE.

(c) *Wage combining.* The State's provisions complying with the *Interstate Arrangement for Combining Employment and Wages* (part 616 of this chapter) shall apply, where appropriate, to individuals filing claims for UCFE.

(d) *Procedural requirements.* The provisions of the applicable State law which apply hereunder to claims for and the payment of UCFE shall be applied consistently with the requirements of title III of the Social Security Act and the Federal Unemployment Tax Act which are pertinent in the case of State unemployment compensation, including but not limited to those standards and requirements specifically referred to in the provisions of this part, except as provided in paragraph (f) of § 609.6.

§ 609.10 Restrictions on entitlement.

(a) *Disqualification.* If the week of unemployment for which an individual claims UCFE is a week to which a disqualification for State unemployment compensation applies under the applicable State law, or would apply but for the fact that the individual has no right to such compensation, the individual shall not be entitled to a payment of UCFE for that week.

(b) *Allocation of terminal annual leave payments.* Lump-sum terminal annual leave payments shall not be allocated by a Federal agency and shall be allocated by a State agency in the same manner as similar payments to individuals employed by private employers are allocated under the applicable State law. In a State in which a private employer has an option as to the period to which such payments shall be allocated, such payments shall be allocated to the date of separation from employment.

§ 609.11 Overpayments; penalties for fraud.

(a) *False statements and representations.* Section 8507(a) of the Act provides that if a State agency, the Department, or a court of competent jurisdiction finds that an individual—

(1) Knowingly has made, or caused to be made by another, a false statement or representation of a material fact, or knowingly has failed, or caused another to fail, to disclose a material fact; and

(2) As a result of that action has received an amount as UCFE to which the individual was not entitled; the individual shall repay the amount to the State agency or the Department. Instead of requiring repayments, the State agency or the Department may recover the amount by deductions from UCFE payable to the individual during the 2-year period after the date of the finding. A finding by a State agency or the Department may be made only after an opportunity for a fair hearing, subject to such further review as may be appropriate under § 609.7.

(b) *Prosecution for fraud.* Section 1919 of title 18, United States Code, provides that whoever makes a false statement or representation of a material fact knowing it to be false, or knowingly fails to disclose a material fact, to obtain or increase for himself or for any other individual any payment authorized to be paid under chapter 85 of title 5, United States Code, or under an agreement thereunder, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) *Absence of fraud.* If a State agency or court of competent jurisdiction finds that an individual has received a payment of UCFE to which the individual was not entitled under the Act and this part, which was not due to a false statement or representation as provided in paragraph (a) or (b) of this section, the individual shall be liable to repay to the applicable State the total sum of the payment to which the individual was not entitled, and the State agency shall take all reasonable measures authorized under any State law or Federal law to recover for the account of the United States the total sum of the payment to which the individual was not entitled.

(d) *Recovery by offset.* (1) The State agency shall recover, insofar as is possible, the amount of any overpayment which is not repaid by the individual, by deductions from any UCFE payable to the individual under the Act and this part, or from any unemployment compensation payable to the individual under any Federal unemployment compensation law administered by the State agency, or from any assistance or allowance payable to the individual with respect to unemployment under any other Federal law administered by the State agency.

(2) A State agency shall also recover, insofar as is possible, the amount of any overpayment of UCFE made to the individual by another State, by deductions from any UCFE payable by the State agency to the individual under the Act and this part, or from any unemployment compensation payable to the individual under any Federal unemployment compensation law administered by the State agency, or from any assistance or allowance payable to the individual with respect to unemployment under any other Federal law administered by the State agency.

(3) Recoupment of fraudulent overpayments referred to in paragraph (a) of this section shall be limited to the 2-year period stated in that paragraph. Recoupment of fraudulent overpayments referred to in paragraph (b) of this section, and nonfraudulent overpayments referred to in paragraph (c) of this section shall be subject to any time limitation on recoupment provided for in the State law that applies to the case.

(e) *Debts due the United States.* UCFE payable to an individual shall be applied by the State agency for the recovery by offset of any debt due to the United States from the individual, but shall not be applied or used by the State agency in any manner for the payment of any debt of the individual to any State or any other entity or person except pursuant to a court order for child support or alimony in accordance with the law of the State and section 459 of the Social Security Act, 42 U.S.C. 659.

(f) *Application of State law.* (1) Except as indicated in paragraph (a) of this section, any provision of State law

that may be applied for the recovery of overpayments or prosecution for fraud, and any provision of State law authorizing waiver of recovery of overpayments of unemployment compensation, shall be applicable to UCFE.

(2) In the case of any finding of false statement or representation under the Act and paragraph (a) of this section, or prosecution for fraud under 18 U.S.C. 1919 or pursuant to paragraph (f)(1) of this section, the individual shall be disqualified or penalized in accordance with the provisions of the applicable State law relating to fraud in connection with a claim for State unemployment compensation.

(g) *Final decision.* Recovery of any overpayment of UCFE shall not be enforced by the State agency until the determination or redetermination establishing the overpayment has become final, or if appeal is taken from the determination or redetermination, until the decision after opportunity for a fair hearing has become final.

(h) *Procedural requirements.* (1) The provisions of paragraphs (c), (d), and (g) of § 609.6 shall apply to determinations and redeterminations made pursuant to this section.

(2) The provisions of § 609.7 shall apply to determinations and redeterminations made pursuant to this section.

(i) *Fraud detection and prevention.* Provisions in the procedures of each State with respect to detection and prevention of fraudulent overpayments of UCFE shall be, as a minimum, commensurate with the procedures adopted by the State with respect to State unemployment compensation and consistent with the Secretary's ''Standard for Fraud and Overpayment Detection'' *(Employment Security Manual,* part V, section 7510 *et seq.*).

(j) *Recovered overpayments.* An amount repaid or recouped under this section shall be—

(1) Deposited in the fund from which payment was made, if the repayment was to a State agency; or

(2) Returned to the Treasury of the United States and credited to the current applicable appropriation, fund, or account from which payment was made, if the repayment was to the Department.

§ 609.12 Inviolate rights to UCFE.

Except as specifically provided in this part, the rights of individuals to UCFE shall be protected in the same manner and to the same extent as the rights of persons to State unemployment compensation are protected under the applicable State law. Such measures shall include protection of applicants for UCFE from waiver, release, assignment, pledge, encumbrance, levy, execution, attachment, and garnishment of their rights to UCFE, except as provided in § 609.11. In the same manner and to the same extent, individuals shall be protected from discrimination and obstruction in regard to seeking, applying for, and receiving any right to UCFE.

§ 609.13 Recordkeeping; disclosure of information.

(a) *Recordkeeping.* Each State agency will make and maintain records pertaining to the administration of the UCFE Program as the Department requires, and will make all such records available for inspection, examination, and audit by such Federal officials or employees as the Department may designate or as may be required by law.

(b) *Disclosure of Information.* Information in records maintained by a State agency in administering the UCFE Program shall be kept confidential, and information in such records may be disclosed only in the same manner and to the same extent as information with respect to State unemployment compensation and the entitlement of individuals thereto may be disclosed under the applicable State law. This provision on the confidentiality of information maintained in the administration of the UCFE Program shall not apply, however, to the Department or for the purposes of §§ 609.11 or 609.13, or in the case of information, reports and studies required pursuant to §§ 609.17 or 609.25, or where the result would be inconsistent with the Freedom of Information Act (5 U.S.C. 552), the Privacy Act of 1974 (5 U.S.C. 552a), or regulations of the Department promulgated thereunder.

§ 609.14 Payments to States.

(a) *State entitlement.* Each State is entitled to be paid by the United States

with respect to each individual whose base period wages included Federal wages, an amount bearing the same ratio to the total amount of compensation paid to such individual as the amount of the individual's Federal wages in the individual's base period bears to the total amount of the individual's base period wages.

(b) *Payment.* Each State shall be paid, either in advance or by way of reimbursement, as may be determined by the Department, the sum that the Department estimates the State is entitled to receive under the Act and this part for each calendar month. The sum shall be reduced or increased by the amount which the Department finds that its estimate for an earlier calendar month was greater or less than the sum which should have been paid to the State. An estimate may be made on the basis of a statistical, sampling, or other method agreed on by the Department and the State agency.

(c) *Certification by the Department.* The Department, from time to time, shall certify to the Secretary of the Treasury the sum payable to each State under this section. The Secretary of the Treasury, before audit or settlement by the General Accounting Office, shall pay the State in accordance with the certification from the funds for carrying out the purposes of the Act and this part.

(d) *Use of money.* Money paid a State under the Act and this part may be used solely for the purposes for which it is paid. Money so paid which is not used solely for these purposes shall be returned, at the time specified by the Agreement, to the Treasury of the United States and credited to the current applicable appropriation, fund, or account from which payments to states under the Act and this part may be made.

§ 609.15 Public access to Agreements.

The State agency of a State will make available to any individual or organization a true copy of the Agreement with the State for inspection and copying. Copies of an Agreement may be furnished on request to any individual or organization upon payment of the same charges, if any, as apply to the furnishing of copies of other records of the State agency.

§ 609.16 Administration in absence of an Agreement.

(a) *Administering Program.* The Department shall administer the UCFE Program through personnel of the Department or through other arrangements under procedures prescribed by the Department, in the case of any State which does not have an Agreement with the Secretary as provided for in 5 U.S.C. 8502. The procedures prescribed by the Department under this section shall be consistent with the Act and this part.

(b) *Applicable State law.* On the filing by an individual of a claim for UCFE in accordance with arrangements under this section, UCFE shall be paid to the individual, if eligible, in the same amount, on the same terms, and subject to the same conditions as would be paid to the individual under the applicable State law if the individual's Federal civilian service and Federal wages had been included as employment and wages under the State law. Any such claim shall include the individual's Federal civilian service and Federal wages, combined with any service and wages covered by State law. However, if the individual, without regard to his or her Federal civilian service and Federal wages, has employment or wages sufficient to qualify for compensation during the benefit year under that State law, then payments of UCFE under this section may be made only on the basis of the individual's Federal civilian service and Federal wages.

(c) *Fair hearing.* An individual whose claim for UCFE is denied under this section is entitled to a fair hearing under rules of procedure prescribed by the Department. A final determination by the Department with respect to entitlement to UCFE under this section is subject to review by the courts in the same manner and to the same extent as is provided by section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

§ 609.17 Information, reports, and studies.

State agencies shall furnish to the Department such information and reports and conduct such studies as the Department determines are necessary or appropriate for carrying out the purposes of the UCFE Program.

Subpart C—Responsibilities of Federal Agencies

§ 609.20 Information to Federal civilian employees.

Each Federal agency shall:

(a) Furnish information to its employees as to their rights and responsibilities under the UCFE Program and 18 U.S.C. 1919; and

(b) Furnish a completed copy of a form approved by the Department, ''Notice to Federal Employee About Unemployment Compensation,'' in accordance with instructions thereon, to each employee at the time of separation from Federal civilian service, when transferred from one payroll office to another, or when the office responsible for distribution of the form is advised that an individual is in nonpay status for seven consecutive days or more.

§ 609.21 Findings of Federal agency.

(a) *Answering request.* Within four workdays after receipt from a State agency of a request for Federal findings on a form furnished by the State agency, and prescribed by the Department, a Federal agency shall make such Federal findings, complete all copies of the form, and transmit the completed copies to the State agency. If documents necessary for completion of the form have been assigned to an agency records center or the Federal Records Center in St. Louis, the Federal agency shall obtain the necessary information from the records center. Any records center shall give priority to such a request.

(b) *Failure to meet time limit.* If a completed form containing the Federal agency's findings cannot be returned within four workdays of receipt, the Federal agency immediately shall inform the State agency, and shall include an estimated date by which the completed form will be returned.

(c) *Administrative control.* Each Federal agency shall maintain a control of all requests for Federal findings received by it, and the Federal agency's response to each request. The records shall be maintained so as to enable the Federal agency to ascertain at any time the number of such forms that have not been returned to State agencies, and the dates of the Federal agency's receipt of such unreturned forms.

§ 609.22 Correcting Federal findings.

If a Federal agency ascertains at any time within one year after it has returned a completed form reporting its findings, that any of its findings were erroneous, it shall promptly correct its error and forward its corrected findings to the State agency.

§ 609.23 Furnishing additional information.

On receipt of a request for additional information from a State agency, a Federal agency shall consider the information it supplied initially in connection with such request and shall review its findings. The Federal agency promptly shall forward to the State agency such additional findings as will respond to the request. The Federal agency shall, if possible, respond within four workdays after the receipt of a request under this section.

§ 609.24 Reconsideration of Federal findings.

On receipt of a request for reconsideration of Federal findings from a State agency, the Federal agency shall consider the initial information supplied in connection with such request and shall review its findings. The Federal agency shall correct any errors or omissions in its findings and shall affirm, modify, or reverse any or all of its findings in writing. The Federal agency promptly shall forward its reconsidered findings to the requesting authority. The Federal agency shall, if possible, respond within four workdays after the receipt of a request under this section.

§ 609.25 Furnishing other information.

(a) *Additional Information.* In addition to the information required by §§ 609.21, 609.22, 609.23, and 609.24, a Federal agency shall furnish to a State agency or the Department, within the time requested, any information which it is not otherwise prohibited from releasing by law, which the Department determines is necessary for the administration of the UCFE Program.

(b) *Reports.* Federal agencies shall furnish to the Department or State agencies such reports containing such information as the Department determines are necessary or appropriate for carrying out the purposes of the UCFE Program.

§ 609.26 Liaison with Department.

To facilitate the Department's administration of the UCFE Program, each Federal agency shall designate one or more of its officials to be the liaison with the Department. Each Federal agency will inform the Department of its designation(s) and of any change in a designation.

PART 614—UNEMPLOYMENT COMPENSATION FOR EX-SERVICEMEMBERS

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AUTHORITY: 5 U.S.C. 8508; Secretary's Order No. 4–75 (40 FR 18515).

SOURCE: 47 FR 54697, Dec. 3, 1982, unless otherwise noted.

Subpart A—General Provisions

§ 614.1 Purpose and application.

(a) *Purpose.* Subchapter II of chapter 85, title 5 of the United States Code (5 U.S.C. 8521-8525) provides for a permanent program of unemployment compensation for unemployed individuals separated from the Armed Forces. The unemployment compensation provided for in subchapter II is hereinafter referred to as Unemployment Compensation for Ex-servicemembers, or UCX. The regulations in this part are issued to implement the UCX Program.

(b) *First rule of construction.* The Act and the implementing regulations in this part shall be construed liberally so as to carry out the purposes of the Act.

(c) *Second rule of construction.* The Act and the implementing regulations in this part shall be construed so as to assure insofar as possible the uniform interpretation and application of the Act throughout the United States.

(d) *Effectuating purpose and rules of construction.* (1) In order to effectuate the provisions of this section, each State agency shall forward to the United States Department of Labor (hereafter Department), not later than 10 days after issuance, a copy of each judicial or administrative decision ruling on an individual's entitlement to payment of UCX or to credit for a waiting period. On request of the Department, a State agency shall forward to

the Department a copy of any determination or redetermination ruling on an individual's entitlement to UCX or waiting period credit.

(2)(i) If the Department believes that a determination, redetermination, or decision is inconsistent with the Department's interpretation of the Act or this part, the Department may at any time notify the State agency of the Department's view. Thereafter, the State agency shall issue a redetermination or appeal if possible, and shall not follow such determination, redetermination, or decision as a precedent; and, in any subsequent proceedings which involve such determination, redetermination, or decision, or wherein such determination, redetermination, or decision is cited as precedent or otherwise relied upon, the State agency shall inform the claims deputy or hearing officer or court of the Department's view and shall make all reasonable efforts, including appeal or other proceedings in an appropriate forum, to obtain modification, limitation, or overruling of the determination, redetermination, or decision.

(ii) If the Department believes that a State agency has failed to use, or use in a timely manner, the crossmatch mechanism at the claims control center designated by the Department, the Department may at any time notify the State of the Department's view. Thereafter, the State agency shall take action to ensure that operable procedures for the effective utilization of the claims control center are in place and adhered to. In any case of any determination, redetermination, or decision that is not legally warranted under the Act or this part had the State used, or used in a timely manner, the crossmatch mechanism at the claims control center designated by the Department, State agency shall take the steps outlined in paragraph (d)(2)(i) of this section.

(3) If the Department believes that a determination, redetermination, or decision is patently and flagrantly violative of the Act or this part, the Department may at any time notify the State agency of the Department's view. If the determination, redetermination, or decision in question denies UCX to a claimant, the steps outlined in paragraph (2) above shall be followed by the State agency. If the determination, redetermination, or decision in question awards UCX to a claimant, the benefits are ''due'' within the meaning of section 303(a)(1) of the Social Security Act, 42 U.S.C. 503(a)(1), and therefore must be paid promptly to the claimant. However, the State agency shall take the steps outlined in paragraph (d)(2) of this section, and payments to the claimant may be temporarily delayed if redetermination or appeal action is taken not more than one business day following the day on which the first payment otherwise would be issued to the claimant; and the redetermination action is taken or appeal is filed to obtain a reversal of the award of UCX and a ruling consistent with the Department's view; and the redetermination action or appeal seeks an expedited redetermination or appeal within not more than two weeks after the redetermination action is taken or the appeal is filed. If redetermination action is not taken or appeal is not filed within the above time limit, or a redetermination or decision is not obtained within the two-week limit, or any redetermination or decision or order is issued which affirms the determination, redetermination, or decision awarding UCX or allows it to stand in whole or in part, the benefits awarded must be paid promptly to the claimant.

(4)(i) If any determination, redetermination, or decision, referred to in paragraph (d)(2) or paragraph (d)(3) of this section, is treated as a precedent for any future UCX claim or claim under the UCFE Program (part 609 of this chapter), the Secretary will decide whether the Agreement with the State entered into under the Act shall be terminated.

(ii) In the case of any determination, redetermination, or decision that is not legally warranted under the Act or this part, including any determination, redetermination, or decision referred to in paragraph (d)(2) or in paragraph (d)(3) of this section, the Secretary will decide whether the State shall be required to restore the funds of the United States for any sums paid under such a determination, redetermination, or decision, and whether, in absence of such restoration, the Agreement with

the State shall be terminated and whether other action shall be taken to recover such sums for the United States.

(5) A State agency may request reconsideration of a notice issued pursuant to paragraph (d)(2) or paragraph (d)(3) of this section, and shall be given an opportunity to present views and arguments if desired.

(6) Concurrence of the Department in a determination, redetermination, or decision shall not be presumed from the absence of a notice issued pursuant to this section.

(Approved by the Office of Management and Budget under control number 1205–0163)

[47 FR 54697, Dec. 3, 1982, as amended at 53 FR 40553, Oct. 17, 1988; 53 FR 43799, Oct. 26, 1988; 57 FR 59799, Dec. 15, 1992]

§ 614.2 Definitions of terms.

For purposes of the Act and this part:

(a) *Act* means subchapter II of chapter 85 of title 5 of the United States Code, 5 U.S.C. 8521–8525.

(b) *Agreement* means the Agreement entered into pursuant to 5 U.S.C. 8502 between a State and the Secretary under which the State agency of the State agrees to make payments of unemployment compensation in accordance with the Act and the regulations and procedures thereunder prescribed by the Department.

(c) *Base period* means the base period as defined by the applicable State law for the benefit year.

(d) *Benefit year* means the benefit year as defined by the applicable State law, and if not so defined the term means the period prescribed in the Agreement with the State or, in the absence of an Agreement, the period prescribed by the Department.

(e) *Ex-servicemember* means an individual who has performed Federal military service.

(f) *Federal military agency* means any of the Armed Forces of the United States, including the Army, Air Force, Navy, Marine Corps, and Coast Guard, and the National Oceanic and Atmospheric Administration (Department of Commerce).

(g) *Federal military service* means active service (not including active duty in a reserve status unless for a continuous period of 90 days or more) in the Armed Forces or the Commissioned Corps of the National Oceanic and Atmospheric Administration if with respect to that service—

(1) The individual was discharged or released under honorable conditions (and, if an officer, did not resign for the good of the service); and

(2)(i) The individual was discharged or released after completing his/her first full term of active service which the individual initially agreed to serve, or

(ii) The individual was discharged or released before completing such term of active service—

(A) For the convenience of the Government under an early release program,

(B) Because of medical disqualification, pregnancy, parenthood, or any service-incurred injury or disability,

(C) Because of hardship, or

(D) Because of personality disorders or inaptitude but only if the service was continuous for 365 days or more.

(h) *Federal military wages* means all pay and allowances in cash and in kind for Federal military service, computed on the basis of the pay and allowances for the pay grade of the individual at the time of his or her latest discharge or release from Federal/military service, as determined in accordance with the Schedule of Remuneration applicable at the time the individual files his or her first claim for compensation for a benefit year.

(i) *First claim* means an initial claim for unemployment compensation under the UCX Program, the UCFE Program (part 609 of this chapter), or a State law, or some combination thereof, first filed by an individual after the individual's latest discharge or release from Federal military service, whereby a benefit year is established under an applicable State law.

(j) *Military document* means an official document or documents issued to an individual by a Federal military agency relating to the individual's Federal military service and discharge or release from such service.

(k) *Period of active service* means a period of continuous active duty (including active duty for training purposes) in a Federal military agency or agencies, beginning with the date of entry

upon active duty and ending on the effective date of the first discharge or release thereafter which is not qualified or conditional.

(l) *Schedule of Remuneration* means the schedule issued by the Department from time to time under 5 U.S.C. 8521(a)(2) and this part, which specifies for purposes of the UCX Program, the pay and allowances for each pay grade of servicemember.

(m) *Secretary* means the Secretary of Labor of the United States.

(n) *State* means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(o) *State agency* means the agency of the State which administers the applicable State unemployment compensation law and is administering the UCX Program in the State pursuant to an Agreement with the Secretary.

(p)(1) *State law* means the unemployment compensation law of a State approved by the Secretary under section 3304 of the Internal Revenue Code of 1986, 26 U.S.C. 3304, if the State is certified under section 3304(c) of the Internal Revenue Code of 1986, 26 U.S.C. 3304(c).

(2) *Applicable State law* means the State law made applicable to a UCX claimant by §614.8.

(q)(1) *Unemployment compensation* means cash benefits (including dependents' allowances) payable to individuals with respect to their unemployment, and includes regular, additional, emergency, and extended compensation.

(2) *Regular compensation* means unemployment compensation payable to an individual under any State law, but not including additional compensation or extended compensation.

(3) *Additional compensation* means unemployment compensation totally financed by a State and payable under a State law by reason of conditions of high unemployment or by reason of other special factors.

(4) *Emergency compensation* means supplementary unemployment compensation payable under a temporary Federal law after exhaustion of regular and extended compensation.

(5) *Extended compensation* means unemployment compensation payable to an individual for weeks of unemployment in an extended benefit period, under those provisions of a State law which satisfy the requirements of the Federal-State Extended Unemployment Compensation Act of 1970, as amended, 26 U.S.C. 3304 note, and part 615 of this chapter, with respect to the payment of extended compensation.

(r) *Unemployment Compensation for Ex-Servicemember* means the unemployment compensation payable under the Act to claimants eligible for the payments, and is referred to as UCX.

(s) *Week* means, for purposes of eligibility for and payment of UCX, a week as defined in the applicable State law.

(t) *Week of unemployment* means a week of total, part-total, or partial unemployment as defined in the applicable State law, which shall be applied in the same manner and to the same extent to all employment and earnings, and in the same manner and to the same extent for the purposes of the UCX Program, as if the individual filing for UCX were filing a claim for State unemployment compensation.

[47 FR 54697, Dec. 3, 1982, as amended at 53 FR 40554, Oct. 17, 1988; 53 FR 43799, Oct. 26, 1988; 57 FR 59799, Dec. 15, 1992]

Subpart B—Administration of UCX Program

§614.3 Eligibility requirements for UCX.

An individual shall be eligible to receive a payment of UCX or waiting period credit with respect to a week of unemployment if:

(a) The individual has Federal military service and Federal military wages in the base period under the applicable State law;

(b) The individual meets the qualifying employment and wage requirements of the applicable State law, either on the basis of Federal military service and Federal military wages alone or in combination with service and wages covered under a State law or under the UCFE Program (part 609 of this chapter);

(c) The individual has filed an initial claim for UCX and, as appropriate, has filed a timely claim for waiting period credit or payment of UCX with respect to that week of unemployment; and

(d) The individual is totally, part-totally, or partially unemployed, and is able to work, available for work, and seeking work within the meaning of or as required by the applicable State law, and is not subject to disqualification under this part or the applicable State law, with respect to that week of unemployment.

[47 FR 54697, Dec. 3, 1982, as amended at 53 FR 40554, Oct. 17, 1988; 57 FR 59799, Dec. 15, 1992]

§ 614.4 Weekly and maximum benefit amounts.

(a) *Total unemployment.* The weekly amount of UCX payable to an eligible individual for a week of total unemployment shall be the amount that would be payable to the individual as unemployment compensation for a week of total unemployment as determined under the applicable State law.

(b) *Partial and part-total unemployment.* The weekly amount of UCX payable for a week of partial or part-total unemployment shall be the amount that would be payable to the individual as unemployment compensation for a week of partial or part-total unemployment as determined under the applicable State law.

(c) *Maximum amount.* The maximum amount of UCX which shall be payable to an eligible individual during and subsequent to the individual's benefit year shall be the maximum amount of all unemployment compensation that would be payable to the individual as determined under the applicable State law.

(d) *Computation rules.* The weekly and maximum amounts of UCX payable to an individual under the UCX Program shall be determined under the applicable State law to be in the same amount, on the same terms, and subject to the same conditions as the State unemployment compensation which would be payable to the individual under the applicable State law if the individual's Federal military service and Federal military wages assigned or transferred under this part to the State had been included as employment and wages covered by that State law, subject to the use of the applicable Schedule of Remuneration.

[47 FR 54697, Dec. 3, 1982, as amended at 53 FR 40554, Oct. 17, 1988; 57 FR 59800, Dec. 15, 1992]

§ 614.5 Claims for UCX.

(a) *First claims.* A first claim for UCX shall be filed by an individual in any State agency of any State according to the applicable State law, and on a form prescribed by the Department which shall be furnished to the individual by the State agency where the claim is filed.

(b) *Weekly claims.* Claims for waiting week credit and payments of UCX for weeks of unemployment shall be filed in any State agency (or Canada) at the times and in the manner as claims for State unemployment compensation are filed under the applicable State law, and on forms prescribed by the Department which shall be furnished to the individual by the State agency where the claim is filed.

(c) *Secretary's standard.* The procedures for reporting and filing claims for UCX and waiting period credit shall be consistent with this part 614 and the Secretary's ''Standard for Claim Filing, Claimant Reporting, Job Finding and Employment Services'' in the *Employment Security Manual,* part V, sections 5000–5004 (appendix A of this part).

[47 FR 54697, Dec. 3, 1982, as amended at 53 FR 40554, Oct. 17, 1988]

§ 614.6 Determinations of entitlement; notices to individual and Federal military agency.

(a) *Determinations of first claim.* Except for findings of a Federal military agency and the applicable Schedule of Remuneration which are final and conclusive under §614.23, the State agency whose State law applies to an individual under §614.8 shall, promptly upon the filing of a first claim for UCX, determine whether the individual is otherwise eligible, and, if the individual is found to be eligible, the individual's benefit year and the weekly and maximum amounts of UCX payable to the individual.

(b) *Determinations of weekly claims.* The State agency promptly shall, upon the filing of a claim for a payment of

UCX or waiting period credit with respect to a week, determine whether the individual is entitled to a payment of UCX or waiting period credit respect to such week, and, if entitled, the amount of UCX or waiting period credit to which the individual is entitled.

(c) *Redetermination.* The provisions of the applicable State law concerning the right to request, or authority to undertake, reconsideration of a determination pertaining to State unemployment compensation under the applicable State law shall apply to determinations pertaining to UCX.

(d) *Notices to individual and Federal military agency.* (1) The State agency promptly shall give notice in writing to the individual of any determination or redetermination of a first claim, and, except as may be authorized under paragraph (g) of this section, of any determination or redetermination of any weekly claim which denies UCX or waiting period credit or reduces the weekly amount or maximum amount initially determined to be payable. Each notice of determination or redetermination shall include such information regarding the determination or redetermination and notice of right to reconsideration or appeal, or both, as is furnished with written notices of determinations and redeterminations with respect to claims for State unemployment compensation. Such notice shall include the findings of any Federal military agency utilized in making the determination or redetermination, and shall inform the individual of the finality of Federal findings and the individual's right to request correction of such findings as is provided in §614.22.

(2) A notice of claim filing and subsequent notices of monetary and nonmonetary determinations on a UCX claim shall be sent to each Federal military agency for which the individual performed Federal military service during the appropriate base period, together with notice of appeal rights of the Federal military agency to the same extent that chargeable employers are given such notices under State law and practice unless an alternate mechanism is established by the Department of Labor in lieu of such notices.

(e) *Obtaining information for claim determinations.* (1) Information required for the determination of claims for UCX shall be obtained by the State agency from claimants, employers, and others, in the same manner as information is obtained for claim purposes under the applicable State law, but Federal military findings shall be obtained from military documents, the applicable Schedule of Remuneration, and from Federal military agencies as prescribed in §§614.21 through 614.24.

(f) *Promptness.* Full payment of UCX when due shall be consistent with this part and shall be made with the greatest promptness that is administratively feasible, but the provisions of part 640 of this chapter (relating to promptness of benefit payments) shall not be applicable to the UCX Program.

(g) *Secretary's standard.* The procedures for making determinations and redeterminations, and furnishing written notices of determinations, redeterminations, and rights of appeal to individuals appying for UCX and to appropriate Federal military agencies shall be consisent with this part 614 and the Secretary's ''Standard for Claim Determinations-Separation Information'' in the *Employment Security Manual,* part V, sections 6010–6015 (Appendix B of this part).

[47 FR 54697, Dec. 3, 1982, as amended at 53 FR 40554, Oct. 17, 1988]

§614.7 Appeal and review.

(a) *Applicable State Law.* The provisions of the applicable State law concerning the right of appeal and fair hearing from a determination or redetermination of entitlement to State unemployment compensation (exclusive of findings which are final and conclusive under §614.25) shall apply to determinations and redeterminations of eligibility for or entitlement to UCX and waiting period credit. Any such determination or redetermination shall be subject to appeal and review only in the manner and to the extent provided in the applicable State law with respect to determinations and redeterminations of entitlement to State unemployment compensation.

(Section 614.24 governs appeals of findings of the Veterans Administration)

(b) *Rights of appeal and fair hearing.* The provisions on right of appeal and opportunity for a fair hearing with respect to claims for UCX shall be consistent with this part and with sections 303(a)(1) and 303(a)(3) of the Social Security Act, 42 U.S.C. 503(a)(1) and 503(a)(3).

(c) *Promptness on appeals.* (1) Decisions on appeals under the UCX Program shall accord with the Secretary's ''Standard for Appeals Promptness—Unemployment Compensation'' in part 650 of this chapter, and with § 614.1(d).

(2) Any provision of an applicable State law for advancement or priority of unemployment compensation cases on judicial calendars, or otherwise intended to provide for the prompt payment of unemployment compensation when due, shall apply to proceedings involving claims for UCX.

(d) *Appeal and review by Federal military agency.* If a Federal military agency believes that a State agency's determination or redetermination of an individual's eligibility for or entitlement to UCX is incorrect, the Federal military agency may seek appeal and review of such determination or redetermination in the same manner as an interested employer may seek appeal and review under the applicable State law.

§ 614.8 The applicable State for an individual.

(a) *The applicable State.* The applicable State for an individual shall be the State to which the individual's Federal military service and Federal military wages are assigned or transferred under this section. The applicable State law for the individual shall be the State law of such State.

(b) *Assignment of service and wages.* (1) When an individual files a first claim, all of the individual's Federal military service and Federal military wages shall be deemed to be assigned to the State in which such claim is filed, which shall be the ''Paying State'' in the case of a combined-wage claim. (§ 616.6(e) of this chapter.)

(2) Federal military service and Federal military wages assigned to a State in error shall be reassigned for use by the proper State agency. An appropriate record of the reassignment shall be made by the State agency which makes the reassignment.

(c) *Assignment deemed complete.* All of an individual's Federal military service and Federal military wages shall be deemed to have been assigned to a State upon the filing of a first claim. Federal military service and Federal military wages shall be assigned to a State only in accordance with paragraph (b) of this section.

(d) *Use of assigned service and wages.* All assigned Federal military service and Federal military wages shall be used only by the State to which assigned in accordance with paragraph (b) of this section, except that any Federal military service and Federal military wages which are not within the base period of the State to which they were assigned shall be subject to transfer in accordance with part 616 of this chapter for the purposes of any subsequent Combined-Wage Claim filed by the individual.

§ 614.9 Provisions of State law applicable to UCX claims.

(a) *Particular provisions applicable.* Except where the result would be inconsistent with the provisions of the Act or this part or the procedures thereunder prescribed by the Department, the terms and conditions of the applicable State law which apply to claims for, and the payment of, State unemployment compensation shall apply to claims for, and the payment of, UCX and claims for waiting period credit. The provisions of the applicable State law which shall apply include, but are not limited to:

(1) Claim filing and reporting;

(2) Information to individuals, as appropriate;

(3) Notices to individuals, as appropriate, including notice to each individual of each determination and redetermination of eligibility for or entitlement to UCX;

(4) Determinations and redeterminations;

(5) Ability to work, availability for work, and search for work; and

(6) Disqualifications, except in regard to separation from any Federal military agency.

(b) *IBPP.* The *Interstate Benefit Payment Plan* shall apply, where appropriate, to individuals filing claims for UCX.

(c) *Wage combining.* The State's provisions complying with the *Interstate Arrangement for Combining Employment and Wages* (part 616 of this chapter) shall apply, where appropriate, to individuals filing claims for UCX.

(d) *Procedural requirements.* The provisions of the applicable State law which apply hereunder to claims for and the payment of UCX shall be applied consistently with the requirements of title III of the Social Security Act and the Federal Unemployment Tax Act which are pertinent in the case of State unemployment compensation, including but not limited to those standards and requirements specifically referred to in the provisions of this part, except as provided in paragraph (f) of § 614.6.

§ 614.10 Restrictions on entitlement.

(a) *Disqualification.* If the week of unemployment for which an individual claims UCX is a week to which a disqualification for State unemployment compensation applies under the applicable State law, the individual shall not be entitled to a payment of UCX for that week. As provided in § 614.9(a), no disqualification shall apply in regard to separation from any Federal military agency.

(b) *Effect of ''days lost''.* The continuity of a period of an individual's Federal military service shall not be deemed to be interrupted by reason of any ''days lost'' in such period, but ''days lost'' shall not be counted for purposes of determining:

(1) Whether an individual has performed Federal military service;

(2) Whether an individual meets the wage and employment requirements of a State law; or

(3) The amount of an individual's Federal military wages.

(c) *Allocation of military accrued leave.* A State agency shall allocate the number of days of unused military leave specified in an ex-servicemember's military document, for which a lump-sum payment has been made, in the same manner as similar payments by private employers to their employees are allocated under the applicable State law, except that the applicable Schedule of Remuneration instead of the lump-sum payment shall be used to determine the amount of the claimant's Federal military wages. In a State in which a private employer has an option as to the period to which such payments shall be allocated, such payments shall be allocated to the date of the individual's latest discharge or release from Federal military service. An allocation under this paragraph shall be disregarded in determining whether an individual has had a period of active service constituting Federal military service.

(d) *Education and training allowances.* An individual is not entitled to UCX under the Act or this part for a period with respect to which the individual receives:

(1) A subsistence allowance for vocational rehabilitation training under chapter 31 of title 38 of the United States Code, 38 U.S.C. 1501 *et seq.,* or under part VIII of Veterans Regulation Numbered 1(a); or

(2) An educational assistance allowance or special training allowance under chapter 35 of title 38 of the United States Code, 38 U.S.C. 1700 *et seq.*

§ 614.11 Overpayments; penalties for fraud.

(a) *False statements and representations.* Section 8507(a) of the Act provides that if a State agency, the Department, or a court of competent jurisdiction finds that an individual—

(1) Knowingly has made, or caused to be made by another, a false statement or representation of a material fact, or knowingly has failed, or caused another to fail, to disclose a material fact; and

(2) As a result of that action has received an amount as UCX to which the individual was not entitled; the individual shall repay the amount to the State agency or the Department. Instead of requiring repayment, the State agency or the Department may recover the amount by deductions from UCX payable to the individual during the 2-year period after the date of the finding. A finding by a State agency or the Department may be made only after an opportunity for a fair hearing,

subject to such further review as may be appropriate under § 614.7.

(b) *Prosecution for fraud.* Section 1919 of title 18, United States Code, provides that whoever makes a false statement or representation of a material fact knowing it to be false, or knowingly fails to disclose a material fact, to obtain or increase for himself or for any other individual any payment authorized to be paid under chapter 85 of title 5, United States Code, or under an agreement thereunder, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) *Absence of fraud.* If a State agency or court of competent jurisdiction finds that an individual has received a payment of UCX to which the individual was not entitled under the Act and this part, which was not due to a false statement or representation as provided in paragraph (a) or (b) of this section, the individual shall be liable to repay to the applicable State the total sum of the payment to which the individual was not entitled, and the State agency shall take all reasonable measures authorized under any State law or Federal law to recover for the account of the United States the total sum of the payment to which the individual was not entitled.

(d) *Recovery by offset.* (1) The State agency shall recover, insofar as is possible, the amount of any overpayment which is not repaid by the individual, by deductions from any UCX payable to the individual under the Act and this part, or from any unemployment compensation payable to the individual under any Federal unemployment compensation law administered by the State agency, or from any assistance or allowance payable to the individual with respect to unemployment under any other Federal law administered by the State agency.

(2) A State agency shall also recover, insofar as is possible, the amount of any overpayment of UCX made to the individual by another State by deductions from any UCX payable by the State agency to the individual under the Act and this part, or from any unemployment compensation payable to the individual under any Federal unemployment compensation law administered by the State agency, or from any assistance or allowance payable to the individual with respect to unemployment under any other Federal law administered by the State agency.

(3) Recoupment of fraudulent overpayments referred to in paragraph (a) of this section shall be limited to the 2-year period stated in that paragraph. Recoupment of fraudulent overpayments referred to in paragraph (b) of this section, and nonfraudulent overpayments referred to in paragraph (c) of this section shall be subject to any time limitation on recoupment provided for in the State law that applies to the case.

(e) *Debts due the United States.* UCX payable to an individual shall be applied by the State agency for the recovery by offset of any debt due to the United States from the individual, but shall not be applied or used by the State agency in any manner for the payment of any debt of the individual to any State or any other entity or person except pursuant to a court order for child support or alimony in accordance with the law of the State and section 459 of the Social Security Act, 42 U.S.C. 659.

(f) *Application of State law.* (1) Except as indicated in paragraph (a) of this section, any provision of State law that may be applied for the recovery of overpayments or prosecution for fraud, and any provision of State law authorizing waiver of recovery of overpayments of unemployment compensation, shall be applicable to UCX.

(2) In the case of any finding of false statement of representation under the Act and paragraph (a) of this section, or prosecution for fraud under 18 U.S.C. 1919 or pursuant to paragraph (f)(1) of this section, the individual shall be disqualified or penalized in accordance with the provision of the applicable State law relating to fraud in connection with a claim for State unemployment compensation.

(g) *Final decision.* Recovery of any overpayment of UCX shall not be enforced by the State agency until the determination or redetermination establishing the overpayment has become final, or if appeal is taken from the determination or redetermination, until the decision after opportunity for a fair hearing has become final.

(h) *Procedural requirements.* (1) The provisions of paragraphs (c), (d), and (g) of § 614.6 shall apply to determinations and redeterminations made pursuant to this section.

(2) The provisions of § 614.7 shall apply to determinations and redeterminations made pursuant to this section.

(i) *Fraud detection and prevention.* Provisions in the procedures of each State with respect to detection and prevention of fraudulent overpayments of UCX shall be, as a minimum, commensurate with the procedures adopted by the State with respect to State unemployment compensation and consistent with this part 614 and the Secretary's ''Standard for Fraud and Overpayment Detection'' in the *Employment Security Manual,* part V, sections 7510–7515 (Appendix C of this part), and provide for timely use of any crossmatch mechanism established by the Department.

(j) *Recovered overpayments.* An amount repaid or recouped under this section shall be—

(1) Deposited in the fund from which payment was made, if the repayment was to a State agency; or

(2) Returned to the Treasury of the United States and credited to the current applicable appropriation, fund, or account from which payment was made, if the repayment was to the Department.

[47 FR 54697, Dec. 3, 1982, as amended at 53 FR 40555, Oct. 17, 1988]

§ 614.12 Schedules of remuneration.

(a) *Authority.* Section 8521(a)(2) of chapter 85, title 5 of the United States Code, 5 U.S.C. 8521(a)(2), requires the Secretary of Labor to issue from time to time, after consultation with the Secretary of Defense, a Schedule of Remuneration specifying the pay and allowances for each pay grade of members of the Armed Forces.

(b) *Elements of schedule.* A schedule reflects representative amounts for appropriate elements of the pay and allowances, whether in cash or kind, for each pay grade of members of the Armed Forces, with a statement of the effective date of the schedule. Benefit amounts for the UCX Program are computed on the basis of the Federal military wages for the pay grade of the individual at the time of the individual's latest discharge or release from Federal military service, as specified in the schedule applicable at the time the individual files his or her first claim for compensation for the benefit year.

(c) *Effective date.* Any new Schedule of Remuneration shall take effect beginning with the first week of the calendar quarter following the calendar quarter in which such schedule is issued, and shall remain applicable until a subsequent schedule becomes effective. Prior schedules shall continue to remain applicable for the periods they were in effect.

(d) *Publication.* Any new Schedule of Remuneration shall be issued by the Secretary of Labor to the State agencies and the Federal military agencies. Promptly after the issuance of a new Schedule of Remuneration it shall be published as a notice in the FEDERAL REGISTER.

§ 614.13 Inviolate rights to UCX.

Except as specifically provided in this part, the rights of individuals to UCX shall be protected in the same manner and to the same extent as the rights of persons to State unemployment compensation are protected under the applicable State law. Such measures shall include protection of applicants for UCX from waiver, release, assignment, pledge, encumbrance, levy, execution, attachment, and garnishment of their rights to UCX, except as provided in § 614.11. In the same manner and to the same extent, individuals shall be protected from discrimination and obstruction in regard to seeking, applying for, and receiving any right to UCX.

§ 614.14 Recordkeeping; disclosure of information.

(a) *Recordkeeping.* Each State agency will make and maintain records pertaining to the administration of the UCX Program as the Department requires, and will make all such records available for inspection, examination, and audit by such Federal officials or employees as the Department may designate or as may be required by law.

(b) *Disclosure of information.* Information in records maintained by a State

agency in administering the UCX Program shall be kept confidential, and information in such records may be disclosed only in the same manner and to the same extent as information with respect to State unemployment compensation and the entitlement of individuals thereto may be disclosed under the applicable State law. This provision on the confidentiality of information maintained in the administration of the UCX Program shall not apply, however, to the Department or for the purposes of §§ 614.11 or 614.14, or in the case of information, reports and studies required pursuant to §§ 614.18 or 614.26, or where the result would be inconsistent with the Freedom of Information Act, 5 U.S.C. 552, the Privacy Act of 1974, 5 U.S.C. 552a, or regulations of the Department promulgated thereunder.

§ 614.15 Payments to States.

(a) *State entitlement.* Each State is entitled to be paid by the United States with respect to each individual whose base period wages included Federal military wages, an amount bearing the same ratio to the total amount of compensation paid to such individual as the amount of the individual's Federal military wages in the individual's base period bears to the total amount of the individual's base period wages.

(b) *Payment.* Each State shall be paid, either in advance or by way of reimbursement, as may be determined by the Department, the sum that the Department estimates the State is entitled to receive under the Act and this part for each calendar month. The sum shall be reduced or increased by the amount which the Department finds that its estimate for an earlier calendar month was greater or less than the sum which should have been paid to the State. An estimate may be made on the basis of a statistical, sampling, or other method agreed on by the Department and the State agency.

(c) *Certification by the Department.* The Department, from time to time, shall certify to the Secretary of the Treasury the sum payable to each State under this section. The Secretary of the Treasury, before audit or settlement by the General Accounting Office, shall pay the State in accordance with the certification from the funds for carrying out the purposes of the Act and this part.

(d) *Use of money.* Money paid a State under the Act and this part may be used solely for the purposes for which it is paid. Money so paid which is not used solely for these purposes shall be returned, at the time specified by the Agreement, to the Treasury of the United States and credited to the current applicable appropriation, fund, or account from which payments to States under the Act and this part may be made.

§ 614.16 Public access to Agreements.

The State agency of a State will make available to any individual or organization a true copy of the Agreement with the State for inspection and copying. Copies of an Agreement may be furnished on request to any individual or organization upon payment of the same charges, if any, as apply to the furnishing of copies of other records of the State agency.

§ 614.17 Administration in absence of an Agreement.

(a) *Administering program.* The Department shall administer the UCX Program through personnel of the Department or through other arrangements under procedures prescribed by the Department, in the case of any State which does not have an Agreement with the Secretary as provided for in 5 U.S.C. 8502. The procedures prescribed by the Department under this section shall be consistent with the Act and this part.

(b) *Applicable State law.* On the filing by an individual of a claim for UCX in accordance with arrangements under this section, UCX shall be paid to the individual, if eligible, in the same amount, on the same terms, and subject to the same conditions as would be paid to the individual under the applicable State law if the individual's Federal military service and Federal military wages had been included as employment and wages under the State law. Any such claims shall include the individual's Federal military service and Federal military wages, combined with any service and wages covered by State law. However, if the individual,

without regard to his or her Federal military service and Federal military wages, has employment or wages sufficient to qualify for compensation during the benefit year under that State law, then payments of UCX under this section may be made only on the basis of the individual's Federal military service and Federal military wages.

(c) *Fair hearing.* An individual whose claim for UCX is denied under this section is entitled to a fair hearing under rules of procedures prescribed by the Department. A final determination by the Department with respect to entitlement to UCX under this section is subject to review by the courts in the same manner and to the same extent as is provided by section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

§ 614.18 Information, reports, and studies.

State agencies shall furnish to the Department such information and reports and conduct such studies as the Department determines are necessary or appropriate for carrying out the purposes of the UCX Program.

Subpart C—Responsibilities of Federal Military Agencies and State Agencies

§ 614.20 Information to ex-servicemembers.

At the time of discharge or release from Federal military service, each Federal military agency shall furnish to each ex-servicemember information explaining rights and responsibilities under the UCX Program and 18 U.S.C. 1919, and military documents necessary for filing claims for UCX.

§ 614.21 Findings of Federal military agency.

(a) *Findings in military documents.* Information contained in a military document furnished to an ex-servicemember shall constitute findings to which § 614.23 applies as to:

(1) Whether the individual has performed active service in the Armed Forces or the Commissioned Corps of the National Oceanic and Atmospheric Administration;

(2) The beginning and ending dates of the period of active service and ''days lost'' during such period;

(3) The type of discharge or release terminating the period of active service;

(4) The individuals' pay grade at the time of discharge or release from active service; and

(5) The narrative reason or other reason for separation from active service.

(b) *Discharges not under honorable conditions.* A military document which shows that an individual's discharge or release was under other than honorable conditions shall also be a finding to which § 614.23 applies.

[53 FR 40555, Oct. 17, 1988]

§ 614.22 Correcting Federal findings.

(a) *Request for correction.* (1) If an individual believes that a finding specified in § 614.21 is incorrect or that information as to any finding has been omitted from a military document, the individual may request the issuing Federal military agency to correct the military document. A request for correction may be made through the State agency, which shall forward such request and any supporting information submitted by the individual to the Federal military agency.

(2) The Federal military agency shall promptly forward to the individual or State agency making the request the corrected military document. Information contained in a corrected military document issued pursuant to such a request shall constitute the findings of the Federal military agency under § 614.21.

(3) If a determination or redetermination based on a finding as to which correction is sought has been issued by a State agency before a request for correction under this paragraph is made, the individual who requested such correction shall file a request for redetermination or appeal from such determination or redetermination with the State agency, and shall inform the State agency of the request for correction.

(4) An individual who files a request for correction of findings under this paragraph shall promptly notify the State agency of the action of the Federal military agency on such request.

(b) *State agency procedure when request made.* (1) If a determination of entitlement has not been made when an individual notifies a State agency of a request for correction under paragraph (a) of this section, the State agency may postpone such determination until the individual has notified the State agency of the action of the Federal military agency on the request.

(2) If a determination of entitlement has been made when an individual notifies a State agency that a request for correction of Federal findings has been made, or if an individual notifies a State agency prior to a determination of entitlement that a request has been made but such determination is not postponed by the State agency, the individual may file a request for redetermination or appeal in accordance with the applicable State law.

(3) Except as provided in paragraph (c) of this section, no redetermination shall be made or hearing scheduled on an appeal until the individual has notified the State agency of the action of the Federal military agency on a request for correction under paragraph (a) of this section.

(c) *State agency procedure when request answered.* On receipt of notice of the action of a Federal military agency on a request for correction of its findings, a State agency shall:

(1) Make a timely determination or redetermination of the individual's entitlement, or

(2) Promptly schedule a hearing on the individual's appeal.

If such notice is not received by a State agency within one year of the date on which an individual first filed a claim, or such notice is not given promptly by an individual, a State agency without further postponement may make such determination or redetermination or schedule such hearing.

(d) *Findings corrected without request.* Information as to any finding specified in §614.21 contained in a corrected military document issued by a Federal military agency on its own motion shall constitute the findings of such agency under §614.21, if notice thereof is received by a State agency before the period for redetermination or appeal has expired under the State law. On timely receipt of such notice a State agency shall take appropriate action under the applicable State law to give effect to the corrected findings.

§ 614.23 Finality of findings.

The findings of a Federal military agency referred to in §§614.21 and 614.22, and the Schedules of Remuneration issued by the Department pursuant to the Act and §614.12, shall be final and conclusive for all purposes of the UCX Program, including appeal and review pursuant to §614.7 or §614.17.

[53 FR 40555, Oct. 17, 1988]

§ 614.24 Furnishing other information.

(a) *Additional information.* In addition to the information required by §§614.21 and 614.22, a Federal military agency shall furnish to a State agency or the Department, within the time requested, any information which it is not otherwise prohibited from releasing by law, which the Department determines is necessary for the administration of the UCX Program.

(b) *Reports.* Federal military agencies shall furnish to the Department or State agencies such reports containing such information as the Department determines are necessary or appropriate for carrying out the purposes of the UCX Program.

[47 FR 54697, Dec. 3, 1982, as amended at 53 FR 40555, Oct. 17, 1988]

§ 614.25 Liaison with Department

To facilitate the Department's administration of the UCX program, each Federal military agency shall designate one or more of its officials to be the liaison with the Department. Each Federal military agency will inform the Department of its designation(s) and of any change in a designation.

[53 FR 40555, Oct. 17, 1988]

APPENDIX ''A'' TO PART 614—STANDARD FOR CLAIM FILING, CLAIMANT REPORTING, JOB FINDING, AND EMPLOYMENT SERVICES

EMPLOYMENT SECURITY MANUAL (PART V, SECTIONS 5000–5004)*

5000–5099 CLAIMS FILING

5000 *Standards for Claim Filing, Claimant Reporting, Job Finding, and Employment Services*

A. *Federal law requirements.* Section 3304(a)(1) of the Federal Unemployment Tax Act and section 303(a)(2) of the Social Security Act require that a State law provide for:

''Payment of unemployment compensation solely through public employment offices or such other agencies as the Secretary may approve.''

Section 3304(a)(4) of the Federal Unemployment Tax Act and section 303(a)(5) of the Social Security Act require that a State law provide for:

''Expenditure of all money withdrawn from an unemployment fund of such State, in the payment of unemployment compensation. * * *''

Section 303(a)(1) of the Social Security Act requires that the State law provide for:

''Such methods of administration * * * as are found by the Secretary to be reasonably calculated to insure full payment of unemployment compensation when due.''

B. *Secretary's interpretation of Federal law requirements.*

1. The Secretary interprets section 3304(a)(1) of the Federal Unemployment Tax Act and section 303(a)(2) of the Social Security Act to require that a State law provide for payment of unemployment compensation solely through public employment offices or claims offices administered by the State employment security agency if such agency provides for such coordination in the operations of its public employment offices and claims offices as will insure: (a) The payment of benefits only to individuals who are unemployed and who are able to work and available for work, and (b) that individuals claiming unemployment compensation (claimants) are afforded such placement and other employment services as are necessary and appropriate to return them to suitable work as soon as possible.

2. The Secretary interprets all the above sections to require that a State law provide for:

a. Such contact by claimants with public employment offices or claims offices or both, (1) as will reasonably insure the payment of unemployment compensation only to individuals who are unemployed and who are able to work and available for work, and (2) that claimants are afforded such placement and other employment services as are necessary and appropriate to facilitate their return to suitable work as soon as possible; and

b. Methods of administration which do not unreasonably limit the opportunity of individuals to establish their right to unemployment compensation due under such State law.

5001 *Claim Filing and Claimant Reporting Requirements Designed to Satisfy Secretary's Interpretation*

A. *Claim filing—total or part-total unemployment.*

1. Individuals claiming unemployment compensation for total or part-total unemployment are required to file a claim weekly or biweekly, in person or by mail, at a public employment office or a claims office (these terms include offices at itinerant points) as set forth below.

2. Except as provided in paragraph 3, a claimant is required to file in person:

a. His new claim with respect to a benefit year, or his continued claim for a waiting week or for his first compensable week of unemployment in such year; and

b. Any other claim, when requested to do so by the claims personnel at the office at which he files his claim(s) because questions about his right to benefits are raised by circumstances such as the following:

(1) The conditions or circumstances of his separation from employment;

(2) The claimant's answers to questions on mail claim(s) indicate that he may be unable to work or that there may be undue restrictions on his availability for work or that his search for work may be inadequate or that he may be disqualified;

(3) The claimant's answers to questions on mail claims create uncertainty about his credibility or indicate a lack of understanding of the applicable requirement; or

(4) The claimant's record shows that he has previously filed a fraudulent claim.

In such circumstances, the claimant is required to continue to file claims in person each week (or biweekly) until the State agency determines that filing claims in person is no longer required for the resolution of such questions.

3. A claimant must be permitted to file a claim by mail in any of the following circumstances:

a. He is located in an area requiring the expenditure of an unreasonable amount of time or money in traveling to the nearest facility established by the State agency for filing claims in person;

b. Conditions make it impracticable for the agency to take claims in person;

c. He has returned to full-time work on or before the scheduled date for his filing a claim, unless the agency makes provision for

* Revises subgrouping 5000–5004.

in-person filing at a time and place that does not interfere with his employment;

d. The agency finds that he has good cause for failing to file a claim in person.

4. A claimant who has been receiving benefits for partial unemployment may continue to file claims as if he were a partially unemployed worker for the first four consecutive weeks of total or part-total unemployment immediately following his period of partial unemployment so long as he remains attached to his regular employer.

B. *Claim filing—partial unemployment.* Each individual claiming unemployment compensation for a week (or other claim period) during which, because of lack of work, he is working less than his normal customary full-time hours for his regular employer and is earning less than the earnings limit provided in the State law, shall not be required to file a claim for such week or other claim period earlier than 2 weeks from the date that wages are paid for such claim period or, if a low earnings report is required by the State law, from the date the employer furnished such report to the individual. State agencies may permit claims for partial unemployment to be filed either in person or by mail, except that in the circumstances set forth in section A 3, filing by mail must be permitted, and in the circumstances set forth in section A 2 b, filing in person may be required.

5002 *Requirement for Job Finding, Placement, and other Employment Services Designed to Satisfy Secretary's Interpretation*

A. Claims personnel are required to assure that each claimant is doing what a reasonable individual in his circumstances would do to obtain suitable work.

B. In the discretion of the State agency:

1. The claims personnel are required to give each claimant such necessary and appropriate assistance as they reasonably can in finding suitable work and at their discretion determine when more complete placement and employment services are necessary and appropriate for a claimant; and if they determine more complete services are necessary and appropriate, the claims personnel are to refer him to employment service personnel in the public employment office in which he has been filing claim(s), or, if he has been filing in a claims office, in the public employment office most accessible to him; *or*

2. All placement and employment services are required to be afforded to each claimant by employment service personnel in the public employment office most accessible to him, in which case the claims personnel in the office in which the claimant files his claim are to refer him to the employment service personnel when placement or other employment services are necessary and appropriate for him.

C. The personnel to whom the State agency assigns the responsibilities outlined in paragraph B above are required to give claimants such job-finding assistance, placement, and other employment services as are necessary and appropriate to facilitate their return to suitable work as soon as possible.

In some circumstances, no such services or only limited services may be required. For example, if a claimant is on a short-term temporary layoff with a fixed return date, the only service necessary and appropriate to be given to him during the period of the layoff is a referral to suitable temporary work if such work is being performed in the labor market area.

Similarly, claimants whose unemployment is caused by a labor dispute presumably will return to work with their employer as soon as the labor dispute is settled. They generally do not need services, nor do individuals in occupations where placement customarily is made by other nonfee charging placement facilities such as unions and professional associations.

Claimants who fall within the classes which ordinarily would require limited services or no services shall, if they request placement and employment services, be afforded such services as are necessary and appropriate for them to obtain suitable work or to achieve their reasonable employment goals.

On the other hand, a claimant who is permanently separated from his job is likely to require some services. He may need only some direction in how to get a job; he may need placement services if he is in an occupation for which there is some demand in the labor market area; if his occupation is outdated, he may require counseling and referral to a suitable training course. The extent and character of the services to be given any particular claimant may change with the length of his unemployment and depend not only on his own circumstances and conditions, but also on the condition of the labor market in the area.

D. Claimants are required to report to employment service personnel, as directed, but such personnel and the claims personnel are required to so arrange and coordinate the contacts required of a claimant as not to place an unreasonable burden on him or unreasonably limit his opportunity to establish his rights to compensation. As a general rule, a claimant is not required to contact in person claims personnel or employment service personnel more frequently than once a week, unless he is directed to report more frequently for a specific service such as referral to a job or a training course or counseling which cannot be completed in one visit.

E. Employment service personnel are required to report promptly to claims personnel in the office in which the claimant

files his claim(s): (1) His failure to apply for or accept work to which he was referred by such personnel or when known, by any other nonfee-charging placement facility such as a union or a professional association; and (2) any information which becomes available to it that may have a bearing on the claimant's ability to work or availability for work, or on the suitability of work to which he was referred or which was offered to him.

5004 *Evaluation of Alternative State Provisions.* If the State law provisions do not conform to the ''suggested State law requirements'' set forth in sections 5001 and 5002, but the State law contains alternative provisions, the Manpower Administrator, in collaboration with the State agency, will study the actual or anticipated effect of the alternative provisions. If the Manpower Administrator concludes that the alternative provisions satisfy the requirements of the Federal law as construed by the Secretary (see section 5000 B) he will so notify the State agency. If he does not so conclude, he will submit the matter to the Secretary. If the Secretary concludes that the alternative provisions satisfy such requirements, the State agency will be so notified. If the Secretary concludes that there is a question as to whether the alternative provisions satisfy such requirements, the State agency will be advised that unless the State law provisions are appropriately revised, a notice of hearing will be issued as required by the Code of Federal Regulations, title 20, section 601.3.

[53 FR 40555, Oct. 17, 1988; 53 FR 43799, Oct. 26, 1988]

APPENDIX ''B'' TO PART 614—STANDARD FOR CLAIM DETERMINATION—SEPARATION INFORMATION

EMPLOYMENT SECURITY MANUAL (PART V, SECTIONS 6010–6015)

6010–6019 *Standard for Claim Determinations—Separation Information* *

6010 *Federal Law Requirements.* Section 303(a)(1) of the Social Security Act requires that a State law include provision for:

''Such methods of administration . . . as are found by the Secretary to be reasonably calculated to insure full payment of unemployment compensation when due.''

Section 303(a)(3) of the Social Security Act requires that a State law include provision for:

''Opportunity for a fair hearing before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied.''

Section 3304(a)(4) of the Federal Unemployment Tax Act and section 303(a)(5) of the Social Security Act require that a State law include provision for:

''Expenditure of all money withdrawn from an unemployment fund of such State, in the payment of unemployment compensation * * *.

Section 3306(h) of the Federal Unemployment Tax Act defines ''compensation'' as ''cash benefits payable to individuals with respect to their unemployment.''

6011 *Secretary's Interpretation of Federal Law Requirements.* The Secretary interprets the above sections to require that a State law include provisions which will insure that:

A. Individuals who may be entitled to unemployment compensation are furnished such information as will reasonably afford them an opportunity to know, establish, and protect their rights under the unemployment compensation law of such State, and

B. The State agency obtains and records in time for the prompt determination and review of benefit claims such information as will reasonably insure the payment of benefits to individuals to whom benefits are due.

6012 *Criteria for Review of State Law Conformity with Federal Requirements*

In determining the conformity of a State law with the above requirements of the Federal Unemployment Tax Act and the Social Security Act as interpreted by the Secretary, the following criteria will be applied:

A. Is it required that individuals who may be entitled to unemployment compensation be furnished such information of their potential rights to benefits, including the manner and places of filing claims, the reasons for determinations, and their rights of appeal, as will insure them a reasonable opportunity to know, establish, and protect their rights under the law of the State?

B. Is the State agency required to obtain, in time for prompt determination of rights to benefits such information as will reasonably insure the payment of benefits to individuals to whom benefits are due?

C. Is the State agency required to keep records of the facts considered in reaching determinations of rights to benefits?

6013 *Claim Determinations Requirements Designed To Meet Department of Labor Criteria*

A. *Investigation of claims.* The State agency is required to obtain promptly and prior to a determination of an individual's right to benefits, such facts pertaining thereto as will be sufficient reasonably to insure the payment of benefits when due.

This requirement embraces five separate elements:

* Revises subgrouping 6010–6019

1. It is the responsibility of the agency to take the initiative in the discovery of information. This responsibility may not be passed on the claimant or the employer. In addition to the agency's own records, this information may be obtained from the worker, the employer, or other sources. If the information obtained in the first instance discloses no essential disagreement and provides a sufficient basis for a fair determination, no further investigation is necessary. If the information obtained from other sources differs essentially from that furnished by the claimant, the agency, in order to meet its responsibility, is required to inform the claimant of such information from other sources and to afford the claimant an opportunity to furnish any further facts he may have.

2. Evidentiary facts must be obtained as distinguished from ultimate facts or conclusions. That a worker was discharged for misconduct is an ultimate fact or conclusion; that he destroyed a machine upon which he was working is a primary or evidentiary fact, and the sort of fact that the requirement refers to.

3. The information obtained must be sufficient reasonably to insure the payment of benefits when due. In general, the investigation made by the agency must be complete enough to provide information upon which the agency may act with reasonable assurance that its decision is consistent with the unemployment compensation law. On the other hand, the investigation should not be so exhaustive and time-consuming as unduly to delay the payment of benefits and to result in excessive costs.

4. Information must be obtained promptly so that the payment of benefits is not unduly delayed.

5. If the State agency requires any particular evidence from the worker, it must give him a reasonable opportunity to obtain such evidence.

B. *Recording of facts.* The agency must keep a written record of the facts considered in reaching its determinations.

C. *Determination notices*

1. The agency must give each claimant a written notice of:

a. Any monetary determination with respect to his benefit year;

b. Any determination with respect to purging a disqualification if, under the State law, a condition or qualification must be satisfied with respect to each week of disqualification; but in lieu of giving written notice of each determination for each week in which it is determined that the claimant has met the requirements for purging the agency may inform the claimant that he has purged the disqualification for a week by notation on his applicant identification card or otherwise in writing.

c. Any other determination which adversely affects[1] his rights to benefits, except that written notice of determination need not be given with respect to:

(1) A week in a benefit year for which the claimant's weekly benefit amount is reduced in whole or in part by earnings if, the first time in the benefit year that there is such a reduction, he is required to be furnished a booklet or leaflet containing the information set forth below in paragraph 2f(1). However, a written notice of determination is required if: (a) There is a dispute concerning the reduction with respect to any week (e.g., as to the amount computed as the appropriate reduction, etc.); or (b) there is a change in the State law (or in the application thereof) affecting the reduction; or

(2) Any week in a benefit year subsequent to the first week in such benefit year in which benefits were denied, or reduced in whole or in part for reasons other than earnings, if denial or reduction for such subsequent week is based on the same reason and the same facts as for the first week, and if written notice of determination is required to be given to the claimant with respect to such first week, and with such notice of determination, he is required to be given a booklet or pamphlet containing the information set forth below in paragraphs 2f(2) and 2h. However, a written notice of determination is required if: (a) There is a dispute concerning the denial or reduction of benefits with respect to such week; or (b) there is a change in the State law (or in the application thereof) affecting the denial or reduction; or (c) there is a change in the amount of the reduction except as to the balance covered by the last reduction in a series of reductions.

NOTE: This procedure may be applied to determinations made with respect to any subsequent weeks for the same reason and on

[1] A determination ''adversely affects'' claimant's right to benefits if it: (1) Results in a denial to him of benefits (including a cancellation of benefits or wage credits or any reduction in whole or in part below the weekly or maximum amount established by his monetary determination) for any week or other period; or (2) denies credit for a waiting week; or (3) applies any disqualification or penalty; or (4) determines that he has not satisfied a condition of eligibility, requalification for benefits, or purging a disqualification; or (5) determines that an overpayment has been made or orders repayment or recoupment of any sum paid to him; or (6) applies a previously determined overpayment, penalty, or order for repayment or recoupment; or (7) in any other way denies claimant a right to benefits under the State law.

the basis of the same facts: (a) That claimant is unable to work, unavailable for work, or is disqualified under the labor dispute provision; and (b) reducing claimant's weekly benefit amount because of income other than earnings or offset by reason of overpayment.

2. The agency must include in written notices of determinations furnished to claimants sufficient information to enable them to understand the determinations, the reasons therefor, and their rights to protest, request reconsideration, or appeal.

The written notice of monetary determination must contain the information specified in the following items (except h) unless an item is specifically not applicable. A written notice of any other determination must contain the information specified in as many of the following items as are necessary to enable the claimant to understand the determination and to inform him of his appeal rights. Information specifically applicable to the individual claimant must be contained in the written notice of determination. Information of general application such as (but not limited to) the explanation of benefits for partial unemployment, information as to deductions, seasonality factors, and information as to the manner and place of taking an appeal, extension of the appeal period, and where to obtain information and assistance may be contained in a booklet or leaflet which is given the claimant with his monetary determination.

a. *Base period wages.* The statement concerning base-period wages must be in sufficient detail to show the basis of computation of eligibility and weekly and maximum benefit amounts. (If maximum benefits are allowed, it may not be necessary to show details of earnings.)

b. *Employer name.* The name of the employer who reported the wages is necessary so that the worker may check the wage transcript and know whether it is correct. If the worker is given only the employer number, he may not be able to check the accuracy of the wage transcript.

c. *Explanation of benefit formula—weekly and maximum benefit amounts.* Sufficient information must be given the worker so that he will understand how his weekly benefit amount, including allowances for dependents, and his maximum benefit amount were figured. If benefits are computed by means of a table contained in the law, the table must be furnished with the notice of determination whether benefits are granted or denied.

The written notice of determination must show clearly the weekly benefit amount and the maximum potential benefits to which the claimant is entitled.

The notice to a claimant found ineligible by reason of insufficient earnings in the base period must inform him clearly of the reason for ineligibility. An explanation of the benefit formula contained in a booklet or pamphlet should be given to each claimant at or prior to the time he receives written notice of a monetary determination.

d. *Benefit year.* An explanation of what is meant by the benefit year and identification of the claimant's benefit year must be included in the notice of determinaton.

e. *Information as to benefits for partial unemployment.* There must be included either in the written notice of determination or in a booklet or pamphlet accompanying the notice an explanation of the claimant's rights to partial benefits for any week with respect to which he is working less than his normal customary full-time workweek because of lack of work and for which he earns less than his weekly benefit amount or weekly amount plus earnings, whichever is provided by the State law. If the explanation is contained in the notice of determination, reference to the item in the notice in which his weekly benefit amount is entered should be made.

f. *Deductions from weekly benefits.*

(1) *Earnings.* Although written notice of determinations deducting earnings from a claimant's weekly benefit amount is generally not required (see paragraph 1c (1) above), where written notice of determination is required (or given) it shall set forth the amount of earnings, the method of computing the deduction in sufficient detail to enable the claimant to verify the accuracy of the deduction, and his right to protest, request redetermination, and appeal. Where a written notice of determination is given to the claimant because there has been a change in the State law or in the application of the law, an explanation of the change shall be included.

Where claimant is not required to receive a written notice of determination, he must be given a booklet or pamphlet the first time in his benefit year that there is a deduction for earnings which shall include the following information:

(a) The method of computing deductions for earnings in sufficient detail to enable the claimant to verify the accuracy of the deduction;

(b) That he will not automatically be given a written notice of determination for a week with respect to which there is a deduction for earnings (unless there is a dispute concerning the reduction with respect to a week or there has been a change in the State law or in the application of the law affecting the deduction) but that he may obtain such a written notice upon request; and

(c) A clear statement of his right to protest, request a redetermination, and appeal from any determination deducting earnings from his weekly benefit amount even though he does not automatically receive a written notice of determination; and if the State law requires written notice of determination in

order to effectuate a protest, redetermination, or appeal, he must be so advised and advised also that he must request a written notice of determination before he takes any such action.

(2) *Other deductions.*

(a) A written notice of determination is required with respect to the first week in claimant's benefit year in which there is a reduction from his benefits for a reason other than earnings. This notice must describe the deduction made from claimant's weekly benefit amount, the reason for the deduction, the method of computing it in sufficient detail to enable him to verify the accuracy of such deduction, and his right to protest, request redetermination, or appeal.

(b) A written notice of determination is not required for subsequent weeks that a deduction is made for the same reason and on the basis of the same facts, if the notice of determination pursuant to (2)(a), or a booklet or pamphlet given him with such notice explains: (i) The several kinds of deductions which may be made under the State law (e.g., retirement pensions, vacation pay, and overpayments); (ii) the method of computing each kind of deduction in sufficient detail that claimant will be able to verify the accuracy of deductions made from his weekly benefit payments; (iii) any limitation on the amount of any deduction or the time in which any deduction may be made; (iv) that he will not automatically be given a written notice of determination for subsequent weeks with respect to which there is a deduction for the same reason and on the basis of the same facts, but that he may obtain a written notice of determination upon request; (v) his right to protest, request redetermination, or appeal with respect to subsequent weeks for which there is a reduction from his benefits for the same reason, and on the basis of the same facts even though he does not automatically receive a written notice of determination; and (vi) that if the State law requires written notice of determination in order to effectuate a protest, redetermination, or appeal, he must be so advised and advised also that he must request a written notice of determination before he takes any such action.

g. *Seasonality factors.* If the individual's determination is affected by seasonality factors under the State law, an adequate explanation must be made. General explanations of seasonality factors which may affect determinations for subsequent weeks may be included in a booklet or pamphlet given with his notice of monetary determination..

h. *Disqualification or ineligibility*. If a disqualification is imposed, or if the claimant is declared ineligible for one or more weeks, he must be given not only a statement of the period of disqualification or ineligibility and the amount of wage-credit reductions, if any, but also an explanation of the reason for the ineligibility or disqualification. This explanation must be sufficiently detailed so that he will understand why he is ineligible or why he has been disqualified, and what he must do in order to requalify for benefits or purge the disqualification. The statement must be individualized to indicate the facts upon which the determination was based, e.g., state, ''It is found that you left your work with Blank Company because you were tired of working; the separation was voluntary, and the reason does not constitute good cause,'' rather than merely the phrase ''voluntary quit.'' Checking a box as to the reason for the disqualification is not a sufficiently detailed explanation. However, this statement of the reason for the disqualification need not be a restatement of all facts considered in arriving at the determination.

i. *Appeal rights.* The claimant must be given information with respect to his appeal rights.

(1) The following information shall be included in the notice of determination:

(a) A statement that he may appeal or, if the State law requires or permits a protest or redetermination before an appeal, that he may protest or request a redetermination.

(b) The period within which an appeal, protest, or request for redetermination must be filed. The number of days provided by statute must be shown as well as either the beginning date or ending date of the period. (It is recommended that the ending date of the appeal period be shown, as this is the more understandable of the alternatives.)

(2) The following information must be included either in the notice of determination or in separate informational material referred to in the notice:

(a) The manner in which the appeal, protest, or request for redetermination must be filed, e.g., by signed letter, written statement, or on a prescribed form, and the place or places to which the appeal, protest, or request for redetermination may be mailed or hand-delivered.

(b) An explanation of any circumstances (such as nonworkdays, good cause, etc.) which will extend the period for the appeal, protest, or request for redetermination beyond the date stated or identified in the notice of determination.

(c) That any further information claimant may need or desire can be obtained together with assistance in filing his appeal, protest, or request for redetermination from the local office.

If the information is given in separate material, the notice of determination would adequately refer to such material if it said, for example, ''For other information about your (appeal), (protest), (redetermination) rights, see pages —— to —— of the ——— (name of pamphlet or booklet) heretofore furnished to you.''

6014 *Separation Information Requirements Designed To Meet Department of Labor Criteria*

A. *Information to agency.* Where workers are separated, employers are required to furnish the agency promptly, either upon agency request or upon such separation, a notice describing the reasons for and the circumstances of the separation and any additional information which might affect a claimant's right to benefits. Where workers are working less than full time, employers are required to furnish the agency promptly, upon agency request, information concerning a claimant's hours of work and his wages during the claim periods invovled, and other facts which might affect a claimant's eligibility for benefits during such periods.

When workers are separated and the notices are obtained on a request basis, or when workers are working less than full time and the agency requests information, it is essential to the prompt processing of claims that the request be sent out promptly after the claim is filed and the employer be given a specific period within which to return the notice, preferably within 2 working days.

When workers are separated and notices are obtained upon separation, it is essential that the empolyer be required to send the notice to the agency with sufficient promptness to insure that, if a claim is filed, it may be processed promptly. Normally, it is desirable that such a notice be sent to the central office of the agency, since the employer may not know in which local office the worker will file his claim. The usual procedure is for the employer to give the worker a copy of the notice sent by the employer to the agency.

B. *Information to worker.*

1. *Information required to be given.* Employees are required to give their employers information and instructions concerning the employees' potential rights to benefits and concerning registration for work and filing claims for benefits.

The information furnished to employees under such a requirement need not be elaborate; it need only be adequate to insure that the worker who is separated or who is working less than full time knows he is potentially eligible for benefits and is informed as to what he is to do or where he is to go to file his claim and register for work. When he files his claim, he can obtain more detailed information.

In States that do not require employers to furnish periodically to the State agency detailed reports of the wages paid to their employees, each employer is required to furnish to his employees information as to: (a) The name under which he is registered by the State agency, (b) the address where he maintains his payroll records, and (c) the workers' need for this information if and when they file claims for benefits.

2. *Methods for giving information.* The information and instructions required above may be given in any of the following ways:

a. *Posters prominently displayed in the employer's establishment.* The State agency should supply employers with a sufficient number of posters for distribution throughout their places of business and should see that the posters are conspicuously displayed at all times.

b. *Leaflets.* Leaflets distributed either periodically or at the time of separation or reduction of hours. The State agency should supply employers with a sufficient number of leaflets.

c. *Individual notices.* Individual notices given to each employee at the time of separation or reduction in hours.

It is recommended that the State agency's publicity program be used to supplement the employer-information requirements. Such a program should stress the availability and location of claim-filing offices and the importance of visiting those offices whenever the worker is unemployed, wishes to apply for benefits, and to seek a job.

6015 *Evaluation of Alternative State Provisions with Respect to Claim Determinations and Separation Information.* If the State law provisions do not conform to the suggested requirements set forth in sections 6013 and 6014, but the State law contains alternative provisions, the Bureau of Employment Security, in collaboration with the State agency, will study the actual or anticipated effects of the alternative provisions. If the Administrator of the Bureau concludes that the alternative provisions satisfy the criteria in section 6012, he will so notify the State agency. If the Administrator of the Bureau does not so conclude, he will submit the matter to the Secretary. If the Secretary concludes that the alternative provisions satisfy the criteria in section 6012, the State agency will be so notified. If the Secretary concludes that there is a question as to whether the alternative provisions satisfy the criteria, the State agency will be advised that unless the State law provisions are appropriately revised, a notice of hearing will be issued as required by the Code of Federal Regulations, title 20, §601.5.

[53 FR 40557, Oct. 17, 1988; 53 FR 43799, Oct. 26, 1988]

APPENDIX ''C'' TO PART 614—STANDARD FOR FRAUD AND OVERPAYMENT DETECTION

EMPLOYMENT SECURITY MANUAL (PART V, SECTIONS 7510–7515)

7510–7519 *Standard for Fraud and Overpayment Detection*

7510 *Federal Law Requirements.* Section 303(a)(1) of the Social Security Act requires that a State law include provision for:

''Such methods of administration * * * as are found by the Secretary to be reasonably calculated to insure full payment of unemployment compensation when due.''

Section 1603(a)(4) of the Internal Revenue Code and section 3030(a)(5) of the Social Security Act require that a State law include provision for:

''Expenditure for all money withdrawn from an unemployment fund of such State, in the payment of unemployment compensation * * *''

Section 1607(h) of the Internal Revenue Code defines ''compensation'' as ''cash benefits payable to individuals with respect to their unemployment.''

7511 *The Secretary's Interpretation of Federal Law Requirements.* The Secretary of Labor interprets the above sections to require that a State law include provision for such methods of administration as are, within reason, calculated (1) to detect benefits paid through error by the agency or through willful misrepresentation or error by the claimant or others, and (2) to deter claimants from obtaining benefits through willful misrepresentation.

7513 *Criteria for Review of State Conformity With Federal Requirements.* In detemining State conformity with the above requirements of the Internal Revenue Code and the Social Security Act, as interpreted by the Secretary of Labor, the following criteria will be applied:

A. *Are investigations required to be made after the payment of benefits, (or, in the case of interstate claims, are investigations made by the agent State after the processing of claims) as to claimants' entitlement to benefits paid to them in a sufficient proportion of cases to test the effectiveness of the agency's procedures for the prevention of payments which are not due? To carry out investigations, has the agency assigned to some individual or unit, as a basic function, the responsibility of making or functionally directing such investigations?*

Explantaion: It is not feasible to prescribe the extent to which the above activities are required; however, they should always be carried on to such an extent that they will show whether or not error or willful misrepresentation is increasing or decreasing, and will reveal problem areas. The extent and nature of the above activities should be varied according to the seriousness of the problem in the State. The responsible individual or unit should:

1. Check paid claims for overpayment and investigate for willful misrepresentation or, alternatively, advise and assist the operating units in the performance of such functions, or both;

2. Perform consultative services with respect to methods and procedures for the prevention and detection of fraud; and

3. Perform other services which are closely related to the above.

Although a State agency is expected to make a full-time assignment of responsibility to a unit or individual to carry on the functions described above, a small State agency might make these functions a part-time responsibility of one individual. In connection with the detection of overpayments, such a unit or individual might, for example:

(a) Investigate information on suspected benefit fraud received from any agency personnel, and from sources outside the agency, including anonymous complaints;

(b) Investigate information secured from comparisons of benefit payments with employment records to detect cases of concurrent working (whether in covered or noncovered work) and claiming of benefits (including benefit payments in which the agency acted as agent for another State).

The benefit fraud referred to herein may involve employers, agency employees, and witnesses, as well as claimants.

Comparisons of benefit payments with employment records are commonly made either by post-audit or by industry surveys. The so-called ''post-audit'' is a matching of central office wage-record files against benefit payments for the same period. ''Industry surveys'' or ''mass audits'' are done in some States by going directly to employers for pay-roll information to be checked against concurrent benefit lists. A plan

A. of investigation based on a sample post-audit will be considered as partial fulfillment of the investigation program; it would need to be supplemented by other methods capable of detecting overpayments to persons who have moved into noncovered occupations or are claiming interstate benefits.

B. *Are adequate records maintained by which the results of investigations may be evaluated?**

Explanation. To meet this criterion, the State agency will be expected to maintain records of all its activities in the detection of overpayments, showing whether attributable to error or willful misrepresentation, measuring the results obtained through various methods, and noting the remedial action taken in each case. The adequacy and effectiveness of various methods of checking

* Revises section 7513 as issued 5/5/50.

for willful misrepresentation can be evaluated only if records are kept of the results obtained. Internal reports on fraudulent and erroneous overpayments are needed by State agencies for self-evaluation. Detailed records should be maintained in order that the State agency may determine, for example, which of several methods of checking currently used are the most productive. Such records also will provide the basis for drawing a clear distinction between fraud and error.

C. *Does the agency take adequate action with respect to publicity concerning willful misrepresentation and its legal consequences to deter fraud by claimants?**

Explanation. To meet this criterion, the State agency must issue adequate material on claimant eligibility requirements and must take necessary action to obtain publicity on the legal consequences of willful misrepresentation or willful nondisclosure of facts.

Public announcements on convictions and resulting penalties for fraud are generally considered necessary as a deterrent to other persons, and to inform the public that the agency is carrying on an effective program to prevent fraud. This alone is not considered adequate publicity. It is important that information be circulated which will explain clearly and understandably the claimant's rights, and the obligations which he must fulfill to be eligible for benefits. Leaflets for distribution an posters placed in local offices are appropriate media for such information.

7515 *Evalauation of Alternative State Provisions with Respect to Erroneous and Illegal Payments.* If the methods of administration provided for by the State law do not conform to the suggested methods of meeting the requirements set forth in section 7511, but a State law does provide for alternative methods of administration designed to accomplish the same results, the Bureau of Employment Security, in collaboration with the State agency, will study the actual or anticipated effect of the alternative methods of administration. If the Bureau concludes that the alternative methods satisfy the criteria in section 7513, it will so notify the State agency. If the Bureau does not so conclude, it will submit to the Secretary the results of the study for his determination of whether the State's alternative methods of administration meet the criteria.*

* Revises section 7513 as issued 5/5/50.

PART 615—EXTENDED BENEFITS IN THE FEDERAL-STATE UNEMPLOYMENT COMPENSATION PROGRAM

Sec.

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AUTHORITY: 26 U.S.C. 7805; 42 U.S.C. 1102; Secretary's Order No. 4–75 (40 FR 18515).

SOURCE: 53 FR 27937, July 25, 1988, unless otherwise noted.

§615.1 Purpose.

The regulations in this part are issued to implement the ''Federal-State Extended Unemployment Compensation Act of 1970'' as it has been amended, which requires, as a condition of tax offset under the Federal Unemployment Tax Act (26 U.S.C. 3301 *et seq.*), that a State unemployment compensation law provide for the payment of extended unemployment compensation during periods of high unemployment to eligible individuals as prescribed in the Act. The benefits provided under State law, in accordance with the Act and this part, are hereafter referred to as Extended Benefits, and the program is referred to as the Extended Benefit Program.

§615.2 Definitions.

For the purposes of the Act and this part—

(a) *Act* means the ''Federal-State Extended Unemployment Compensation Act of 1970'' (title II of Pub. L. 91–373; 84 Stat. 695, 708), approved August 10,

1970, as amended from time to time, including the 1980 amendments in section 416 of Pub. L. 96–364 (94 Stat. 1208, 1310), approved September 26, 1980, and in sections 1022 and 1024 of Pub. L. 96–499 (94 Stat. 2599, 2656, 2658) approved December 5, 1980, and the 1981 amendments in sections 2401 through 2404 and section 2505(b) of Pub. L. 97–35 (95 Stat. 357, 874–875, 884) approved August 13, 1981, and the 1982 amendment in section 191 of Pub. L. 97–248 (96 Stat. 324, 407) approved September 3, 1982, and the 1983 amendment in section 522 of Pub. L. 98–21 (97 Stat. 65, 148) approved April 20, 1983.

(b) *Base period* means, with respect to an individual, the base period as determined under the applicable State law for the individual's applicable benefit year.

(c)(1) *Benefit year* means, with respect to an individual, the benefit year as defined in the applicable State law.

(2) *Applicable benefit year* means, with respect to an individual, the current benefit year if, at the time an initial claim for Extended Benefits is filed, the individual has an unexpired benefit year only in the State in which such claim is filed, or, in any other case, the individual's most recent benefit year. For this purpose, the most recent benefit year for an individual who has unexpired benefit years in more than one State when an initial claim for Extended Benefits is filed, is the benefit year with the latest ending date or, if such benefit years have the same ending date, the benefit year in which the latest continued claim for regular compensation was filed. The individual's most recent benefit year which expires in an Extended Benefit Period is the applicable benefit year if the individual cannot establish a second benefit year or is precluded from receiving regular compensation in a second benefit year solely by reason of a State law provision which meets the requirement of section 3304(a)(7) of the Internal Revenue Code of 1986 (26 U.S.C. 3304(a)(7)).

(d) *Compensation* and *unemployment compensation* means cash benefits (including dependents' allowances) payable to individuals with respect to their unemployment, and includes regular compensation, additional compensation and extended compensation as defined in this section.

(e) *Regular compensation* means compensation payable to an individual under a State law, and, when so payable, includes compensation payable pursuant to 5 U.S.C. chapter 85, but does not include extended compensation or additional compensation.

(f) *Additional compensation* means compensation totally financed by a State and payable under a State law by reason of conditions of high unemployment or by reason of other special factors and, when so payable, includes compensation payable pursuant to 5 U.S.C. chapter 85.

(g) *Extended compensation* means the extended unemployment compensation payable to an individual for weeks of unemployment which begin in an Extended Benefit Period, under those provisions of a State law which satisfy the requirements of the Act and this part with respect to the payment of extended unemployment compensation, and, when so payable, includes compensation payable pursuant to 5 U.S.C. chapter 85, but does not include regular compensation or additional compensation. Extended compensation is referred to in this part as Extended Benefits.

(h) *Eligibility period* means, with respect to an individual, the period consisting of—

(1) The weeks in the individual's applicable benefit year which begin in an Extended Benefit Period, or with respect to a single benefit year, the weeks in the benefit year which begin in more than one Extended Benefit Period, and

(2) If the applicable benefit year ends within an Extended Benefit Period, any weeks thereafter which begin in such Extended Benefit Period, but an individual may not have more than one eligibility period with respect to any one exhaustion of regular benefits, or carry over from one eligibility period to another any entitlement to Extended Benefits.

(i) *Sharable compensation* means:

(1) Extended Benefits paid to an eligible individual under those provisions of a State law which are consistent with the Act and this part, and that does

not exceed the smallest of the following:

(i) 50 percent of the total amount of regular compensation payable to the individual during the applicable benefit year; or

(ii) 13 times the individual's weekly amount of Extended Benefits payable for a week of total unemployment, as determined pursuant to §615.6(a); or

(iii) 39 times the individual's weekly benefit amount, referred to in (ii), reduced by the regular compensation paid (or deemed paid) to the individual during the applicable benefit year; and

(2) Regular compensation paid to an eligible individual with respect to weeks of unemployment in the individual's eligibility period, but only to the extent that the sum of such compensation, plus the regular compensation paid (or deemed paid) to the individual with respect to prior weeks of unemployment in the applicable benefit year, exceeds 26 times and does not exceed 39 times the average weekly benefit amount (including allowances for dependents) for weeks of total unemployment payable to the individual under the State law in such benefit year: *Provided,* that such regular compensation is paid under provisions of a State law which are consistent with the Act and this part.

(3) Notwithstanding the preceding provisions of this paragraph, sharable compensation shall not include any regular or extended compensation with respect to which a State is not entitled to a payment under section 202(a)(6) or 204 of the Act or §615.14 of this part.

(j)(1) *Secretary* means the Secretary of Labor of the United States.

(2) *Department* means the United States Department of Labor, and shall include the Employment and Training Administration, the agency of the United States Department of Labor headed by the Assistant Secretary of Labor for Employment and Training to whom has been delegated the Secretary's authority under the Act in Secretary's Order No. 4–75 (40 FR 18515) and Secretary's Order No. 14–75.

(k)(1) *State* means the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and the U. S. Virgin Islands.

(2) *Applicable State* means, with respect to an individual, the State with respect to which the individual is an ''exhaustee'' as defined in §615.5, and in the case of a combined wage claim for regular compensation, the term means the ''paying State'' as defined in §616.6(e) of this chapter.

(3) *State agency* means the State Employment Security Agency of a State which administers the State law.

(l)(1) *State law* means the unemployment compensation law of a State, approved by the Secretary under section 3304(a) of the Internal Revenue Code of 1986 (26 U.S.C. 3304(a)).

(2) *Applicable State law* means the law of the State which is the applicable State for an individual.

(m)(1) *Week* means, for purposes of eligibility for and payment of Extended Benefits, a week as defined in the applicable State law.

(2) *Week* means, for purposes of computation of Extended Benefit ''on'' and ''off'' and ''no change'' indicators and insured unemployment rates and the beginning and ending of Extended Benefit Periods, a calendar week.

(n)(1) *Week of unemployment* means a week of total, part-total, or partial unemployment as defined in the applicable State law, which shall be applied in the same manner and to the same extent to the Extended Benefit Program as if the individual filing a claim for Extended Benefits were filing a claim for regular compensation, except as provided in paragraph (n)(2) of this section.

(2) *Week of unemployment* in section 202(a)(3)(A) of the Act means a week of unemployment, as defined in paragraph (n)(1) of this section, for which the individual claims Extended Benefits or sharable regular benefits.

(o) For the purposes of section 202(a)(3) of the Act—

(1) *Employed,* for the purposes of section 202(a)(3)(B)(ii) of the Act, and *employment,* for the purposes of section 202(a)(4) of the Act, means service performed in an employer-employee relationship as defined in the State law; and that law also shall govern whether that service must be covered by it, must consist of consecutive weeks, and must consist of more weeks of work

than are required under section 202(a)(3)(B) of the Act;

(2) *Individual's capabilities,* for the purposes of section 202(a)(3)(C), means work which the individual has the physical and mental capacity to perform and which meets the minimum requirements of section 202(a)(3)(D);

(3) *Reasonably short period,* for the purposes of section 202(a)(3)(C), means the number of weeks provided by the applicable State law;

(4) *Average weekly benefit amount,* for the purposes of section 202(a)(3)(D)(i), means the weekly benefit amount (including dependents' allowances payable for a week of total unemployment and before any reduction because of earnings, pensions or other requirements) applicable to the week in which the individual failed to take an action which results in a disqualification as required by section 202(a)(3)(B) of the Act;

(5) *Gross average weekly remuneration,* for the purposes of section 202(a)(3)(D)(i), means the remuneration offered for a week of work before any deductions for taxes or other purposes and, in case the offered pay may vary from week to week, it shall be determined on the basis of recent experience of workers performing work similar to the offered work for the employer who offered the work;

(6) *And,* as used in section 202(a)(3)(D)(ii), shall be interpreted to mean ''or'';

(7) *Provisions of the applicable State law,* as used in section 202(a)(3)(D)(iii), include statutory provisions and decisions based on statutory provisions, such as not requiring an individual to take a job which requires traveling an unreasonable distance to work, or which involves an unreasonable risk to the individual's health, safety or morals; and such provisions shall also include labor standards and training provisions required under sections 3304(a)(5) and 3304(a)(8) of the Internal Revenue Code of 1986 and section 236(e) of the Trade Act of 1974;

(8) A *systematic and sustained effort,* for the purposes of section 202(a)(3)(E), means—

(i) A high level of job search activity throughout the given week, compatible with the number of employers and employment opportunities in the labor market reasonably applicable to the individual,

(ii) A plan of search for work involving independent efforts on the part of each individual which results in contacts with persons who have the authority to hire or which follows whatever hiring procedure is required by a prospective employer in addition to any search offered by organized public and private agencies such as the State employment service or union or private placement offices or hiring halls,

(iii) Actions by the individual comparable to those actions by which jobs are being found by people in the community and labor market, but not restricted to a single manner of search for work such as registering with and reporting to the State employment service and union or private placement offices or hiring halls, in the same manner that such work is found by people in the community,

(iv) A search not limited to classes of work or rates of pay to which the individual is accustomed or which represent the individual's higher skills, and which includes all types of work within the individual's physical and mental capabilities, except that the individual, while classified by the State agency as provided in § 615.8(d) as having ''good'' job prospects, shall search for work that is suitable work under State law provisions which apply to claimants for regular compensation (which is not sharable),

(v) A search by every claimant, without exception for individuals or classes of individuals other than those in approved training, as required under section 3304(a)(8) of the Internal Revenue Code of 1986 or section 236(e) of the Trade Act of 1974,

(vi) A search suspended only when severe weather conditions or other calamity forces suspension of such activities by most members of the community, except that

(vii) The individual, while classified by the State agency as provided in § 615.8(d) as having ''good'' job prospects, if such individual normally obtains customary work through a hiring hall, shall search for work that is suitable work under State law provisions which apply to claimants for regular compensation (which is not sharable);

(9) *Tangible evidence* of an active search for work, for the purposes of section 202(a)(3)(E), means a written record which can be verified, and which includes the actions taken, methods of applying for work, types of work sought, dates and places where work was sought, the name of the employer or person who was contacted and the outcome of the contact;

(10) *Date* of a disqualification, as used in section 202(a)(4), means the date the disqualification begins, as determined under the applicable State law;

(11) *Jury duty*, for purposes of section 202(a)(3)(A)(ii), means the performance of service as a juror, during all periods of time an individual is engaged in such service, in any court of a State or the United States pursuant to the law of the State or the United States and the rules of the court in which the individual is engaged in the performance of such service; and

(12) *Hospitalized for treatment of an emergency or life-threatening condition*, as used in section 202(a)(3)(A)(ii), has the following meaning: ''Hospitalized for treatment'' means an individual was admitted to a hospital as an inpatient for medical treatment. Treatment is for an ''emergency or life threatening condition'' if determined to be such by the hospital officials or attending physician that provide the treatment for a medical condition existing upon or arising after hospitalization. For purposes of this definition, the term ''medical treatment'' refers to the application of any remedies which have the objective of effecting a cure of the emergency or life-threatening condition. Once an ''emergency condition'' or a ''life-threatening condition'' has been determined to exist by the hospital officials or attending physician, the status of the individual as so determined shall remain unchanged until release from the hospital.

(p)(1) *Claim filed in any State under the interstate benefit payment plan*, as used in section 202(c), means any interstate claim for a week of unemployment filed pursuant to the Interstate Benefit Payment Plan, but does not include—

(i) A claim filed in Canada,

(ii) A visiting claim filed by an individual who has received permission from his/her regular reporting office to report temporarily to a local office in another State and who has been furnished intrastate claim forms on which to file claims, or

(iii) A transient claim filed by an individual who is moving from place to place searching for work, or an intrastate claim for Extended Benefits filed by an individual who does not reside in a State that is in an Extended Benefit Period,

(2) *The first 2 weeks*, as used in section 202(c), means the first two weeks for which the individual files compensable claims for Extended Benefits under the Interstate Benefit Payment Plan in an agent State in which an Extended Benefit Period is not in effect during such weeks, and

(q) *Benefit structure* as used in section 204(a)(2)(D), for the requirement to round down to the ''nearest lower full dollar amount'' for Federal reimbursement of sharable regular and sharable extended compensation means all of the following:

(1) Amounts of regular weekly benefit payments,

(2) Amounts of additional and extended weekly benefit payments,

(3) The State maximum or minimum weekly benefit,

(4) Partial and part-total benefit payments,

(5) Amounts payable after deduction for pensions, and

(6) Amounts payable after any other deduction required by State law.

§615.3 Effective period of the program.

An Extended Benefit Program conforming with the Act and this part shall be a requirement for a State law effective on and after January 1, 1972, pursuant to section 3304(a)(11) of the Internal Revenue Code of 1986, (26 U.S.C. 3304(a)(11)). Continuation of the program by a State in conformity and substantial compliance with the Act and this part, throughout any 12-month period ending on October 31 of a year subsequent to 1972, shall be a condition of the certification of the State with respect to such 12-month period under section 3304(c) of the Internal Revenue Code of 1986 (26 U.S.C. 3304(c)). Conformity with the Act and this part in the payment of regular compensation

and Extended Benefits to any individual shall be a continuing requirement, applicable to every week as a condition of a State's entitlement to payment for any compensation as provided in the Act and this part.

§ 615.4 Eligibility requirements for Extended Benefits.

(a) *General.* An individual is entitled to Extended Benefits for a week of unemployment which begins in the individual's eligibility period if, with respect to such week, the individual is an exhaustee as defined in § 615.5, files a timely claim for Extended Benefits, and satisfies the pertinent requirements of the applicable State law which are consistent with the Act and this part.

(b) *Qualifying for Extended Benefits.* The State law shall specify whether an individual qualifies for Extended Benefits by earnings and employment in the base period for the individual's applicable benefit year as required by section 202(a)(5) of the Act, (and if it does not also apply this requirement to the payment of sharable regular benefits, the State will not be entitled to a payment under § 615.14), as follows:

(1) One and one-half times the high quarter wages; or

(2) Forty times the most recent weekly benefit amount, and if this alternative is adopted, it shall use the weekly benefit amount (including dependents' allowances) payable for a week of total unemployment (before any reduction because of earnings, pensions or other requirements) which applied to the most recent week of regular benefits; or

(3) Twenty weeks of full-time insured employment, and if this alternative is adopted, the term ''full-time'' shall have the meaning provided by the State law.

§ 615.5 Definition of "exhaustee."

(a)(1) ''Exhaustee'' means an individual who, with respect to any week of unemployment in the individual's eligibility period:

(i) Has received, prior to such week, all of the regular compensation that was payable under the applicable State law or any other State law (including regular compensation payable to Federal civilian employees and Ex-Servicemembers under 5 U.S.C. chapter 85) for the applicable benefit year that includes such week; or

(ii) Has received, prior to such week, all of the regular compensation that was available under the applicable State law or any other State law (including regular compensation available to Federal civilian employees and Ex-Servicemembers under 5 U.S.C. chapter 85) in the benefit year that includes such week, after the cancellation of some or all of the individual's wage credits or the total or partial reduction of the individual's right to regular compensation; or

(iii) The applicable benefit year having expired prior to such week and the individual is precluded from establishing a second (new) benefit year, or the individual established a second benefit year but is suspended indefinitely from receiving regular compensation, solely by reason of a State law provision which meets the requirement of section 3304(a)(7) of the Internal Revenue Code of 1954 (26 U.S.C. 3304(a)(7)): *Provided,* that, an individual shall not be entitled to Extended Benefits based on regular compensation in a second benefit year during which the individual is precluded from receiving regular compensation solely by reason of a State law provision which meets the requirement of section 3304(a)(7) of the Internal Revenue Code of 1986 (26 U.S.C. 3304(a)(7)); or

(iv) The applicable benefit year having expired prior to such week, the individual has insufficient wages or employment, or both, on the basis of which a new benefit year could be established in any State that would include such week; and

(v) Has no right to unemployment compensation for such week under the Railroad Unemployment Insurance Act or such other Federal laws as are specified by the Department pursuant to this paragraph; and

(vi) Has not received and is not seeking for such week unemployment compensation under the unemployment compensation law of Canada, unless the Canadian agency finally determines that the individual is not entitled to unemployment compensation under the Canadian law for such week.

(2) An individual who becomes an exhaustee as defined above shall cease to be an exhaustee commencing with the first week that the individual becomes eligible for regular compensation under any State law or 5 U.S.C. chapter 85, or has any right to unemployment compensation as provided in paragraph (a)(1)(v) of this section, or has received or is seeking unemployment compensation as provided in paragraph (a)(1)(vi) of this section. The individual's Extended Benefit Account shall be terminated upon the occurrence of any such week, and the individual shall have no further right to any balance in that Extended Benefit Account.

(b) *Special Rules.* For the purposes of paragraphs (a)(1)(i) and (a)(1)(ii) of this section, an individual shall be deemed to have received in the applicable benefit year all of the regular compensation payable according to the monetary determination, or available to the individual, as the case may be, even though—

(1) As a result of a pending appeal with respect to wages or employment or both that were not included in the original monetary determination with respect to such benefit year, the individual may subsequently be determined to be entitled to more or less regular compensation, or

(2) By reason of a provision in the State law that establishes the weeks of the year in which regular compensation may be paid to the individual on the basis of wages in seasonal employment—

(i) The individual may be entitled to regular compensation with respect to future weeks of unemployment in the next season or off season, as the case may be, but such compensation is not payable with respect to the week of unemployment for which Extended Benefits are claimed, and

(ii) The individual is otherwise an exhaustee within the meaning of this section with respect to rights to regular compensation during the season or off season in which that week of unemployment occurs, or

(3) Having established a benefit year, no regular compensation is payable during such year because wage credits were cancelled or the right to regular compensation was totally reduced as the result of the application of a disqualification.

(c) *Adjustment of week.* If it is subsequently determined as the result of a redetermination or appeal that an individual is an exhaustee as of a different week than was previously determined, the individual's rights to Extended Benefits shall be adjusted so as to accord with such redetermination or decision.

§ 615.6 Extended Benefits; weekly amount.

(a) *Total unemployment.* (1) The weekly amount of Extended Benefits payable to an individual for a week of total unemployment in the individual's eligibility period shall be the amount of regular compensation payable to the individual for a week of total unemployment during the applicable benefit year. If the individual had more than one weekly amount of regular compensation for total unemployment during such benefit year, the weekly amount of extended compensation for total unemployment shall be one of the following which applies as specified in the applicable State law:

(i) The average of such weekly amounts of regular compensation,

(ii) The last weekly benefit amount of regular compensation in such benefit year, or

(iii) An amount that is reasonably representative of the weekly amounts of regular compensation payable during such benefit year.

(2) If the method in paragraph (a)(1)(iii) of this section is adopted by a State, the State law shall specify how such amount is to be computed. If the method in paragraph (a)(1)(i) of this section is adopted by a State, and the amount computed is not an even dollar amount, the amount shall be raised or lowered to an even dollar amount as provided by the applicable State law for regular compensation.

(b) *Partial and part-total unemployment.* The weekly amount of Extended Benefits payable for a week of partial or part-total unemployment shall be determined under the provisions of the applicable State law which apply to regular compensation, computed on the

basis of the weekly amount of Extended Benefits payable for a week of total unemployment as determined pursuant to paragraph (a) of this section.

§ 615.7 Extended Benefits; maximum amount.

(a) *Individual account.* An Extended Benefit Account shall be established for each individual determined to be eligible for Extended Benefits, in the sum of the maximum amount potentially payable to the individual as computed in accordance with paragraph (b) of this section.

(b) *Computation of amount in individual account.* (1) The amount established in the Extended Benefit Account of an individual, as the maximum amount potentially payable to the individual during the individual's eligibility period, shall be equal to the lesser of—

(i) 50 percent of the total amount of regular compensation (including dependents' allowances) payable to the individual during the individual's applicable benefit year; or

(ii) 13 times the individual's weekly amount of Extended Benefits payable for a week of total unemployment, as determined pursuant to § 615.6(a); or

(iii) 39 times the individual's weekly benefit amount referred to in (ii), reduced by the regular compensation paid (or deemed paid) to the individual during the individual's applicable benefit year.

(2) If the State law so provides, the amount in the individual's Extended Benefit Account shall be reduced by the aggregate amount of additional compensation paid (or deemed paid) to the individual under such law for prior weeks of unemployment in such benefit year which did not begin in an Extended Benefit Period.

(c) *Changes in accounts.* (1) If an individual is entitled to more or less Extended Benefits as a result of a redetermination or an appeal which awarded more or less regular compensation or Extended Benefits, an appropriate change shall be made in the individual's Extended Benefit Account pursuant to an amended determination of the individual's entitlement to Extended Benefits.

(2) If an individual who has received Extended Benefits for a week of unemployment is determined to be entitled to more regular compensation with respect to such week as the result of a redetermination or an appeal, the Extended Benefits paid shall be treated as if they were regular compensation up to the greater amount to which the individual has been determined to be entitled, and the State agency shall make appropriate adjustments between the regular and extended accounts. If the individual is entitled to more Extended Benefits as a result of being entitled to more regular compensation, an amended determination shall be made of the individual's entitlement to Extended Benefits. If the greater amount of regular compensation results in an increased duration of regular compensation, the individual's status as an exhaustee shall be redetermined as of the new date of exhaustion of regular compensation.

(3) If an individual who has received Extended Benefits for a week of unemployment is determined to be entitled to less regular compensation as the result of a redetermination or an appeal, and as a consequence is entitled to less Extended Benefits, any Extended Benefits paid in excess of the amount to which the individual is determined to be entitled after the redetermination or decision on appeal shall be considered an overpayment which the individual shall have to repay on the same basis and in the same manner that excess payments of regular compensation are required to be repaid under the applicable State law. If such decision reduces the duration of regular compensation payable to the individual, the claim for Extended Benefits shall be backdated to the earliest date, subsequent to the date when the redetermined regular compensation was exhausted and within the individual's eligibility period, that the individual was eligible to file a claim for Extended Benefits. Any such changes shall be made pursuant to an amended determination of the individual's entitlement to Extended Benefits.

(d) *Reduction because of trade readjustment allowances.* Section 233(d) of the Trade Act of 1974 (and section

204(a)(2)(C) of the Act), requiring a reduction of Extended Benefits because of the receipt of trade readjustment allowances, shall be applied as follows:

(1) The reduction of Extended Benefits shall apply only to an individual who has not exhausted his/her Extended Benefits at the end of the benefit year;

(2) The amount to be deducted is the product of the weekly benefit amount for Extended Benefits multiplied by the number of weeks for which trade readjustment allowances were paid (regardless of the amount paid for any such week) up to the close of the last week that begins in the benefit year; and

(3) The amount to be deducted shall be deducted from the balance of Extended Benefits not used as of the close of the last week which begins in the benefit year.

§615.8 Provisions of State law applicable to claims.

(a) *Particular provisions applicable.* Except where the result would be inconsistent with the provisions of the Act or this part, the terms and conditions of the applicable State law which apply to claims for, and the payment of, regular compensation shall apply to claims for, and the payment of, Extended Benefits. The provisions of the applicable State law which shall apply to claims for, and the payment of, Extended Benefits include, but are not limited to:

(1) Claim filing and reporting;

(2) Information to individuals, as appropriate;

(3) Notices to individuals and employers, as appropriate;

(4) Determinations, redeterminations, and appeal and review;

(5) Ability to work and availability for work, except as provided otherwise in this section;

(6) Disqualifications, including disqualifying income provisions, except as provided by paragraph (c) of this section;

(7) Overpayments, and the recovery thereof;

(8) Administrative and criminal penalties;

(9) The Interstate Benefit Payment Plan;

(10) The Interstate Arrangement for Combining Employment and Wages, in accordance with part 616 of this chapter.

(b) *Provisions not to be applicable.* The State law and regulations shall specify those of its terms and conditions which shall not be applicable to claims for, or payment of, Extended Benefits. Among such terms and conditions shall be at least those relating to—

(1) Any waiting period;

(2) Monetary or other qualifying requirements, except as provided in §615.4(b); and

(3) Computation of weekly and total regular compensation.

(c) *Terminating disqualifications.* A disqualification in a State law, as to any individual who voluntarily left work, was suspended or discharged for misconduct, gross misconduct or the commission or conviction of a crime, or refused an offer of or a referral to work, as provided in sections 202(a) (4) and (6) of the Act—

(1) As applied to regular benefits which are not sharable, is not subject to any limitation in sections 202(a) (4) and (6);

(2) As applied to eligibility for Extended Benefits, shall require that the individual be employed again subsequent to the date of the disqualification before it may be terminated, even though it may have been terminated on other grounds for regular benefits which are not sharable; and if the State law does not also apply this provision to the payment of what would otherwise be sharable regular benefits, the State will not be entitled to a payment under the Act and §615.14 in regard to such regular compensation; and

(3) Will not apply in regard to eligibility for Extended Benefits in a subsequent eligibility period.

(d) *Classification and determination of job prospects.* (1) As to each individual who files an initial claim for Extended Benefits (or sharable regular compensation), the State agency shall classify the individual's prospects for obtaining work in his/her customary occupation within a reasonably short period, as ''good'' or ''not good,'' and shall promptly (not later than the end of the week in which the initial claim is filed) notify the individual in writing

of such classification and of the requirements applicable to the individual under the provisions of the applicable State law corresponding to section 202(a)(3) of the Act and this part. Such requirements shall be applicable beginning with the week following the week in which the individual is furnished such written notice.

(2) If an individual is thus classified as having good prospects, but those prospects are not realized by the close of the period the State law specifies as a reasonably short period, the individual's prospects will be automatically reclassified as ''not good'' or classified as ''good'' or ''not good'' depending on the individual's job prospects as of that date.

(3) Whenever, as part of a determination of an individual's eligibility for benefits, an issue arises concerning the individual's failure to apply for or accept an offer of work (sections 202(a)(3)(A)(i) and (F) of the Act and paragraphs (e) and (f) of this section), or to actively engage in seeking work (sections 202(a)(3)(A)(ii) and (E) of the Act and paragraph (g) of this section), a written appealable determination shall be made which includes a finding as to the individual's job prospects at the time the issue arose. The reasons for allowing or denying benefits in the written notice of determination shall explain how the individual's job prospects relate to the decision to allow or deny benefits.

(4) If an individual's job prospects are determined in accordance with the preceding paragraph (3) to be ''good,'' the suitability of work will be determined under the standard State law provisions applicable to claimants for regular compensation which is not sharable; and if determined to be ''not good,'' the suitability of work will be determined under the definition of suitable work in the State law provisions corresponding to sections 202(a)(3) (C) and (D) of the Act and this part. Any determination or classification of an individual's job prospects is mutually exclusive, and only one suitable work definition shall be applied to a claimant as to any failure to accept or apply for work or seek work with respect to any week.

(e) *Requirement of referral to work.* (1) The State law shall provide, as required by section 202(a)(3)(F) of the Act and this part, that the State agency shall refer every claimant for Extended Benefits to work which is ''suitable work'' as provided in paragraph (d)(4) of this section, beginning with the week following the week in which the individual is furnished a written notice of classification of job prospects as required by paragraphs (d)(1) and (h) of this section.

(2) To make such referrals, the State agency shall assure that each Extended Benefit claimant is registered for work and continues to be considered for referral to job openings as long as he/she continues to claim benefits.

(3) In referring claimants to available job openings, the State agency shall apply to Extended Benefit claimants the same priorities, policies, and judgments as it does to other applicants, except that it shall not restrict referrals only to work at higher skill levels, prior rates of pay, customary work, or preferences as to work or pay for individuals whose prospects of obtaining work in their customary occupations have been classified as or determined to be ''not good.''

(4) For referral purposes, any work which does not exceed the individual's capabilities shall be considered suitable work for an Extended Benefit claimant whose job prospects have been classified as or determined to be ''not good'', except as modified by this paragraph (e).

(5) For Extended Benefit claimants whose prospects of obtaining work in their customary occupations have been classified as or determined to be ''not good'', work shall not be suitable, and referral to a job shall not be made, if—

(i) The gross average weekly remuneration for the work for any week does not exceed the sum of the individual's weekly benefit amount plus any supplemental unemployment benefits (SUB) (as defined in section 501(c)(17)(D) of the Internal Revenue Code of 1986) payable to the individual,

(ii) The work is not offered in writing or is not listed with the State employment service,

(iii) The work pays less than the higher of the minimum wage set in section 6(a)(1) of the Fair Labor Standards Act of 1938, without regard to any exemption, or any applicable State or local minimum wage, or

(iv) Failure to accept or apply for the work would not result in a denial of compensation under the provisions of the applicable State law as defined in §615.2(o)(7).

(6) In addition, if the State agency classifies or determines that an individual's prospects for obtaining work in his/her customary occupation within a reasonably short period are ''good,'' referral shall not be made to a job if such referral would not be made under the State law provisions applicable to claimants for regular benefits which are not sharable, and such referrals shall be limited to work which the individual is required to make a ''systematic and sustained effort'' to search for as defined in §615.2(o)(8).

(7) For the purposes of the foregoing paragraphs of this paragraph (e), State law applies regarding whether members of labor organizations shall be referred to nonunion work in their customary occupations.

(8) If the State law does not also apply this paragraph (e) to individuals who claim what would otherwise be sharable regular compensation, the State will not be entitled to payment under the Act and §615.14 in regard to such regular compensation.

(f) *Refusal of work.* (1) The State law shall provide, as required by section 202(a)(3)(A)(i) of the Act and this part, that if an individual who claims Extended Benefits fails to accept an offer of work or fails to apply for work to which he/she was referred by the State agency—

(i) If the individual's prospects for obtaining work in his/her customary occupation within a reasonably short period are determined to be ''good,'' the State agency shall determine whether the work is suitable under the standard State law provisions which apply to claimants for regular compensation which is not sharable, and if determined to be suitable the individual shall be ineligible for Extended Benefits for the week in which the individual fails to apply for or accept an offer of suitable work and thereafter until the individual is employed in at least four weeks with wages from such employment totalling not less than four times the individual's weekly benefit amount, as provided by the applicable State law; or

(ii) If the individual's prospects for obtaining work in his/her customary occupation are determined to be ''not good,'' the State agency shall determine whether the work is suitable under the applicable State law provisions corresponding to sections 202(a)(3) (C) and (D) of the Act and paragraphs (e)(5) and (f)(2) of this section, and if determined to be suitable the individual shall be ineligible for Extended Benefits for the week in which the individual fails to apply for or accept an offer of suitable work and thereafter until the individual is employed in at least four weeks with wages from such employment totalling not less than four times the individual's weekly benefit amount, as provided by the applicable State law.

(2) For an individual whose prospects of obtaining work in his/her customary occupation within the period specified by State law are classified or determined to be ''not good,'' the term ''suitable work'' shall mean any work which is within the individual's capabilities, except that work shall not be suitable if—

(i) The gross average weekly remuneration for the work for any week does not exceed the sum of the individual's weekly benefit amount plus any supplemental unemployment benefits (SUB) (as defined in section 501(c)(17)(D) of the Internal Revenue Code of 1986) payable to the individual,

(ii) The work is not offered in writing or is not listed with the State employment service, or

(iii) The work pays less than the higher of the minimum wage set in section 6(a)(1) of the Fair Labor Standards Act of 1938, without regard to any exemption, or any applicable State or local minimum wage,

(iv) Failure to accept or apply for the work would not result in a denial of compensation under the provisions of the applicable State law as defined in §615.2(o)(7).

(3) For the purposes of the foregoing paragraphs of this paragraph (f), State law applies regarding whether members of labor organizations shall be referred to nonunion work in their customary occupations.

(4) If the State law does not also apply this paragraph (f) to individuals who claim what would otherwise be sharable regular compensation, the State will not be entitled to payment under the Act and §615.14 in regard to such regular compensation.

(g) *Actively seeking work.* (1) The State law shall provide, as required by sections 202(a)(3) (A)(ii) and (E) of the Act and this part, that an individual who claims Extended Benefits shall be required to make a systematic and sustained effort (as defined in §615.2(o)(8)) to search for work which is ''suitable work'' as provided in paragraph (d)(4) of this section, throughout each week beginning with the week following the week in which the individual is furnished a written notice of classification of job prospects as required by paragraphs (d)(1) and (h) of this section, and to furnish to the State agency with each claim tangible evidence of such efforts.

(2) If the individual fails to thus search for work, or to furnish tangible evidence of such efforts, he/she shall be ineligible for Extended Benefits for the week in which the failure occurred and thereafter until the individual is employed in at least four weeks with wages from such employment totalling not less than four times the individual's weekly benefit amount, as provided by the applicable State law.

(3)(i) A State law may provide that eligibility for Extended Benefits be determined under the applicable provisions of State law for regular compensation which is not sharable, without regard to the active search provisions otherwise applicable in paragraph (g)(1) of this section, for any individual who fails to engage in a systematic and sustained search for work throughout any week because such individual is—

(A) Serving on jury duty, or

(B) Hospitalized for treatment of an emergency or life-threatening condition.

(ii) The conditions in (i) (A) and (B) must be applied to individuals filing claims for Extended Benefits in the same manner as applied to individuals filing claims for regular compensation which is not sharable compensation.

(4) For the purposes of the foregoing paragraphs of this paragraph (g), State law applies regarding whether members of labor organizations shall be required to seek nonunion work in their customary occupations.

(5) If the State law does not also apply this paragraph (g) to individuals who claim what would otherwise be sharable regular compensation, the State will not be entitled to payment under the Act and §615.14 in regard to such regular compensation.

(h) *Information to claimants.* The State agency shall assure that each Extended Benefit claimant (and claimant for sharable regular compensation) is informed in writing—

(1) Of the State agency's classification of his/her prospects for finding work in his/her customary occupation within the time set out in paragraph (d) as ''good'' or ''not good,''

(2) What kind of jobs he/she may be referred to, depending on the classification of his/her job prospects,

(3) What kind of jobs he/she must be actively engaged in seeking each week depending on the classification of his/her job prospects, and what tangible evidence of such search must be furnished to the State agency with each claim for benefits, and

(4) The resulting disqualification if he/she fails to apply for work to which referred, or fails to accept work offered, or fails to actively engage in seeking work or to furnish tangible evidence of such search for each week for which Extended Benefits or sharable regular benefits are claimed, beginning with the week following the week in which such information is furnished in writing to the individual.

§ 615.9 Restrictions on entitlement.

(a) *Disqualifications.* If the week of unemployment for which an individual claims Extended Benefits is a week to which a disqualification for regular compensation applies, including a reduction because of the receipt of disqualifying income, or would apply but

for the fact that the individual has exhausted all rights to such compensation, the individual shall be disqualified in the same degree from receipt of Extended Benefits for that week.

(b) *Additional compensation.* No individual shall be paid additional compensation and Extended Benefits with respect to the same week. If both are payable by a State with respect to the same week, the State law may provide for the payment of Extended Benefits instead of additional compensation with respect to the week. If Extended Benefits are payable to an individual by one State and additional compensation is payable to the individual for the same week by another State, the individual may elect which of the two types of compensation to claim.

(c) *Interstate claims.* An individual who files claims for Extended Benefits under the Interstate Benefit Payment Plan, in a State which is not in an Extended Benefit Period for the week(s) for which Extended Benefits are claimed, shall not be paid more than the first two weeks for which he/she files such claims.

(d) *Other restrictions.* The restrictions on entitlement specified in this section are in addition to other restrictions in the Act and this part on eligibility for and entitlement to Extended Benefits.

§ 615.10 Special provisions for employers.

(a) *Charging contributing employers.* (1) Section 3303(a)(1) of the Internal Revenue Code of 1986 (26 U.S.C. 3303(a)(1)) does not require that Extended Benefits paid to an individual be charged to the experience rating accounts of employers.

(2) A State law may, however, consistently with section 3303(a)(1), require the charging of Extended Benefits paid to an individual; and if it does, it may provide for charging all or any portion of such compensation paid.

(3) Sharable regular compensation must be charged as all other regular compensation is charged under the State law.

(b) *Payments by reimbursing employers.* If an employer is reimbursing the State unemployment fund in lieu of paying contributions pursuant to the requirements of State law conforming with sections 3304(a)(6)(B) and 3309(a)(2) of the Internal Revenue Code of 1986 (26 U.S.C. 3304(a)(6)(B) and 3309(a)(2)), the State law shall require the employer to reimburse the State unemployment fund for not less than 50 percent of any sharable compensation that is attributable under the State law to service with such employer; and as to any compensation which is not sharable compensation under § 615.14, the State law shall require the employer to reimburse the State unemployment fund for 100 percent, instead of 50 percent, of any such compensation paid.

§ 615.11 Extended Benefit Periods.

(a) *Beginning date.* Except as provided in paragraph (d) of this section, an Extended Benefit Period shall begin in a State on the first day of the third calendar week after a week for which there is a State ''on'' indicator in that State.

(b) *Ending date.* Except as provided in paragraph (c) of this section, an Extended Benefit Period in a State shall end on the last day of the third week after the first week for which there is a State ''off'' indicator in that State.

(c) *Duration.* An Extended Benefit Period which becomes effective in any State shall continue in effect for not less than 13 consecutive weeks.

(d) *Limitation.* No Extended Benefit Period may begin in any State by reason of a State ''on'' indicator before the 14th week after the ending of a Prior Extended Benefit Period with respect to such State.

§ 615.12 Determination of "on" and "off" indicators.

(a) *Standard State indicators.* (1) There is a State ''on'' indicator in a State for a week if the head of the State agency determines, in accordance with this section, that, for the period consisting of that week and the immediately preceding 12 weeks, the rate of insured unemployment (not seasonally adjusted) under the State law—

(i) Equalled or exceeded 120 percent of the average of such rates for the corresponding 13-week periods ending in each of the preceding two calendar years, and

(ii) Equalled or exceeded 5.0 percent.

(2) There is a State ''off'' indicator in a State for a week if the head of the State agency determines, in accordance with this section, that, for the period consisting of that week and the immediately preceding 12 weeks, the rate of insured unemployment (not seasonally adjusted) under the State law—

(i) Was less than 120 percent of the average of such rates for the corresponding 13 week periods ending in each of the preceding two calendar years, or

(ii) Was less than 5.0 percent.

(3) The standard State indicators in this paragraph (a) shall apply to weeks beginning after September 25, 1982.

(b) *Optional State indicators.* (1)(i) A State may, in addition to the State indicators in paragraph (a) of this section, provide by its law that there shall be a State ''on'' indicator in the State for a week if the head of the State agency determines, in accordance with this section, that, for the period consisting of that week and the immediately preceding 12 weeks, the rate of insured unemployment (not seasonally adjusted) under the State law equalled or exceeded 6.0 percent even though it did not meet the 120 percent factor required under paragraph (a).

(ii) A State which adopts the optional State indicator must also provide that, when it is in an Extended Benefit Period, there will not be an ''off'' indicator until (A) the State rate of insured unemployment is less than 6.0 percent, and (B) either its rate of insured unemployment is less than 5.0 percent or is less than 120 percent of the average of such rates for the corresponding 13-week periods ending in each of the preceding two calendar years.

(2) The optional State indicators in this paragraph (b) shall apply to weeks beginning after September 25, 1982.

(c) *Computation of rate of insured unemployment*—(1) *Equation.* Each week the State agency head shall calculate the rate of insured unemployment under the State law (not seasonally adjusted) for purposes of determining the State ''on'' and ''off'' and ''no change'' indicators. In making such calculations the State agency head shall use a fraction, the numerator of which shall be the weekly average number of weeks claimed in claims filed (not seasonally adjusted) in the State in the 13-week period ending with the week for which the determination is made, and the denominator of which shall be the average monthly employment covered by the State law for the first four of the last six calendar quarters ending before the close of the 13-week period. The quotient obtained is to be computed to four decimal places, and is not otherwise rounded, and is to be expressed as a percentage by multiplying the resultant decimal fraction by 100.

(2) *Counting weeks claimed.* To determine the average number of weeks claimed in claims filed to serve as the numerator under paragraph (c)(1), the State agency shall include claims for all weeks for regular compensation, including claims taken as agent State under the Interstate Benefit Payment Plan. It shall exclude claims—

(i) For Extended Benefits under any State law,

(ii) For additional compensation under any State law, and

(iii) Under any Federal law except joint claims which combine regular compensation and compensation payable under 5 U.S.C. chapter 85.

(3) *Method of computing the State 120 percent factor.* The rate of insured unemployment for a current 13-week period shall be divided by the average of the rates of insured unemployment for the corresponding 13-week periods in each of the two preceding calendar years to determine whether the rate is equal to 120 percent of the average rate for the two years. The quotient obtained shall be computed to four decimal places and not otherwise rounded, and shall be expressed as a percentage by multiplying the resultant decimal fraction by 100. The average of the rates for the corresponding 13-week periods in each of the two preceding calendar years shall be one-half the sum of such rates computed to four decimal places and not otherwise rounded. To determine which are the corresponding weeks in the preceding years—

(i) The weeks shall be numbered starting with week number 1 as the first week ending in each calendar year.

(ii) The 13-week period ending with any numbered week in the current year

shall correspond to the period ending with that same numbered week in each preceding year.

(iii) When that period in the current year ends with week number 53, the corresponding period in preceding years shall end with week number 52 if there is no week number 53.

(d) *Amendment of State indicator rates.* (1) Because figures used for determinations under this section may contain errors and because it is not practical to apply any correction in a State ''on'' or ''off'' or ''no change'' indicator retroactively either to recover amounts paid or to adjudicate claims for past periods in which claimants failed to make the required active search for work, any determination by the head of a State agency of an ''on'' or ''off'' or ''no change'' indicator shall not be corrected more than three weeks after the close of the week to which it applies. If any figure used in the computation of a rate of insured unemployment is later found to be wrong, the correct figure shall be used to redetermine the rate of insured unemployment and of the 120 percent factor for that week and all subsequent weeks, but no determination of previous ''on'' or ''off'' or ''no change'' indicator shall be affected unless the redetermination is made within the time the indicator may be corrected under the first sentence of this paragraph (d)(1). Any change hereunder shall be subject to the concurrence of the Department as provided in paragraph (e) of this section.

(2) Any determination of the rate of insured unemployment and its effect on an ''on'' or ''off'' or ''no change'' indicator may be challenged by appeal or by other proceedings, as shall be provided by State law, but the implementation of any change in the indicator from one week to another shall not be stayed or postponed. In a hearing on any such challenge the issue may be limited to the accuracy of the determination of the rate of insured unemployment. If an error in that rate affecting the ''on'' or ''off'' or ''no change'' indicator is discovered in such a hearing or other proceeding, its retroactive effect shall be limited as provided in paragraph (d)(1).

(e) *Notice to Secretary.* Within 10 calendar days after the end of any week with respect to which the head of a State agency has determined that there is an ''on,'' or ''off,'' or ''no change'' indicator in the State, the head of the State agency shall notify the Department of the determination. The notice shall state clearly the State agency head's determination of the specific week for which there is a State ''on'' or ''off'' or ''no change'' indicator. The notice shall include also the State agency head's findings supporting the determination, with a certification that the findings are made in accordance with the requirements of this §615.15. Determinations and findings made as provided in this section shall be accepted by the Department, but the head of the State agency shall comply with such provisions as the Department may find necessary to assure the correctness and verification of notices given under this paragraph. A notice shall not become final for purposes of the Act and this part until such notice is accepted by the Department.

§615.13 Announcement of the beginning and ending of Extended Benefit Periods.

(a) *State indicators.* Upon receipt of the notice required by §615.12(e) which is acceptable to the Department, the Department shall publish in the FEDERAL REGISTER a notice of the State agency head's determination that there is an ''on'' or an ''off'' indicator in the State, as the case may be, the name of the State and the beginning or ending of the Extended Benefit Period, whichever is appropriate. The Department shall also notify appropriate news media, the heads of all other State agencies, and the Regional Administrators of the Employment and Training Administration of the State agency head's determination of such State ''on'' or ''off'' indicator and of its effect.

(b) *Publicity by State.* Whenever a State agency head determines that there is an ''on'' indicator in the State by reason of which an Extended Benefit Period will begin in the State, or an ''off'' indicator by reason of which an Extended Benefit Period in the State will end, the head of the State agency shall promptly announce the determination through appropriate news

media in the State and notify the Department in accordance with §615.12(e). Such announcement shall include the beginning or ending date of the Extended Benefit Period, whichever is appropriate. In the case of an Extended Benefit Period that is about to begin, the announcement shall describe clearly the unemployed individuals who may be eligible for Extended Benefits during the period, and in the case of an Extended Benefit Period that is about to end, the announcement shall also describe clearly the individuals whose entitlement to Extended Benefits will be terminated.

(c) *Notices to individuals.* (1) Whenever there has been a determination that an Extended Benefit Period will begin in a State, the State agency shall provide prompt written notice of potential entitlement to Extended Benefits to each individual who has established a benefit year in the State that will not end prior to the beginning of the Extended Benefit Period, and who exhausted all rights under the State law to regular compensation before the beginning of the Extended Benefit Period.

(2) The State agency shall provide such notice promptly to each individual who begins to claim sharable regular benefits or who exhausts all rights under the State law to regular compensation during an Extended Benefit Period, including exhaustion by reason of the expiration of the individual's benefit year.

(3) The notices required by paragraphs (c) (1) and (2) of this section shall describe those actions required of claimants for sharable regular compensation and Extended Benefits and those disqualifications which apply to such benefits which are different from those applicable to other claimants for regular compensation which is not sharable.

(4) Whenever there has been a determination that an Extended Benefit Period will end in a State, the State agency shall provide prompt written notice to each individual who is currently filing claims for Extended Benefits of the forthcoming end of the Extended Benefit Period and its effect on the individual's right to Extended Benefits.

§ 615.14 Payments to States.

(a) *Sharable compensation.* (1) The Department shall promptly upon receipt of a State's report of its expenditures for a calendar month reimburse the State in the amount of the sharable compensation the State is entitled to receive under the Act and this part.

(2) The Department may instead advance to a State for any period not greater than one day the amount the Department estimates the State will be entitled to be paid under the Act and this part for that period.

(3) Any payment to a State under this section shall be based upon the Department's determination of the amount the State is entitled to be paid under the Act and this part, and such amount shall be reduced or increased, as the case may be, by any amount by which the Department finds that a previous payment was greater or less than the amount that should have been paid to the State.

(4) Any payment to a State pursuant to this paragraph (a) shall be made by a transfer from the extended unemployment compensation account in the Unemployment Trust Fund to the account of the State in such Fund, in accordance with section 204(e) of the Act.

(b) *Payments not to be made to States.* Because a State law must contain provisions fully consistent with sections 202 and 203 of the Act, the Department shall make no payment under paragraph (a) of this section, whether or not the State is certified under section 3304(c) of the Internal Revenue Code of 1986—

(1) In respect of any regular or extended compensation paid to any individual for any week if the State does not apply—

(i) The provisions of the State law required by section 202(a)(3) and this part, relating to failure to accept work offered or to apply for work or to actively engage in seeking work, as to weeks beginning after October 31, 1981, except for any State which the State legislature did not meet in 1981 as to weeks beginning after October 1, 1982 or the provisions of State law required by section 202(a)(4) and this part, relating to terminating a disqualification, as to weeks beginning after March 31, 1981;

(ii) The provisions of the State law required by section 202(a)(5) and this part, relating to qualifying employment, as to weeks beginning after September 25, 1982; or

(2) In respect of any regular or extended compensation paid to any individual for any week which was not payable by reason of the provision of the State law required by section 202(c) and this part, as to weeks which begin after May 31, 1981, or May 31, 1982, as determined by the Department with regard to each State.

(c) *Payments not to be reimbursed.* The Department shall make no payment under paragraph (a) of this section, whether or not the State is certified under section 3304(c) of the Internal Revenue Code of 1986, in respect of any regular or extended compensation paid under a State law—

(1) As provided in section 204(a)(1) of the Act and this part, if the payment made was not sharable extended compensation or sharable regular compensation;

(2) As provided in section 204(a)(2)(A) of the Act, if the State is entitled to reimbursement for the payment under the provisions of any Federal law other than the Act;

(3) As provided in section 204(a)(2)(B) of the Act, if for the first week in an individual's eligibility period with respect to which Extended Benefits or sharable regular benefits are paid to the individual, that first week begins after December 5, 1980, and the State law provides for the payment (at any time or under any circumstances) of regular compensation to any individual for the first week of unemployment in any such individual's benefit year; except that—

(i) In the case of a State with respect to which the Department finds that legislation is required in order to end the payment (at any time or under any circumstances) of regular compensation for any such first week of unemployment, this paragraph (c)(3) shall not apply to the first week in an individual's eligibility period which began before the end of the first regularly scheduled session of the State legislature that ends after January 4, 1981, as determined by the Department; and

(ii) In the case of a State law which is changed so that regular compensation is not paid at any time or under any circumstances with respect to the first week of unemployment in any individual's benefit year, this paragraph (c)(3) shall not apply to any week which begins after the effective date of such change in the State law; and

(iii) In the case of a State law which is changed so that regular compensation is paid at any time or under any circumstances with respect to the first week of unemployment in any individual's benefit year, this paragraph (c)(3) shall apply to all weeks which begin after the effective date of such change in the State law;

(4) As provided in section 204(a)(2)(C) of the Act and this part, for any week with respect to which Extended Benefits are not payable because of the payment of trade readjustment allowances, as provided in section 233(d) of the Trade Act of 1974, and §615.7(d). This paragraph (c)(4) applies to any week which begins after October 31, 1982, or 1983, as determined by the Department in regard to each State;

(5) As provided in section 204(a)(2)(D) of the Act and this part, if the State does not provide for a benefit structure under which benefits are rounded down to the next lower dollar amount, for the 50 percent Federal share of the amount by which sharable regular or Extended Benefits paid to any individual exceeds the nearest lower full dollar amount. This paragraph (c)(5) shall apply to any sharable regular compensation or Extended Benefits paid to individuals whose eligibility periods begin on or after October 1, 1983, unless a later date, as determined by the Department, applies in a particular State under the grace period of section 191(b)(2) of Pub. L. 97–248;

(6) As provided in section 204(a)(3) of the Act, to the extent that such compensation is based upon employment and wages in service performed for governmental entities or instrumentalities to which section 3306(c)(7) of the Internal Revenue Code of 1986 (26 U.S.C. 3306(c)(7)) applies, in the proportion that wages for such service in the base period bear to the total base period wages;

(7) If the payment made was not sharable extended compensation or sharable regular compensation because the payment was not consistent with the requirements of—

(i) Section 202(a)(3) of the Act, and § 615.8 (e), (f), or (g);

(ii) Section 202(a)(4) of the Act, and § 615.8(c); or

(iii) Section 202(a)(5) of the Act, and § 615.4(b);

(8) If the payment made was not sharable extended compensation or sharable regular compensation because there was not in effect in the State an Extended Benefit Period in accord with the Act and this part; or

(9) For any week with respect to which the claimant was either ineligible for or not entitled to the payment.

(d) *Effectuating authorization for reimbursement.* (1) If the Department believes that reimbursement should not be authorized with respect to any payments made by a State that are claimed to be sharable compensation paid by the State, because the State law does not contain provisions required by the Act and this part, or because such law is not interpreted or applied in rules, regulations, determinations or decisions in a manner that is consistent with those requirements, the Department may at any time notify the State agency in writing of the Department's view. The State agency shall be given an opportunity to present its views and arguments if desired.

(2) The Department shall thereupon decide whether the State law fails to include the required provisions or is not interpreted and applied so as to satisfy the requirements of the Act and this part. If the Department finds that such requirements are not met, the Department shall notify the State agency of its decision and the effect thereof on the State's entitlement to reimbursement under this section and the provisions of section 204 of the Act.

(3) Thereafter, the Department shall not authorize any payment under paragraph (a) of this section in respect of any sharable regular or extended compensation if the State law does not contain all of the provisions required by sections 202 and 203 of the Act and this part, or if the State law, rules, regulations, determinations or decisions are not consistent with such requirements, or which would not have been payable if the State law contained the provisions required by the Act and this part or if the State law, rules, regulations, determinations or decisions had been consistent with such requirements. Loss of reimbursement for such compensation shall begin with the date the State law was required to contain such provisions, and shall continue until such time as the Department finds that such law, rules and regulations have been revised or the interpretations followed pursuant to such determinations and decisions have been overruled and payments are made or denied so as to accord with the Federal law requirements of the Act and this part, but no reimbursement shall be authorized with respect to any payment that did not fully accord with the Act and this part.

(4) A State agency may request reconsideration of a decision issued pursuant to paragraph (d)(2) above, within 10 calendar days of the date of such decision, and shall be given an opportunity to present views and arguments if desired.

(5) Concurrence of the Department in any State law provision, rule, regulation, determination or decision shall not be presumed from the absence of notice issued pursuant to this section or from a certification of the State issued pursuant to section 3304(c) of the Internal Revenue Code of 1986.

(6) Upon finding that a State has made payments for which it claims reimbursement that are not consistent with the Act or this part, such claim shall be denied; and if the State has already been paid such claim in advance or by reimbursement, it shall be required to repay the full amount to the Department. Such repayment may be made by transfer of funds from the State's account in the Unemployment Trust Fund to the Extended Unemployment Compensation Account in the Fund, or by offset against any current advances or reimbursements to which the State is otherwise entitled, or the amount repayable may be recovered for the Extended Unemployment Compensation Account by other means and

from any other sources that may be available to the United States or the Department.

(e) *Compensation under Federal unemployment compensation programs.* The Department shall promptly reimburse each State which has paid sharable compensation based on service covered by the UCFE and UCX Programs (parts 609 and 614 of this chapter, respectively) pursuant to 5 U.S.C. chapter 85, an amount which represents the full amount of such sharable compensation paid under the State law, or may make advances to the State. Such amounts shall be paid from the Federal Employees Compensation Account established for those programs, rather than from the Extended Unemployment Compensation Account.

(f) *Combined-wage claims.* If an individual was paid benefits under the Interstate Arrangement for Combining Employment and Wages (part 616 of this chapter) any payment required by paragraph (a) of this section shall be made to the States which contributed the wage credits.

(g) *Interstate claims.* Where sharable compensation is paid to an individual under the provisions of the Interstate Benefit Payment Plan, any payment required by paragraph (a) of this section shall be made only to the liable State.

§ 615.15 Records and reports.

(a) *General.* State agencies shall furnish to the Secretary such information and reports and make such studies as the Secretary decides are necessary or appropriate for carrying out the purposes of the Act and this part.

(b) *Recordkeeping.* Each State agency will make and maintain records pertaining to the administration of the Extended Benefit Program as the Department requires, and will make all such records available for inspection, examination and audit by such Federal officials or employees as the Secretary or the Department may designate or as may be required by law.

(c) *Weekly report of Extended Benefit data.* Each State shall file with the Department within 10 calendar days after the end of each calendar week a weekly report entitled ETA 539, Extended Benefit Data. The report shall include:

(1) The data reported on the form ETA 539 for the week ending (date). Week-ending dates shall always be the Saturday ending date of the calendar week beginning at 12:01 a.m. Sunday and ending 12:00 p.m. Saturday.

(2)(i) The number of continued weeks claimed for regular compensation in claims filed during the week ending (date). The report shall include intrastate continued weeks claimed and interstate continued weeks claimed (taken as agent State) but shall exclude interstate continued weeks claimed (received as liable State) and continued weeks claimed for regular compensation filed solely under 5 U.S.C. chapter 85; and

(ii) The report of the number of continued weeks claimed filed in the State for regular compensation shall not be adjusted for seasonality.

(3) The average weekly number of weeks claimed in claims filed in the most recent calendar week and the immediately preceding 12 calendar weeks.

(4) The rate of insured unemployment for the current 13-week period.

(5) The average of the rates of insured unemployment in corresponding 13-week periods in the preceding two years.

(6) The current rate of insured unemployment as a percentage of the average of the rates in the corresponding 13-week periods in the preceding two years.

(7) The 12 month average monthly employment covered by the State law for the first 4 of the last 6 complete calendar quarters ending prior to the end of the last week of the current 13-week period to which the insured unemployment data relate. Such covered employment shall exclude Federal civilian and military employment covered by 5 U.S.C. chapter 85.

(8) The date that a State Extended Benefit Period begins or ends, or a report that there is no change in the existing Extended Benefit Period status.

(d) *Methodology.* The State agency head shall submit to the Department, for approval, the method used to identify and select the weeks claimed which are used in the determination of an ''on'' or ''off'' or ''no change'' indicator. Any change proposed in the method of identification and selection

of such weeks claimed constitutes a new plan which must be submitted to and approved by the Department prior to implementing the new plan.

(Approved by the Office of Management and Budget under control number 1205–0028)

PART 616—INTERSTATE ARRANGEMENT FOR COMBINING EMPLOYMENT AND WAGES

Sec.

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AUTHORITY: Sec. 3304(a)(9)(B), 84 Stat. 702; 26 U.S.C. 3304(a)(9)(B); Secretary's Order No. 20–71, August 13, 1971.

SOURCE: 36 FR 24992, Dec. 28, 1971, unless otherwise noted.

§ 616.1 Purpose of arrangement.

This arrangement is approved by the Secretary under the provisions of section 3304(a)(9)(B) of the Federal Unemployment Tax Act to establish a system whereby an unemployed worker with covered employment or wages in more than one State may combine all such employment and wages in one State, in order to qualify for benefits or to receive more benefits.

§ 616.2 Consultation with the State agencies.

As required by section 3304(a)(9)(B), this arrangement has been developed in consultation with the State unemployment compensation agencies. For purposes of such consultation in its formulation and any future amendment the Secretary recognizes, as agents of the State agencies, the duly designated representatives of the Interstate Conference of Employment Security Agencies.

§ 616.3 Interstate cooperation.

Each State agency will cooperate with every other State agency by implementing such rules, regulations, and procedures as may be prescribed for the operation of this arrangement. Each State agency shall identify the paying and the transferring State with respect to Combined-Wage Claims filed in its State.

§ 616.4 Rules, regulations, procedures, forms—resolution of disagreements.

All State agencies shall operate in accordance with such rules, regulations, and procedures, and shall use such forms, as shall be prescribed by the Secretary in consultation with the State unemployment compensation agencies. All rules, regulations, and standards prescribed by the Secretary with respect to intrastate claims will apply to claims filed under this arrangement unless they are clearly inconsistent with the arrangement. The Secretary shall resolve any disagreement between State agencies concerning the operation of the arrangement, with the advice of the duly designated representatives of the State agencies.

§ 616.5 Effective date.

This arrangement shall apply to all new claims (to establish a benefit year) filed under it after December 31, 1971.

§ 616.6 Definitions.

These definitions apply for the purpose of this arrangement and the procedures issued to effectuate it.

(a) *State.* ''State'' includes the States of the United States of America, the District of Columbia, and the Commonwealth of Puerto Rico, and includes the Virgin Islands effective on the day after the day on which the Secretary approves under section 3304(a) of the Internal Revenue Code of 1954 (26 U.S.C. 3304(a)), an unemployment compensation law submitted to the Secretary by the Virgin Islands for approval.

(b) *State agency.* The agency which administers the unemployment compensation law of a State.

(c) *Combined-Wage Claim.* A claim filed under this arrangement.

(d) *Combined-Wage Claimant.* A claimant who has covered wages under the unemployment compensation law of more than one State and who has filed a claim under this arrangement.

(e) *Paying State.* (1) The State in which a Combined-Wage Claimant files a Combined-Wage Claim, if the claimant qualifies for unemployment benefits in that State on the basis of combined employment and wages.

(2) If the State in which a Combined-Wage Claimant files a Combined-Wage Claim is not the Paying State under the criterion set forth in paragraph (e)(1) of this section, or if the Combined-Wage Claim is filed in Canada or the Virgin Islands, then the Paying State shall be that State where the Combined-Wage Claimant was last employed in covered employment among the States in which the claimant qualifies for unemployment benefits on the basis of combined employment and wages: *Provided,* That, this paragraph (e)(2) shall read as if the Virgin Islands was not referred to therein, effective on the day after the day on which the Secretary approves under section 3304(a) of the Internal Revenue Code of 1954 (26 U.S.C. 3304(a)), an unemployment compensation law submitted to the Secretary by the Virgin Islands for approval.

(f) *Transferring State.* A State in which a Combined-Wage Claimant had covered employment and wages in the base period of a paying State, and which transfers such employment and wages to the paying State for its use in determining the benefit rights of such claimant under its law.

(g) *Employment and wages.* ''Employment'' refers to all services which are covered under the unemployment compensation law of a State, whether expressed in terms of weeks of work or otherwise. ''Wages'' refers to all remuneration for such employment.

(h) *Secretary.* The Secretary of Labor of the United States.

(i) *Base period and benefit year.* The base period and benefit year applicable under the unemployment compensation law of the paying State.

[36 FR 24992, Dec. 28, 1971, as amended at 39 FR 45215, Dec. 31, 1974; 43 FR 2625, Jan. 17, 1978]

§ 616.7 Election to file a Combined-Wage Claim.

(a) Any unemployed individual who has had employment covered under the unemployment compensation law of two or more States, whether or not he is monetarily qualified under one or more of them, may elect to file a Combined-Wage Claim. He may not so elect, however, if he has established a benefit year under any State or Federal unemployment compensation law and:

(1) The benefit year has not ended, and

(2) He still has unused benefit rights based on such benefit year.[1]

(b) For the purposes of this arrangement, a claimant will not be considered to have unused benefit rights based on a benefit year which he has established under a State or Federal unemployment compensation law if:

(1) He has exhausted his rights to all benefits based on such benefit year; or

(2) His rights to such benefits have been postponed for an indefinite period or for the entire period in which benefits would otherwise be payable; or

(3) Benefits are affected by the application of a seasonal restriction.

(c) If an individual elects to file a Combined-Wage Claim, all employment and wages in all States in which he worked during the base period of the paying State must be included in such combining, except employment and wages which are not transferrable under the provisions of § 616.9(b).

(d) A Combined-Wage Claimant may withdraw his Combined-Wage Claim within the period prescribed by the law of the paying State for filing an appeal, protest, or request for redetermination

[1] The Federal-State Extended Unemployment Compensation Act of 1970, title II, Public Law 91–373, section 202(a)(1), limits the payment of extended benefits with respect to any week to individuals who have no rights to regular compensation with respect to such week under any State unemployment compensation law or to compensation under any other Federal law and in certain other instances. This provision precludes any individual from receiving any Federal-State extended benefits with respect to any week for which he is eligible to receive regular benefits based on a Combined Wage Claim. (See section 5752, part V of the Employment Security Manual.)

(as the case may be) from the monetary determination of the Combined-Wage Claim, provided he either:

(1) Repays in full any benefits paid to him thereunder, or

(2) Authorizes the State(s) against which he files a substitute claim(s) for benefits to withhold and forward to the paying State a sum sufficient to repay such benefits.

(e) If the Combined-Wage Claimant files his claim in a State other than the paying State, he shall do so pursuant to the Interstate Benefit Payment Plan.

§ 616.8 Responsibilities of the paying State.

(a) *Transfer of employment and wages—payment of benefits.* The paying State shall request the transfer of a Combined-Wage Claimant's employment and wages in all States during its base period, and shall determine his entitlement to benefits (including additional benefits, extended benefits and dependents' allowances when applicable) under the provisions of its law based on employment and wages in the paying State, if any, and all such employment and wages transferred to it hereunder. The paying State shall apply all the provisions of its law to each determination made hereunder, even if the Combined-Wage Claimant has no earnings in covered employment in that State, except that the paying State may not determine an issue which has previously been adjudicated by a transferring State. Such exception shall not apply, however, if the transferring State's determination of the issue resulted in making the Combined-Wage Claim possible under §616.7(b)(2). If the paying State fails to establish a benefit year for the Combined-Wage Claimant, or if he withdraws his claim as provided herein, it shall return to each transferring State all employment and wages thus unused.

(b) *Notices of determination.* The paying State shall give to the claimant a notice of each of its determinations on his Combined-Wage Claim that he is required to receive under the Secretary's Claim Determinations Standard and the contents of such notice shall meet such Standard. When the claimant is filing his Combined-Wage Claims in a State other than the paying State, the paying State shall send a copy of each such notice to the local office in which the claimant filed such claims.

(c) *Redeterminations.* (1) Redeterminations may be made by the paying State in accordance with its law based on additional or corrected information received from any source, including a transferring State, except that such information shall not be used as a basis for changing the paying State if benefits have been paid under the Combined-Wage Claim.

(2) When a determination is made, as provided in paragraph (a) of this section, which suspends the use of wages earned in employment with an educational institution during a prescribed period between successive academic years or terms or other periods as prescribed in the law of the paying State in accordance with section 3304(a)(6)(A)(i)–(iv) of the Internal Revenue Code of 1954, the paying State shall furnish each transferring State involved in the combined-Wage Claim an adjusted determination used to recompute each State's proportionate share of any charges that may accumulate for benefits paid during the period of suspended use of school wages. Wages which are suspended shall be retained by the paying State for possible future reinstatement to the Combined-Wage Claim and shall not be returned to the transferring State.

(d) *Appeals.* (1) Except as provided in paragraph (d)(3) of this section, where the claimant files his Combined-Wage Claim in the paying State, any protest, request for redetermination or appeal shall be in accordance with the law of such State.

(2) Where the claimant files his Combined-Wage Claim in a State other than the paying State, or under the circumstances described in paragraph (d)(3) of this section, any protest, request for redetermination or appeal shall be in accordance with the Interstate Benefit Payment Plan.

(3) To the extent that any protest, request for redetermination or appeal involves a dispute as to the coverage of the employing unit or services in a transferring State, or otherwise involves the amount of employment and wages subject to transfer, the protest,

request for redetermination or appeal shall be decided by the transferring State in accordance with its law.

(e) *Recovery of prior overpayments.* If there is an overpayment outstanding in a transferring State and such transferring State so requests, the overpayment shall be deducted from any benefits the paying State would otherwise pay to the claimant on his Combined-Wage Claim except to the extent prohibited by the law of the paying State. The paying State shall transmit the amount deducted to the transferring State or credit the deduction against the transferring State's required reimbursement under this arrangement. This paragraph shall apply to overpayments only if the transferring State certifies to the paying State that the determination of overpayment was made within 3 years before the Combined-Wage Claim was filed and that repayment by the claimant is legally required and enforceable against him under the law of the transferring State.

(f) *Statement of benefit charges.* (1) At the close of each calendar quarter, the paying State shall send each transferring State a statement of benefits charged during such quarter to such State as to each Combined-Wage Claimant.

(2) Except as provided in paragraphs (c)(2), (f)(3), and (f)(5) of this section, each such charge shall bear the same ratio to the total benefits paid to the Combined-Wage Claimant by the paying State as the claimant's wages transferred by the transferring State bear to the total wages used in such determination. Each such ratio shall be computed as a percentage, to three or more decimal places.

(3) Charges to the transferring State shall not include the costs of any benefits paid which are funded or reimbursed from the Federal Unemployment Benefits and Allowances account in the U.S. Department of Labor appropriation, including:

(i) Benefits paid pursuant to 5 U.S.C. 8501–8525; and

(ii) Benefits which are reimbursable under part B of title II of the Emergency Jobs and Unemployment Assistance Act of 1974 (Pub. L. 93–567).

(4) With respect to benefits paid after December 31, 1978, except as provided in paragraphs (f)(3) and (f)(5) of this section, all transferring States will be charged by the paying State for Extended Benefits in the same manner as for regular benefits.

(5) With respect to new claims establishing a benefit year effective on and after July 1, 1977, the United States shall be charged directly by the paying State, in the same manner as is provided in paragraphs (f)(1) and (f)(2) of this section, in regard to Federal civilian service and wages and Federal military service and wages assigned or transferred to the paying State and included in Combined-Wage Claims in accordance with this part and parts 609 and 614 of this chapter. With respect to new claims effective before July 1, 1977, prior law shall apply.

(26 U.S.C. 3304(a)(9)(B); Secretary's Order No. 4–75, (40 FR 18515))

[36 FR 24992, Dec. 28, 1971, as amended at 43 FR 2625, Jan. 17, 1978; 45 FR 47109, July 11, 1980]

§ 616.9 Responsibilities of transferring States.

(a) *Transfer of employment and wages.* Each transferring State shall promptly transfer to the Paying State the employment and wages the Combined-Wage Claimant had in covered employment during the base period of the paying State. Any employment and wages so transferred shall be transferred without restriction as to their use for determination and benefit payments under the provisions of the paying State's law.

(b) *Employment and wages not transferable.* Employment and wages transferred to the paying State by a transferring State shall not include:

(1) Any employment and wages which have been transferred to any other paying State and not returned unused, or which have been used in the transferring State as the basis of a monetary determination which established a benefit year.

(2) Any employment and wages which have been canceled or are otherwise unavailable to the claimant as a result of a determination by the transferring State made prior to its receipt of the request for transfer, if such determination has become final or is in the process of appeal but is still pending. If the

appeal is finally decided in favor of the Combined-Wage Claimant, any employment and wages involved in the appeal shall forthwith be transferred to the paying State and any necessary redetermination shall be made by such paying State.

(c) *Reimbursement of paying State.* Each transferring State shall, as soon as practicable after receipt of a quarterly statement of charges described herein, reimburse the paying State accordingly.

(26 U.S.C. 3304(a)(9)(B); Secretary's Order No. 4–75, (40 FR 18515))

[36 FR 24992, Dec. 28, 1971, as amended at 45 FR 47109, July 11, 1980]

§ 616.10 Reuse of employment and wages.

Employment and wages which have been used under this arrangement for a determination of benefits which establishes a benefit year shall not thereafter be used by any State as the basis for another monetary determination of benefits.

§ 616.11 Amendment of arrangement.

Periodically the Secretary shall review the operation of this arrangement, and shall propose such amendments to the arrangement as he believes are necessary or appropriate. Any State unemployment compensation agency or the ICESA may propose amendments to the arrangement. Any proposal shall constitute an amendment to the arrangement upon approval by the Secretary in consultation with the State unemployment compensation agencies. Any such amendment shall specify when the change shall take effect, and to which claims it shall apply.

PART 617—TRADE ADJUSTMENT ASSISTANCE FOR WORKERS UNDER THE TRADE ACT OF 1974

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AUTHORITY: 19 U.S.C. 2320; Secretary's Order No. 3–81, 46 FR 31117.

SOURCE: 51 FR 45848, Dec. 22, 1986, unless otherwise noted.

Subpart A—General

§617.1 Scope.

The regulations in this part 617 pertain to:

(a) Adjustment assistance, such as counseling, testing, training, placement, and other supportive services for workers adversely affected under the terms of chapter 2 of title II of the Trade Act of 1974, as amended (hereafter referred to as the Act);

(b) Trade readjustment allowances (hereafter referred to as TRA) and other allowances such as allowances while in training, job search and relocation allowances; and

(c) Administrative requirements applicable to State agencies to which such individuals may apply.

§617.2 Purpose.

The Act created a program of trade adjustment assistance (hereafter referred to as TAA) to assist individuals, who became unemployed as a result of increased imports, return to suitable employment. The TAA program provides for reemployment services and allowances for eligible individuals. The regulations in this part 617 are issued to implement the Act.

§617.3 Definitions.

For the purposes of the Act and this part 617:

(a) *Act* means chapter 2 of title II of the Trade Act of 1974, Pub. L. 93–618, 88 Stat. 1978, 2019–2030 (19 U.S.C. 2271–2322), as amended.

(b) *Adversely affected employment* means employment in a firm or appropriate subdivision of a firm, including workers in any agricultural firm or subdivision of an agricultural firm, if workers of such firm or appropriate subdivision are certified under the Act as eligible to apply for TAA.

(c) *Adversely affected worker* means an individual who, because of lack of work in adversely affected employment:

(1) Has been totally or partially separated from such employment; or

(2) Has been totally separated from employment with the firm in a subdivision of which such adversely affected employment exists.

(d) *Appropriate week* means the week in which the individual's first separation occurred.

(e) *Average weekly hours* means a figure obtained by dividing:

(1) Total hours worked (excluding overtime) by a partially separated individual in adversely affected employment in the 52 weeks (excluding weeks in such period during which the individual was sick or on vacation) preceding the individual's first qualifying separation, by

(2) The number of weeks in such 52 weeks (excluding weeks in such period during which the individual was sick or on vacation) in which the individual actually worked in such employment.

(f) *Average weekly wage* means one-thirteenth of the total wages paid to an individual in the individual's high quarter. The high quarter for an individual is the quarter in which the total wages paid to the individual were highest among the first four of the last five completed calendar quarters preceding the individual's appropriate week.

(g) *Average weekly wage in adversely affected employment* means a figure obtained by dividing:

(1) Total wages earned by a partially separated individual in adversely affected employment in the 52 weeks (excluding the weeks in that period the individual was sick or on vacation) preceding the individual's first qualifying separation, by

(2) The number of weeks in such 52 weeks (excluding the weeks in that period the individual was sick or on vacation) the individual actually worked in such employment.

(h) *Benefit period* means, with respect to an individual:

(1) The benefit year and any ensuing period, as determined under the applicable State law, during which the individual is eligible for regular compensation, additional compensation, extended compensation, or federal supplemental compensation, as these terms are defined by paragraph (oo) of this section; or

(2) The equivalent to such a benefit year or ensuing period provided for under the Federal unemployment insurance law.

(i) *Bona fide application for training* means an individual's signed and dated application for training filed with the State agency administering the TAA training program, on a form necessarily containing the individual's name, petition number, local office number, and specific occupational training. This form shall be signed and dated by a State agency representative upon receipt.

(j)(1) *Certification* means a certification of eligibility to apply for TAA issued under section 223 of the Act with respect to a specified group of workers of a firm or appropriate subdivision of a firm.

(2) *Certification period* means the period of time during which total and partial separations from adversely affected employment within a firm or appropriate subdivision of a firm are covered by the certification.

(k) *Commuting area* means the area in which an individual would be expected to travel to and from work on a daily basis as determined under the applicable State law.

(l) *Date of separation* means:

(1) With respect to a total separation—

(i) For an individual in employment status, the last day worked; and

(ii) For an individual on employer-authorized leave, the last day the individual would have worked had the individual been working; and

(2) With respect to a partial separation, the last day of the week in which the partial separation occurred.

(m) *Eligibility period* means the period of consecutive calendar weeks during which basic or additional TRA is payable to an otherwise eligible individual, and for an individual such eligibility period is—

(1) *Basic TRA.* (i) With respect to a first qualifying separation (as defined in paragraph (t)(3)(i)(A) of this section) that occurs on a day that precedes August 23, 1988, the 104-week period beginning with the first week following the week with respect to which the individual first exhausts all rights to regular compensation (as defined in paragraph (oo)(1) of this section) in such individual's first benefit period (as described in §617.11(a)(1)(iv)) or §617.11(a)(2)(iv), whichever is applicable), and

(ii) With respect to a total qualifying separation (as defined in paragraph (t)(3)(i)(B) of this section) that occurs on or after August 23, 1988—or before August 23, 1988, if the individual also had a prior first qualifying separation under the same certification—the 104-week period beginning with the first week following the week in which such total qualifying separation occurred;

Provided, that, an individual who has a second or subsequent total qualifying separation within the certification period of the same certification shall be determined to have a new 104-week eligibility period based upon the most recent such total qualifying separation; but the rule of this proviso shall not be applicable in the case of an individual who had a total qualifying separation before August 23, 1988, and also had a prior first qualifying separation (as referred to in paragraph (m)(1)(i) of this section) within the certification period of the same certification, if the individual's 104-week eligibility period based upon the total qualifying separation (as referred to in paragraph

(m)(1)(i) of this section) would end on a date earlier than the ending date of the individual's eligibility period which is based upon the prior first qualifying separation; and

(2) *Additional TRA.* With respect to additional weeks of TRA, and any individual determined under this part 617 to be entitled to additional TRA, the consecutive calendar weeks that occur in the 26-week period that—

(i) Immediately follows the last week of entitlement to basic TRA otherwise payable to the individual, or

(ii) Begins with the first week of training approved under this part 617, if such training begins after the last week described in paragraph (m)(2)(i) of this section, or

(iii) Begins with the first week in which such training is approved under this part 617, if such training is so approved after the training has commenced; but approval of training under this part 617 after the training has commenced shall not imply or justify approval of a payment of basic or additional TRA with respect to any week which ended before the week in which such training was approved, nor approval of payment of any costs of training or any costs or expenses associated with such training (such as travel or subsistence) which were incurred prior to the date of the approval of such training under this part 617.

(n) *Employer* means any individual or type of organization, including the Federal government, a State government, a political subdivision, or an instrumentality of one or more governmental entities, with one or more individuals performing service in employment for it within the United States.

(o) *Employment* means any service performed for an employer by an officer of a corporation or an individual for wages.

(p) *Exhaustion of UI* means exhaustion of all rights to UI in a benefit period by reason of:

(1) Having received all UI to which an individual was entitled under the applicable State law or Federal unemployment compensation law with respect to such benefit period; or

(2) The expiration of such benefit period.

(q) *Family* means the following members of an individual's household whose principal place of abode is with the individual in a home the individual maintains or would maintain but for unemployment:

(1) A spouse;

(2) An unmarried child, including a stepchild, adopted child, or foster child, under age 21 or of any age if incapable of self-support because of mental or physical incapacity; and

(3) Any other person whom the individual would be entitled to claim as a dependent for income tax purposes under the Internal Revenue Code of 1954.

(r) *First benefit period* means the benefit period established after the individual's first qualifying separation or in which such separation occurs.

(s) *First exhaustion of UI* means the first time in an individual's first benefit period that the individual exhausts all rights to UI; first exhaustion shall be deemed to be complete at the end of the week the exhaustion occurs.

(t)(1) *First separation* means, for an individual to qualify as an adversely affected worker for the purposes of TAA program benefits (without regard to whether the individual also qualifies for TRA), the individual's first total or partial separation within the certification period of a certification, irrespective of whether such first separation also is a qualifying separation as defined in paragraph (t)(2) of this section;

(2) *Qualifying separation* means, for an individual to qualify as an adversely affected worker and for basic TRA—

(i) Prior to August 23, 1988, the individual's first (total or partial) separation within the certification per-iod of a certification, with respect to which the individual meets all of the requirements of §617.11(a)(1) (i) through (iv), and which qualifies as a first qualifying separation as defined in paragraph (t)(3)(i)(A) of this section, and

(ii) At any time before, on, or after August 23, 1988, any total separation of the individual within the certification period of a certification (other than a first qualifying separation as defined in paragraph (t)(3)(i)(A) of this section), with respect to which the individual meets all of the requirements in

§ 617.11(a)(2) (i) through (iv), and which qualifies as a total qualifying separation as defined in paragraph (B) of (t)(3)(i)(B) of this section;

(3) ''First qualifying separation'' means—

(i) For the purposes of determining an individual's eligibility period for basic TRA—

(A) With respect to a separation that occurs before August 23, 1988, the individual's first (total or partial) separation within the certification period of a certification, with respect to which the individual meets all of the requirements of § 617.11(a)(1) (i) through (iv), and

(B) With respect to a separation that occurs before, on, or after August 23, 1988 (other than a first qualifying separation as defined in paragraph (t)(3)(i)(A) of this section), the first total separation of the individual within the certification period of a certification, with respect to which the individual meets all of the requirements in § 617.11(a)(2) (i) through (iv); and

(ii) For the purposes of determining the weekly and maximum amounts of basic TRA payable to an individual, with respect to a separation that occurs before, on, or after August 23, 1988, the individual's first (total or partial) separation within the certification period of a certification if, with respect to such separation, the individual meets the requirements of § 617.11(a)(1) (i), (ii) and (iv) or § 617.11(a)(2) (i), (ii) and (iv).

(u) *Head of family* means an individual who maintains a home for a family. An individual maintains a home if over half the cost of maintenance is furnished by the individual or would be furnished but for unemployment.

(v) *Impact date* means the date stated in a certification issued under the Act on which total or partial separations began or threatened to begin in a firm or a subdivision of a firm.

(w) *Job search program* means a job search workshop or job finding club.

(x) *Job search workshop* means a short (1 to 3 days) seminar designed to provide participants with knowledge that will enable the participants to find jobs. Subjects should include, but not be limited to, labor market information, resume writing, interviewing techniques, and techniques for finding job openings.

(y) *Job finding club* means a job search workshop which includes a period of 1 to 2 weeks of structured, supervised activity in which participants attempt to obtain jobs.

(z) *Layoff* means a suspension of or separation from employment by a firm for lack of work, initiated by the employer, and expected to be for a definite or indefinite period of not less than seven consecutive days.

(aa) *Liable State* and *Agent State* are defined as follows:

(1) *Liable State* means, with respect to any individual, the State whose State law is the applicable State law as determined under § 617.16 for all purposes of this Part 617.

(2) *Agent State* means, with respect to any individual, any State other than the State which is the liable State for such individual.

(bb) *On-the-job training* means training provided by an employer to an individual who is employed by the employer.

(cc) *Partial separation* means that during a week ending on or after the impact date specified in the certification under which an adversely affected worker is covered, the individual had:

(1) Hours of work reduced to 80 percent or less of the individual's average weekly hours in adversely affected employment; and

(2) Wages reduced to 80 percent or less of the individual's average weekly wage in such adversely affected employment.

(dd) *Regional Administrator* means the appropriate Regional Administrator of the Employment and Training Administration, United States Department of Labor (hereafter Department).

(ee) *Remuneration* means remuneration as defined in the applicable State law.

(ff) *Secretary* means the Secretary of Labor, U.S. Department of Labor, or his or her designee.

(gg) *Separate maintenance* means maintaining another (second) residence, in addition to the individual's

regular place of residence, while attending a training facility outside the individual's commuting area.

(hh) *State* means the States of the United States, the District of Columbia, and the Commonwealth of Puerto Rico, and the term ''United States'' when used in a geographical sense includes such Commonwealth.

(ii) *State agency* means the State Employment Security Agency; the employment service of the State; any State agency carrying out title III of the Job Training Partnership Act; or any other State or local agency administering job training or related programs with which the Secretary has an agreement to carry out any of the provisions of the Act.

(jj) *State law* means the unemployment compensation law of a State approved by the Secretary under section 3304 of the Internal Revenue Code of 1954 (26 U.S.C. 3304).

(kk) *Suitable work* means, with respect to an individual:

(1) Suitable work as defined in the applicable State law for claimants for regular compensation (as defined in paragraph (oo)(1) of this section); or

(2) Suitable work as defined in applicable State law provisions consistent with section 202(a)(3) of the Federal-State Extended Unemployment Compensation Act of 1970;

whichever is applicable, but does not in any case include self-employment or employment as an independent contractor.

(ll) *Total separation* means a layoff or severance of an individual from employment with a firm in which, or in a subdivision of which, adversely affected employment exists.

(mm) *Trade adjustment assistance* (*TAA*) means the services and allowances provided for achieving reemployment of adversely affected workers, including TRA, training and other reemployment services, and job search allowances and relocation allowances.

(nn) *Trade readjustment allowance* (*TRA*) means a weekly allowance payable to an adversely affected worker with respect to such worker's unemployment under subpart B of this part 617.

(oo) *Unemployment insurance* (*UI*) means the unemployment compensation payable to an individual under any State law or Federal unemployment compensation law, including chapter 85, title 5 of the United States Code, and the Railroad Unemployment Insurance Act. ''UI'' includes ''regular compensation,'' ''additional compensation,'' ''extended compensation,'' and ''federal supplemental compensation,'' defined as follows:

(1) *Regular compensation* means unemployment compensation payable to an individual under any State law, and, when so payable, includes unemployment compensation payable pursuant to chapter 85, title 5 of the United States Code, but does not include extended compensation, additional compensation, or federal supplemental compensation;

(2) *Additional compensation* means unemployment compensation totally financed by a State and payable under a State law by reason of conditions of high unemployment or by reason of other special factors and, when so payable, includes unemployment compensation payable pursuant to chapter 85, title 5 of the United States Code; and

(3) *Extended compensation* means the extended unemployment compensation payable to an individual for weeks of unemployment which begin in an Extended Benefit Period, under those provisions of a State law which satisfy the requirements of the Federal-State Extended Unemployment Compensation Act of 1970 and regulations governing the payment of extended unemployment compensation, and, when so payable, includes unemployment compensation payable pursuant to chapter 85, title 5 of the United States Code, but does not include regular compensation, additional compensation, or federal supplemental compensation. Extended compensation is also referred to in this part 617 as Extended Benefits or EB.

(4) *Federal supplemental compensation* means the supplemental unemployment compensation payable to individuals who have exhausted their rights to regular and extended compensation, and which is payable under the Federal Supplemental Compensation Act of 1982 or any similar Federal law enacted before or after the 1982 Act.

(pp) *Wages* means all compensation for employment for an employer, including commissions, bonuses, and the cash value of all compensation in a medium other than cash.

(qq) *Week* means a week as defined in the applicable State law.

(rr) *Week of unemployment* means a week of total, part total, or partial unemployment as determined under the applicable State law or Federal unemployment compensation law.

[51 FR 45848, Dec. 22, 1986, as amended at 53 FR 32348, Aug. 24, 1988; 59 FR 926, 927, Jan. 6, 1994; 61 FR 19983, May 3, 1996]

§ 617.4 Benefit information to workers.

(a) *Providing information to workers.* State agencies shall provide full information to workers about the benefit allowances, training, and other employment services available under subparts B through E of this part 617 and about the petition and application procedures, and the appropriate filing dates, for such allowances, training and services.

(b) *Providing assistance to workers.* State agencies shall provide whatever assistance is necessary to enable groups of workers, including unorganized workers, to prepare petitions or applications for program benefits.

(c) *Providing information to State vocational education agencies and others.* State agencies shall inform the State Board for Vocational Education or equivalent agency and other public or private agencies, institutions, and employers, as appropriate, of each certification issued under section 223 of the Act and of projections, if available, of the needs for training under section 236 of the Act as a result of such certification.

(d) *Written and newspaper notices.* (1) *Written notices to workers.* (i) Upon receipt of a certification issued by the Department of Labor, the State agency shall provide a written notice through the mail of the benefits available under subparts B through E of this part 617 to each worker covered by a certification issued under section 223 of the Act when the worker is partially or totally separated or as soon as possible after the certification is issued if such workers are already partially or totally separated from adversely affected employment.

(ii) The State agency will satisfy this requirement by obtaining from the firm, or other reliable source, the names and addresses of all workers who were partially or totally separated from adversely affected employment before the certification was received by the agency, and workers who are thereafter partially or totally separated within the certification period. The State agency shall mail a written notice to each such worker of the benefits available under the TAA Program. The notice must include the following information:

(A) Worker group(s) covered by the certification, and the article(s) produced as specified in the copy of the certification furnished to the State agency.

(B) Name and the address or location of workers' firm.

(C) Impact, certification, and expiration dates in the certification document.

(D) Benefits and reemployment services available to eligible workers.

(E) Explanation of how workers apply for TAA benefits and services.

(F) Whom to call to get additional information on the certification.

(G) When and where the workers should come to apply for benefits and services.

(2) *Newspaper notices.* (i) Upon receipt of a copy of a certification issued by the Department affecting workers in a State, the State agency shall publish a notice of such certification in a newspaper of general circulation in areas in which such workers reside. Such a newspaper notice shall not be required to be published, however, in the case of a certification with respect to which the State agency can substantiate, and enters in its records evidence substantiating, that all workers covered by the certification have received written notice required by paragraph (d)(1) of this section.

(ii) A published notice must include the following kinds of information:

(A) Worker group(s) covered by the certification, and the article(s) produced as specified in the copy of the certification furnished to the State agency.

(B) Name and the address or location of workers' firm.

(C) Impact, certification, and expiration dates in the certification document.

(D) Benefits and reemployment services available to eligible workers.

(E) Explanation of how and where workers should apply for TAA benefits and services.

(e) *Advice and assistance to workers.* In addition to the information and assistance to workers as required under paragraphs (a) and (b) of this section, State agencies shall—

(1) Advise each worker who applies for unemployment insurance under the State law of the benefits available under subparts B through E of this part and the procedures and deadlines for applying for such benefits.

(2) Facilitate the early filing of petitions under section 221 of the Act and §617.4(b) for any workers that the agency considers are likely to be eligible for benefits. State agencies shall utilize information received by the State's dislocated worker unit to facilitate the early filing of petitions under section 221 of the Act by workers potentially adversely affected by imports.

(3) Advise each adversely affected worker to apply for training under §617.22(a) before, or at the same time as, the worker applies for trade readjustment allowances under subpart B of this part.

(4) Interview each adversely affected worker, as soon as practicable, regarding suitable training opportunities available to the worker under §617.22(a) and review such opportunities with the worker.

[51 FR 45848, Dec. 22, 1986, as amended at 59 FR 927, Jan. 6, 1994]

Subpart B—Trade Readjustment Allowances (TRA)

§617.10 Applications for TRA.

(a) *Before and after certification.* An individual covered under a certification or a petition for certification may apply to a State agency for TRA. A determination shall be made at any time to the extent necessary to establish or protect an individual's entitlement to TRA or other TAA, but no payment of TRA or other TAA may be made by a State agency until a certification is made and the State agency determines that the individual is covered thereunder.

(b) *Timing of applications.* An initial application for TRA, and applications for TRA for weeks of unemployment beginning before the initial application for TRA is filed, may be filed within a reasonable period of time after publication of the determination certifying the appropriate group of workers under section 223 of the Act. However, an application for TRA for a week of unemployment beginning after the initial application is filed shall be filed within the time limit applicable to claims for regular compensation under the applicable State law. For purposes of this paragraph (b), a reasonable period of time means such period of time as the individual had good cause for not filing earlier, which shall include, but not be limited to, the individual's lack of knowledge of the certification or misinformation supplied the individual by the State agency.

(c) *Applicable procedures.* Applications shall be filed in accordance with this subpart B and on forms which shall be furnished to individuals by the State agency. The procedures for reporting and filing applications for TRA shall be consistent with this part 617 and the Secretary's ''Standard for Claim Filing, Claimant Reporting, Job Finding and Employment Services'', *Employment Security Manual,* part V, sections 5000 *et seq.* (Appendix A of this part).

(d) *Advising workers to apply for training.* State agencies shall advise each worker of the qualifying requirements for entitlement to TRA and other TAA benefits at the time the worker files an initial claim for State UI, and shall advise each adversely affected worker to apply for training under subpart C of this part before, or at the same time, the worker applies for TRA, as required by §617.4(e)(1) and (3).

[51 FR 45848, Dec. 22, 1986, as amended at 59 FR 928, 943, Jan. 6, 1994

§617.11 Qualifying requirements for TRA.

(a) *Basic qualifying requirements for entitlement*—(1) *Prior to November 21,*

1988. To qualify for TRA for any week of unemployment that begins prior to November 21, 1988, an individual must meet each of the following requirements of paragraphs (a)(1) (i) through (vii) of this section:

(i) *Certification.* The individual must be an adversely affected worker covered under a certification.

(ii) *Separation.* The individual's first qualifying separation (as defined in paragraph (t)(3)(i) of §617.3) before application for TRA must occur:

(A) On or after the impact date of such certification; and

(B) Before the expiration of the two-year period beginning on the date of such certification, or, if earlier, before the termination date, if any, of such certification.

(iii) *Wages and employment.* (A) In the 52-week period (i.e., 52 consecutive calendar weeks) ending with the week of the individual's first qualifying separation, the individual must have had at least 26 weeks of employment at wages of $30 or more a week in adversely affected employment with a single firm or subdivision of a firm. Evidence that an individual meets this requirement shall be obtained as provided in §617.12. Employment and wages covered under more than one certification may not be combined to qualify for TRA.

(B)(*1*) For the purposes of paragraph (a)(1)(iii) of this section, any week in which such individual—

(*i*) is on employer-authorized leave from such adversely affected employment for purposes of vacation, sickness, injury, maternity, or inactive duty or active duty military service for training, or

(*ii*) does not work in such adversely affected employment because of a disability compensable under a workers' compensation law or plan of a State or the United States, or

(*iii*) had adversely affected employment interrupted to serve as a full-time representative of a labor organization in such firm or subdivision,

shall be treated as a week of employment at wages of $30 or more;

(*2*) *Provided,* that—

(*i*) not more than 7 weeks in the case of weeks described in paragraph (a)(1)(iii)(B)(*1*)(*i*) or paragraph (a)(1)(*iii*)(B)(*1*)(*iii*) of this section, or both, and (*ii*) not more than 26 weeks described in paragraph (a)(1)(iii)(B)(*1*)(*ii*) of this section,

may be treated as weeks of employment for purposes of paragraph (a)(1)(iii) of this section.

(C) Wages and employment creditable under paragraph (a)(1)(iii) of this section shall not include employment or wages earned or paid for employment which is contrary to or prohibited by any Federal law.

(iv) *Entitlement to UI.* The individual must have been entitled to (or would have been entitled to if the individual had applied therefor) UI for a week within the benefit period—

(A) in which the individual's first qualifying separation occurred, or

(B) which began (or would have begun) by reason of the filing of a claim for UI by the individual after such first qualifying separation.

(v) *Exhaustion of UI.* The individual must:

(A) Have exhausted all rights to any UI to which the individual was entitled (or would have been entitled to if the individual had applied therefor); and

(B) Not have an unexpired waiting period applicable to the individual for any such UI.

(vi) *Extended Benefit work test.* (A) The individual must—

(*1*) Accept any offer of suitable work, as defined in §617.3(kk), and actually apply for any suitable work the individual is referred to by the State agency, and

(*2*) Actively engage in seeking work and furnish the State agency tangible evidence of such efforts each week, and

(*3*) Register for work and be referred by the State agency to suitable work,

in accordance with those provisions of the applicable State law which apply to claimants for Extended Benefits and which are consistent with Part 615 of this Chapter.

(B) The Extended Benefit work test shall not apply to an individual with respect to claims for TRA for weeks of unemployment beginning prior to the filing of an initial claim for TRA, nor for any week which begins before the individual is notified that the individual is covered by a certification issued under the Act and is fully informed of the Extended Benefit work

test requirements of paragraph (a)(1)(vi) of this section and §617.17. Prior to such notification and advice, the individual shall not be subject to the Extended Benefit work test requirements, nor to any State timely filing requirement, but shall be required to be unemployed and able to work and available for work with respect to any such week except as provided for workers in approved training in §617.17(b)(1).

(vii) *Job search program participation.* (A) The individual is enrolled in, participating in, or has successfully completed a job search program which meets the requirements of §617.49(a); or the State agency has determined that no acceptable job search program is reasonably available under the criteria set forth in §617.49(c).

(B) The job search program requirement shall not apply to an individual with respect to claims for TRA for weeks of unemployment beginning prior to the filing of an initial claim for TRA, nor for any week which begins before the individual is notified that the individual is covered by a certification issued under the Act and is fully informed of the job search program requirement of paragraph (a)(1)(vii) of this section and §617.49.

(C) The job search program requirement shall not apply to an individual, as a qualifying requirement for TRA, with respect to any week ending after November 20, 1988, but cooperating State agencies are encouraged to continue to utilize job search programs after November 20, 1988, as an effective tool to assist adversely affected workers in finding suitable employment, particularly unemployed workers who have completed training or for whom the training requirement has been waived under §617.19.

(2) *On and after November 21, 1988.* To qualify for TRA for any week of unemployment that begins on or after November 21, 1988, an individual must meet each of the following requirements of paragraphs (a)(2) (i) through (vii) of this section:

(i) *Certification.* The individual must be an adversely affected worker covered under a certification.

(ii) *Separation.* The individual's first qualifying separation (as defined in paragraph (t)(3)(i) of §617.3) before application for TRA must occur:

(A) On or after the impact date of such certification; and

(B) Before the expiration of the two-year period beginning on the date of such certification, or, if earlier, before the termination date, if any, of such certification.

(iii) *Wages and employment.* (A) In the 52-week period (i.e., 52 consecutive calendar weeks) ending with the week of the individual's first qualifying separation, or any subsequent total qualifying separation under the same certification, the individual must have had at least 26 weeks of employment at wages of $30 or more a week in adversely affected employment with a single firm or subdivision of a firm. Evidence that an individual meets this requirement shall be obtained as provided in §617.12. Employment and wages covered under more than one certification may not be combined to qualify for TRA.

(B)(*1*) For the purposes of paragraph (a)(2)(iii) of this section, any week in which such individual—

(*i*) Is on employer-authorized leave from such adversely affected employment for purposes of vacation, sickness, injury, maternity, or inactive duty or active duty military service for training, or

(*ii*) Does not work in such adversely affected employment because of a disability compensable under a workers' compensation law or plan of a State or the United States, or

(*iii*) Had adversely affected employment interrupted to serve as a full-time representative of a labor organization in such firm or subdivision, or

(*iv*) Is on call-up for the purpose of active duty in a reserve status in the Armed Forces of the United States (if such week began after August 1, 1990), provided such active duty is ''Federal service'' as defined in part 614 of this chapter,

shall be treated as a week of employment at wages of $30 or more;

(*2*) *Provided,* that—

(*i*) Not more than 7 weeks in the case of weeks described in paragraph (a)(2)(iii)(B)(*1*) (*i*) or (*iii*) of this section, or both, and

(*ii*) Not more than 26 weeks described in paragraph (a)(2)(iii)(B)(*1*) (*ii*) or (*iv*) of this section,

may be treated as weeks of employment for purposes of paragraph (a)(2)(iii) of this section.

(C) Wages and employment creditable under paragraph (a)(2)(iii) of this section shall not include employment or wages earned or paid for employment which is contrary to or prohibited by any Federal law.

(iv) *Entitlement to UI.* The individual must have been entitled to (or would have been entitled to if the individual had applied therefor) UI for a week within the benefit period—

(A) in which the individual's first qualifying separation occurred, or

(B) which began (or would have begun) by reason of the filing of a claim for UI by the individual after such first qualifying separation.

(v) *Exhaustion of UI.* The individual must:

(A) Have exhausted all rights to any UI to which the individual was entitled (or would have been entitled if the individual had applied therefor); and

(B) Not have an unexpired waiting period applicable to the individual for any such UI.

(vi) *Extended Benefit work test.* (A) The individual must—

(*1*) Accept any offer of suitable work, as defined in §617.3(kk), and actually apply for any suitable work the individual is referred to by the State agency, and

(*2*) Actively engage in seeking work and furnish the State agency tangible evidence of such efforts each week, and

(*3*) Register for work and be referred by the State agency to suitable work,

in accordance with those provisions of the applicable State law which apply to claimants for Extended Benefits and which are consistent with part 615 of this chapter.

(B) The Extended Benefit work test shall not apply to an individual with respect to claims for TRA for weeks of unemployment beginning prior to the filing of an initial claim for TRA, nor for any week which begins before the individual is notified that the individual is covered by a certification issued under the Act and is fully informed of the Extended Benefit work test requirements of paragraph (a)(2)(vi) of this section and §617.17. Prior to such notification and advice, the individual shall not be subject to the Extended Benefit work test requirements, nor to any State timely filing requirement, but shall be required to be unemployed and able to work and available for work with respect to any such week except as provided in §617.17(b)(2) for workers enrolled in, or participating in, a training program approved under §617.22(a).

(vii) *Participation in training.* (A) The individual must—

(*1*) Be enrolled in or participating in a training program approved pursuant to §617.22(a), or

(*2*) Have completed a training program approved under §617.22(a), after a total or partial separation from adversely affected employment within the certification period of a certification issued under the Act, or

(*3*) Have received from the State agency a written statement under §617.19 waiving the participation in training requirement for the individual.

(B) The participation in training requirement of paragraph (a)(2)(vii) of this section shall not apply to an individual with respect to claims for TRA for weeks of unemployment beginning prior to the filing of an initial claim for TRA, nor for any week which begins before the individual is notified that the individual is covered by a certification issued under the Act and is fully informed of the participation in training requirement of paragraph (a)(2)(vii) of this section and §617.19.

(C) The participation in training requirement of paragraph (a)(2)(vii) of this section shall apply, as a qualifying requirement for TRA, to an individual with respect to claims for TRA for weeks of unemployment commencing on or after November 21, 1988, and beginning with the first week following the week in which a certification covering the individual is issued under the Act, unless the State agency has issued a written statement to the individual under §617.19 waiving the participation in training requirement for the individual.

(D) For purposes of paragraph (a)(2)(vii) of this section, the following definitions shall apply:

(*1*) *Enrolled in Training.* A worker shall be considered to be enrolled in training when the worker's application for training is approved by the State agency and the training institution has furnished written notice to the State agency that the worker has been accepted in the approved training program which is to begin within 30 calendar days of the date of such approval. (A waiver under §617.19 shall not be required for an individual who is enrolled in training as defined herein.)

(*2*) *Completed Training.* A worker shall be considered to have completed a training program if the training program was approved, or was approvable and is approved, pursuant to §617.22, and the training was completed subsequent to the individual's total or partial separation from adversely affected employment within the certification period of a certification issued under the Act, and the training provider has certified that all the conditions for completion of the training program have been satisfied.

(*3*) *Special rules for workers separated in 1981 to 1986 period.* (i) *Basic conditions.* Under section 1425(b) of the Omnibus Trade and Competitiveness Act of 1988 (the ''OTCA'') (Pub. L. 100–418) the time limit on the eligibility period for basic TRA in section 233(a)(2) of the Act (before and after the amendment by Public Law 100–418), and the 210-day time limit in section 233(b) of the Act on the filing of a bona fide application for training in order to qualify for additional TRA, are set aside and shall be disregarded for any individual separated from adversely affected employment in the period which began on August 13, 1981, and ended on April 7, 1986: *Provided,* That, any such individual must meet all of the following requirements of paragraphs (a)(3)(i)(A) through (E) of this section to qualify for TRA for any week.

(A) *Period of separation.* The separation of the individual must have occurred on a date within the period which began on August 13, 1981 and ended on April 7, 1986.

(B) *Total separation required.* Such separation must be a ''total separation'' as defined in §617.3(ll), and a ''total qualifying separation'' as defined in §617.3(t)(3)(i)(B); and, for the purposes of determining whether an individual has been continuously unemployed, as defined in §617.3(t)(3)(i)(E), only the last such total separation within the August 13, 1981 to April 7, 1986 period shall be taken into account.

(C) *Other standard requirements.* The individual must, with respect to such total separation, meet all of the requirements of paragraphs (a)(2)(i) through (v) of this section.

(D) *Participation in training.* (*1*) The individual must meet the requirements of paragraph (a)(2)(vii) of this section, with respect to being enrolled in or participating in a training program approved pursuant to §617.22(a), as to each week TRA is claimed, and not be ineligible under §617.18(b)(2) for failure to begin participation in such training or for ceasing to participate in such training.

(*2*) With respect to participation in training, as required under paragraph (a)(3) of this section, the break in training provisions of §617.15(d) shall be applicable, and the waiver of participation provisions in §617.19 shall not be applicable.

(E) *Continuously unemployed.* (*1*) The individual must have been continuously unemployed since the date of the individual's total separation referred to in paragraph (a)(2)(vii)(B) of this section, not taking into account for the purposes of this determination any work in which the individual was employed in seasonal employment, odd jobs, or part-time, temporary employment.

(*2*) For purposes of §617.11(a)(3)(i)(E)(*1*), continuously unemployed shall mean the individual has not been engaged in any employment, except for seasonal employment, odd-jobs, or part-time, temporary employment. Employment shall be considered:

(*i*) *Seasonal employment* when seasonality provisions of the applicable State law are applicable to such employment; or

(*ii*) An *odd job* when the established period of employment occurs within five (5) consecutive days or less; or

(*iii*) *Part-time, temporary employment* when a termination date of one hundred fifty (150) days or less was established at the time of employment, and the average weekly hours for the job, over the period of employment, was less than 30 hours per week.

(ii) *TRA payments prospective only.* The provisions of paragraph (a)(3) of this section apply to payments of TRA only for weeks which begin after August 23, 1988, and with respect to training in which the individual becomes enrolled and begins participation before or after such date, and which is approved under § 617.22(a) before or after such date. No payment of TRA may be authorized under paragraph (a)(3) of this section for any week which ends before such training is approved under § 617.22(a).

(iii) *Other special rules.* (*1*) Although the last total qualifying separation of an individual will be used for the purposes of the determination under paragraph (a)(3)(i)(B) of this section, the individual's first qualifying separation (as defined in paragraph (t)(3)(ii) of § 617.3) must be used to determine the weekly and maximum amounts payable to the individual in accordance with §§ 617.13 and 617.14.

(*2*) No individual shall be determined to be eligible for TRA under paragraph (a)(3) of this section if the individual has previously received all of the basic and additional TRA to which the individual was entitled.

(*3*) The 26-week eligibility period for additional TRA is applicable under paragraph (a)(3) of this section, as such term is defined in paragraph (m)(2) of § 617.3.

(4) *Special rules for oil and gas workers—retroactive*—(i) *Basic conditions.* Under section 1421(a)(1)(B) of the OTCA, individuals employed by independent firms engaged in exploration or drilling for oil and natural gas who were separated after September 30, 1985, may be entitled, retroactively, to TAA program benefits, but only if, as to any such individual, all of the conditions in the following provisions of paragraph (a)(4) of this section are met.

(ii) *Prior certification.* Individuals covered by this paragraph (a)(4) do not include any individual covered under a certification (made with respect to the same firm or subdivision of a firm) that was issued under section 223 of the Act without regard to the amendments to section 222 of the Act (relating to oil and gas workers) made by section 1421 (a)(1)(A) of the OTCA.

(iii) *Petition.* (A) To apply for a certification under section 223 covering workers referred to in section 1421 (a)(1)(B) of the OTCA, a petition must have been filed in the Office of Trade Adjustment Assistance after August 23, 1988, and on or before November 18, 1988, by or on behalf of a group of workers of such a firm or subdivision of a firm.

(B) A petition, to be valid, may not be signed by or on behalf of an individual referred to in paragraph (a)(4)(ii) of this section.

(iv) *Certification.* (A) As provided in section 1421(a) (1)(B) of the OTCA, a certification issued pursuant to section 223 of the Act will not be subject to the one-year limitation on the impact date which is specified in section 223(b) of the Act, but the impact date of any such certification may not be a date earlier than October 1, 1985.

(B) A certification shall not be issued under the authority of section 1421(a)(1)(B) of the OTCA if a certification could have been issued under section 223 of the Act before or after the amendment made by section 1421(a)(1)(A) of the OTCA.

(v) *Coverage of certification.* Individuals covered by a certification issued under the authority of section 1421(a)(1)(B) of the OTCA will be eligible to apply for TAA program benefits as follows:

(A) Basic and additional TRA, retroactively and prospectively, subject to the conditions stated in paragraph (a)(4) of this section;

(B) Training, prospectively, subject to the conditions stated in subpart C of this part;

(C) Job search allowances, prospectively, subject to the conditions stated in subpart D of this part; and

(D) Relocation allowances, prospectively, subject to the conditions stated in subpart E of this part.

(vi) *TRA entitlement.* To qualify for TRA for any week, an individual must meet all of the following requirements

of paragraphs (a)(4)(vi)(A) through (D) of this section;

(A) *Certification.* The individual must be an adversely affected worker covered under a certification issued pursuant to section 223 of the Act and under the authority of section 1421(a)(1)(B) of the OTCA.

(B) *Date of separation.* The date of the individual's most recent total separation (as defined in §617.3) must be a date after September 30, 1985, and within the certification period of the certification under which the worker is covered. Separations occurring prior to October 1, 1985, shall be disregarded for the purposes of determining whether an individual experienced a total separation after September 30, 1985.

(C) *Other standard requirements.* (*1*) With respect to weeks of unemployment that begin after September 30, 1985, but prior to November 21, 1988, the individual must, with respect to the separation referred to in paragraph (a)(4)(vi)(B) of this section, meet all of the requirements of paragraph (a)(1)(i) through (vii) of this section, and

(*2*) With respect to weeks of unemployment that begin on or after November 21, 1988, the individual must meet all of the requirements of paragraphs (a)(2)(i) through (vii) of this section.

(D) *Other special rules.* (*1*) Although an individual's most recent total or partial separation after September 30, 1985 must be used for the purposes of this paragraph (a)(4)(vi)(B) of this section, the individual's first qualifying separation (as defined in paragraph (t)(3)(ii) of §617.3) must be used to determine the weekly and maximum amounts payable to the individual in accordance with §§617.13 and 617.14.

(*2*) The 60-day preclusion rule in paragraph (b)(1) of this section shall not be applicable to an individual covered by a certification referred to in paragraph (a)(4)(vi)(A) of this section, and who is eligible for TRA under the provisions of paragraph (a)(4) of this section.

(*3*) The 26-week eligibility period for additional TRA (as defined in paragraph (m)(2) of §617.3) is applicable under paragraph (a)(4) of this section.

(b) *First week of entitlement.* The first week any individual may be entitled to a payment of basic TRA shall be the later of:

(1) The first week beginning more than 60 days after the date of the filing of the petition which resulted in the certification under which the individual is covered (except in the case of oil and gas workers to whom paragraph (a)(4) of this section applies); or

(2) The first week beginning after the individual's exhaustion of all rights to UI including waiting period credit, as determined under §617.11(a)(1)(v) or §617.11(a)(2), as appropriate.

[59 FR 928, Jan. 6, 1994]

§617.12 Evidence of qualification.

(a) *State agency action.* When an individual applies for TRA, the State agency having jurisdiction under §617.50(a) shall obtain information necessary to establish:

(1) Whether the individual meets the qualifying requirements in §617.11;

(2) The individual's average weekly wage; and

(3) For an individual claiming to be partially separated, the average weekly hours and average weekly wage in adversely affected employment.

(b) *Insufficient data.* If information specified in paragraph (a) of this section is not available from State agency records or from any employer, the State agency shall require the individual to submit a signed statement setting forth such information as may be required for the State agency to make the determinations required by paragraph (a) of this section.

(c) *Verification.* A statement made under paragraph (b) of this section shall be certified by the individual to be true to the best of the individual's knowledge and belief and shall be supported by evidence such as Forms W–2, paycheck stubs, union records, income tax returns, or statements of fellow workers, and shall be verified by the employer.

(d) *Determinations.* The State agency shall make the necessary determinations on the basis of information obtained pursuant to this section, except that if, after reviewing information obtained under paragraph (b) of this section against other available data, including agency records, it concludes

that such information is not reasonably accurate, it shall make appropriate adjustments and shall make the determination on the basis of the adjusted data.

§ 617.13 Weekly amounts of TRA.

(a) *Regular allowance.* The amount of TRA payable for a week of total unemployment (including a week of training approved under subpart C of this part 617 or under the provisions of the applicabIe State law) shall be an amount equal to the most recent weekly benefit amount of UI (including dependents' allowances) payable to the individual for a week of total unemployment preceding the individual's first exhaustion of UI following the individual's first qualifying separation: *Provided,* that in a State in which weeks of UI are paid in varying amounts related to wages with separate employers, the weekly amount of TRA shall be calculated as it would be to pay extended compensation: *Provided, further,* that where a State calculates a base amount of UI and calculates dependents' allowances on a weekly supplemental basis. TRA weekly benefit amounts shall be calculated in the same manner and under the same terms and conditions as apply to claimants for UI, except that the base amount shall not change.

(b) *Increased allowance.* An individual in training approved under subpart C of this part 617 who is thereby entitled for any week to TRA and a training allowance under any other Federal law for the training of workers shall be paid in the amount computed under paragraph (a) of this section or, if greater, the amount to which the individual would be entitled under such other Federal law if the individual applied for such allowance, as provided in section 232(b) of the Act. A payment under this paragraph (b) shall be in lieu of any training allowance to which the individual is entitled under such other Federal law.

(c) *Reduction of amount.* An amount of TRA payabIe under paragraph (a) or (b) of this section for any week shall be reduced (but not below zero) by:

(1) Income that is deductible from UI under the disqualifying income provisions of the applicable State law or Federal unemployment compensation law;

(2) The amount of a training allowance (other than a training allowance referred to in paragraph (b) of this section) under any Federal law that the individual receives for such week, as provided in section 232(c) of the Act. This paragraph (c) shall apply to Veterans Educational Assistance, Pell Grants, Supplemental Educational Opportunity Grants, and other training allowances under any Federal law other than for the training of workers; and

(3) Any amount that would be deductible from UI for days of absence from training under the provisions of the applicable State law which apply to individuals in approved training.

[51 FR 45848, Dec. 22, 1986, as amended at 53 FR 32349, Aug. 24, 1988]

§ 617.14 Maximum amount of TRA.

(a) *General rule.* Except as provided under paragraph (b) of this section, the maximum amount of TRA payable to an individual under a certification shall be the amount determined by:

(1) Multiplying by 52 the weekly amount of TRA payable to such individual for a week of total unemployment, as determined under §617.13(a); and

(2) Subtracting from the product derived under paragraph (a)(1) of this section, the total sum of UI to which the individual was entitled (or would have been entitled if the individual had applied therefor) in the individual's first benefit period described in §617.11(a)(1)(iv) or, as appropriate, §617.11(a)(2)(iv). The individual's full entitlement shall be subtracted under this paragraph, without regard to the amount, if any, that was actually paid to the individual with respect to such benefit period.

(b) *Exceptions.* The maximum amount of TRA determined under paragraph (a) of this section will not include:

(1) The amount of dependents' allowances paid as a supplement to the base weekly amount determined under §617.13(a);

(2) The amount of the difference between the individual's weekly increased allowances determined under §617.13(b) and the individual's weekly

amount determined under §617.13(a); and

(3) The amounts paid for additional weeks determined under §617.15(b);

but nothing in this paragraph (b) shall affect an individual's eligibility for such supplemental, increased or additional allowances.

(c) *Reduction for Federal training allowance.* (1) If a training allowance referred to in §617.13(c)(2) is paid to an individual for any week of unemployment with respect to which the individual would be entitled (determined without regard to any disqualification under §617.18(b)(2)) to TRA, if the individual applied for TRA for such week, each week shall be deducted from the total number of weeks of TRA otherwise payable to the individual.

(2) If the training allowance referred to in paragraph (c)(1) of this section is less than the amount of TRA otherwise payable to the individual for such week, the individual shall, when the individual applies for TRA for such week, be paid TRA in an amount not to exceed the amount equal to the difference between the individual's regular weekly TRA amount, as determined under §617.13(a), and the amount of the training allowance paid to the individual for such week, as provided in section 232(c) of the Act.

[51 FR 45848, Dec. 22, 1986, as amended at 53 FR 32349, Aug. 24, 1988; 54 FR 22277, May 23, 1989; 59 FR 931, Jan. 6, 1994]

§617.15 Duration of TRA.

(a) *Basic weeks.* An individual shall not be paid basic TRA for any week beginning after the close of the 104-week eligibility period (as defined in §617.3(m)(1)), which is applicable to the individual as determined under §§617.3(m)(1), 617.3(t), and 617.67(e).

(b) *Additional weeks.* (1) To assist an individual to complete training approved under subpart C of this part, payments may be made as TRA for up to 26 additional weeks in the 26-week eligibility period (as defined in §617.3(m)(2)) which is applicable to the individual as determined under §§617.3(m)(2) and 617.67(f).

(2) To be eligible for TRA for additional weeks, an individual must make a bona fide application for such training—

(i) within 210 days after the date of the first certification under which the individual is covered, or

(ii) if later, within 210 days after the date of the individual's most recent partial or total separation (as defined in §§617.3(cc) and 617.3(ll)) under such certification.

(3) Except as provided in paragraph (d) of this section, payments of TRA for additional weeks may be made only for those weeks in the 26-week eligibility period during which the individual is actually participating fully in training approved under §617.22(a).

(c) *Limit.* The maximum TRA payable to any individual on the basis of a single certification is limited to the maximum amount of basic TRA as determined under §617.14 plus additional TRA for up to 26 weeks as provided in paragraph (b) of this section.

(d) *Scheduled breaks in training.* (1) An individual who is otherwise eligible will continue to be eligible for basic and additional weeks of TRA during scheduled breaks in training, but only if a scheduled break is not longer than 14 days, and the following additional conditions are met:

(i) The individual was participating in the training approved under §617.22(a) immediately before the beginning of the break; and

(ii) The break is provided for in the published schedule or the previously established schedule of training issued by the training provider or is indicated in the training program approved for the worker; and, further

(iii) The individual resumes participation in the training immediately after the break ends.

(2) A scheduled break in training shall include all periods within or between courses, terms, quarters, semesters and academic years of the approved training program.

(3) No basic or additional TRA will be paid to an individual for any week which begins and ends within a scheduled break that is 15 days or more.

(4) The days within a break in a training program that shall be counted in determining the number of days of the break for the purposes of paragraph (d) of this section shall include all calendar days beginning with the first day of the break and ending with the last

day of the break, as provided for in the schedule of the training provider, except that any Saturday, Sunday, or official State or National holiday occurring during the scheduled break in training, on which training would not normally be scheduled in the training program if there were no break in training, shall not be counted in determining the number of days of the break for the purposes of paragraph (d) of this section.

(5) When the worker is drawing basic TRA, the maximum amount of TRA payable is not affected by the weeks the worker does not receive TRA while in a break period, but the weeks will count against the 104-week eligibility period.

(6) When the worker is drawing additional weeks of TRA to complete training, any weeks for which TRA is not paid will count against the continuous 26-week eligibility period and the number of weeks payable.

[59 FR 931, Jan. 6, 1994]

§ 617.16 Applicable State law.

(a) *What law governs.* The applicable State law for any individual, for all of the purposes of this part 617, is the State law of the State—

(1) In which the individual is entitled to UI (whether or not the individual has filed a claim therefor) immediately following the individual's first separation (as defined in paragraph (t)(1) of § 617.3), or

(2) If the individual is not so entitled to UI under the State law of any State immediately following such first separation, or is entitled to UI under the Railroad Unemployment Insurance Act (RRUI), the State law of the State in which such first separation occurred.

(b) *Change of law.* The State law determined under paragraph (a) of this section to be the applicable State law for an individual shall remain the applicable State law for the individual until the individual becomes entitled to UI under the State law of another State (whether or not the individual files a claim therefor).

(c) *UI entitlement.* (1) An individual shall be deemed to be entitled to UI under a State law if the individual satisfies the base period employment and wage qualifying requirements of such State law.

(2) In the case of a combined-wage claim (Part 616 of this chapter), UI entitlement shall be determined under the law of the paying State.

(3) In case of a Federal UI claim, or a joint State and Federal UI claim (Parts 609 and 614 of this Chapter), UI entitlement shall be determined under the law of the State which is the applicable State for such claims.

(d) *RRUI claimants.* If an individual is entitled to UI under the Railroad Unemployment Insurance Act, the applicable State law for purposes of paragraphs (a) and (b) of this section is the law of the State in which the individual's first qualifying separation occurs.

(e) *Liable State.* The State whose State law is determined under this section to be the applicable State law for any individual shall be the liable State for the individual for all purposes of this part 617. Any State other than the liable State shall be an agent State.

[59 FR 932, Jan. 6, 1994]

§ 617.17 Availability and active search for work.

(a) *Extended Benefit work test applicable.* Except as provided in paragraph (b) of this section, an individual shall, as a basic condition of entitlement to basic TRA for a week of unemployment—

(1) be unemployed, as defined in the applicable State law for UI claimants, and

(2) be able to work and available for work, as defined in the applicable State law for UI claimants, and

(3) satisfy the Extended Benefit work test in each week for which TRA is claimed, as set forth in §§ 617.11(a)(1)(vi) and 617.11(a)(2)(vi).

(b) *Exceptions*—(1) *Prior to November 21, 1988.* The conditions stated in paragraphs (a) and (b) of this section shall not be applicable to an individual actually participating in training approved under the applicable State law or under § 617.22(a), or during a scheduled break in the training program if (as determined for the purposes of § 617.15 (d)) the individual participated in the training immediately before the beginning of the break and resumes participation in the training immediately

after the break ends, unless the individual is ineligible or subject to disqualification under the applicable State law or § 617.18 (b)(2).

(2) *On and after November 21, 1988.* The conditions stated in paragraphs (a)(2) and (a)(3) of this section shall not be applicable to an individual who is enrolled in or participating in a training program approved under § 617.22 (a), or during a break in the training program if (as determined for the purposes of § 617.15(d)) the individual participated in the training immediately before the beginning of the break and resumes participation in the training immediately after the break ends.

[59 FR 932, Jan. 6, 1994]

§ 617.18 Disqualifications.

(a) *State law applies.* Except as stated in paragraph (b) of this section and § 617.55(b), an individual shall not be paid TRA for any week of unemployment the individual is or would be disqualified to receive UI under the disqualification provisions of the applicable State law, including the provisions of the applicable State law which apply to EB claimants and which are consistent with section 202(a)(3) of the Federal-State Extended Unemployment Compensation Act of 1970.

(b) *Disqualification of trainees*—(1) *State law inapplicable.* A State law shall not be applied to disqualify an individual from receiving either UI or TRA because the individual:

(i) Is enrolled in or is participating in a training program approved under § 617.22(a); or

(ii) Refuses work to which the individual has been referred by the State agency, if such work would require the individual to discontinue training, or if added to hours of training would occupy the individual more than 8 hours a day or 40 hours a week, except that paragraph (b)(1)(ii) of this section shall not apply to an individual who is ineligible under paragraph (b)(2) of this section; or

(iii) Quits work, if the individual was employed in work which was not suitable (as defined in § 617.22(a)(1)), and it was reasonable and necessary for the individual to quit work to begin or continue training approved for the individual under § 617.22(a).

(2) *Trainees ineligible.* (i) An individual who, without justifiable cause, fails to begin participation in a training program which is approved under § 617.22(a), or ceases to participate in such training, or for whom a waiver is revoked pursuant to § 617.19(c), shall not be eligible for basic TRA, or any other payment under this part 617, for the week in which such failure, cessation, or revocation occurred, or any succeeding week thereafter until the week in which the individual begins or resumes participation in a training program that is approved under § 617.22(a).

(ii) For purposes of this section and other provisions of this Part 617, the following definitions shall be used:

(A) *Failed to begin participation.* A worker shall be determined to have failed to begin participation in a training program when the worker fails to attend all scheduled training classes and other training activities in the first week of the training program, without justifiable cause.

(B) *Ceased participation.* A worker shall be determined to have ceased participation in a training program when the worker fails to attend all scheduled training classes and other training activities scheduled by the training institution in any week of the training program, without justifiable cause.

(C) *Justifiable cause.* For the purposes of paragraph (b)(2) of this section, the term ''justifiable cause'' means such reasons as would justify an individual's conduct when measured by conduct expected of a reasonable individual in like circumstances, including but not limited to reasons beyond the individual's control and reasons related to the individual's capability to participate in or complete an approved training program.

(c) *Disqualification while in OJT.* In no case may an individual receive TRA for any week with respect to which the worker is engaged in on-the-job training.

[51 FR 45848, Dec. 22, 1986, as amended at 53 FR 32350, Aug. 24, 1988; 59 FR 932, Jan. 6, 1994]

§ 617.19 Requirement for participation in training.

(a) *In general*—(1) *Basic requirement.* (i) All individuals otherwise entitled to

basic TRA, for all weeks beginning on and after November 21, 1988, must either be enrolled in or participating in a training program approved under §617.22(a), or have completed a training program approved under §617.22(a), as provided in §617.11(a)(2)(vii), in order to be entitled to basic TRA payments for any such week (except for continuation of payments during scheduled breaks in training of 14 days or less under the conditions stated in §617.15(d)). The training requirement of paragraph (a)(1)(i) of this section shall be waived in writing on an individual basis, solely in regard to entitlement to basic TRA, if approval of training for the individual is not feasible or is not appropriate, as determined in accordance with paragraph (a)(2) of this section.

(ii) As a principal condition of entitlement to additional TRA payments, all individuals must actually be participating in a training program approved under §617.22(a), for all weeks beginning before November 21, 1988, and for all weeks beginning on and after November 21, 1988 (except for continuation of payments during breaks in training under the conditions stated in §617.15(d)). Paragraph (a)(2) of this section is not applicable in regard to additional TRA, and the participation in training requirement of paragraph (a)(1)(ii) of this section may not be waived under any circumstances.

(2) *Waiver of participation requirement.* When it is determined, in accordance with paragraph (a)(2) of this section, that it is not feasible or is not appropriate (as such terms are defined in paragraph (b) of this section) to approve a training program for an individual otherwise entitled to basic TRA, the individual shall be furnished a formal written notice of waiver, with an explanation of the reason(s) for the waiver and a statement of why training is not feasible or is not appropriate in the case of such individual. At a minimum, the written statement furnished to the individual shall contain information required by §617.50(e) as well as the following information:

(i) Name and social security number of the individual;

(ii) Petition number under which the worker was certified;

(iii) A statement why the agency has determined that it is not feasible or is not appropriate to approve training for the individual at that time, and the reason(s) for the finding;

(iv) A statement that the waiver will be revoked at any time that feasible and appropriate training becomes available;

(v) Any other advice or information the State agency deems appropriate in informing the individual;

(vi) Signature block (with signature) for the appropriate State official; and

(vii) Signature block (with signature) for the worker's acknowledgement of receipt.

(3) *Denial of a waiver.* In any case in which a determination is made to deny to any individual a waiver of the participation requirement, the individual shall be furnished a formal written notice of denial of waiver, which shall contain all of the information required of formal written notices under paragraph (a)(2) of this section.

(4) *Procedure.* Any determination under paragraph (a)(2) or paragraph (a)(3) of this section shall be a determination to which §§617.50 and 617.51 apply, including the requirement that any written notice furnished to an individual shall include notice of the individual's appeal rights as is provided in §617.50(e).

(b) *Reasons for issuing a waiver.* (1) For the purposes of paragraphs (a)(2) and (a)(3) of this section, a waiver of the participation in training requirement shall be issued to an individual only upon a supported finding that approval of a §617.22(a) training program for that individual is not feasible or is not appropriate at that time.

(i) *Feasible and appropriate.* For the purposes of this section:

(A) *Feasible.* The term *feasible* means:

(*1*) training is available at that time which meets all the criteria of §617.22(a);

(*2*) the individual is so situated as to be able to take full advantage of the training opportunity and complete the training; and

(*3*) funding is available to pay the full costs of the training and any transportation and subsistence expenses which are compensable.

The funding referred to in paragraph (b)(1)(i)(A)(*3*) of this section includes not only TAA program funds but also all other funds available under any of the provisions of the Job Training Partnership Act (including Title III) or any other Federal, State or private source that may be utilized for training approvable under §617.22(a). Further, the individual's situation in respect to undertaking training (as referred to in paragraph (b)(1)(i)(A)(*2*) of this section) shall include taking into account personal circumstances that preclude the individual from being able to participate in and complete the training program, such as the availability of transportation, the ability to make arrangements for necessary child care, and adequate financial resources if the weeks of training exceeds the duration of UI and TRA payments.

(B) *Appropriate.* The term *appropriate* means being suitable or compatible, fitting, or proper. Appropriate, therefore, refers to suitability of the training for the worker (including whether there is a reasonable prospect which is reasonably foreseeable that the individual will be reemployed by the firm from which separated), and compatibility of the training for the purposes of the TAA Program. In these respects, suitability of training for the individual is encompassed within the several criteria in §617.22 (a), and compatibility with the program is covered by the various provisions of subpart C of this part which describe the types of training approvable under §617.22(a) and the limitations thereon.

(ii) *Basis for application.* Whether training is feasible or appropriate at any given time is determined by finding whether, at that time, training suitable for the worker is available, the training is approvable under subpart C of this part including the criteria in §617.22(a), the worker is so situated as to be able to take full advantage of the training and satisfactorily complete the training, full funding for the training is available from one or more sources in accordance with §§617.24 and 617.25, the worker has the financial resources to complete the training when the duration of the training program exceeds the worker's eligibility for TRA, and the training will commence within 30 days of approval.

(2) *Particular applications.* The reasons for any determination that training is not feasible or is not appropriate shall be in accord with the following:

(i) *Not feasible* because—

(A) The beginning date of approved training is beyond 30 days, as required by the definition for ''Enrolled in training'' in §617.11(a)(2)(vii)(D),

(B) Training is not reasonably available to the individual,

(C) Training is not available at a reasonable cost,

(D) Funds are not available to pay the total costs of training, or

(E) Personal circumstances such as health or financial resources, preclude participation in training or satisfactory completion of training,

(F) Other (explain).

(ii) *Not appropriate* because—

(A)(*1*) The firm from which the individual was separated plans to recall the individual within the reasonably foreseeable future (State agencies must verify planned recalls with the employer),

(*2*) *Planned recall.* For the purpose of determining whether the recall or reemployment of an individual is reasonably foreseeable (for the purposes of this section and §617.22), either a specific or general type of recall (as set out) shall be deemed to be sufficient.

(*i*) *Specific recall.* A specific recall is where an individual or group of individuals who was separated from employment is identified and notified by the employer to return to work within a specified time period.

(*ii*) *General recall.* A general recall is where the employer announces an intention to recall an individual or group of individuals, or by other action reasonably signals an intent to recall, without specifying any certain date or specific time period.

(*iii*) *Reasonably foreseeable.* For purposes of determining whether training should be denied and a training waiver granted, because of a planned recall that is reasonably foreseeable, such a planned recall includes a specific recall and also includes a general recall (as defined in paragraph (b)(2)(ii)(A)(*2*) of this section) if the general recall in

each individual's case is reasonably expected to occur before the individual exhausts eligibility for any regular UI payments for which the individual is or may become entitled. A general recall, in which the timing of the recall is reasonably expected to occur after the individual's exhaustion of any regular UI to which the individual is or may become entitled, shall not be treated as precluding approval of training, but shall be treated as any other worker separation for these purposes.

(B) The duration of training suitable for the individual exceeds the individual's maximum entitlement to basic and additional TRA payments and the individual cannot assure financial responsibility for completing the training program,

(C) The individual possesses skills for ''suitable employment'' and there is a reasonable expectation of employment in the foreseeable future, or

(D) Other (explain).

(3) *Waivers and able and available.* An individual who has been furnished a written notice of waiver under paragraph (a)(2) of this section (or denial of waiver under paragraph (a)(3) of this section) shall be subject to all of the requirements of §617.17(a), which shall continue until the individual is enrolled in a training program as required by paragraph (a)(2)(vii) of §617.11.

(c) *Waiver review and revocations.* (1) State agencies must have a procedure for reviewing regularly (i.e., every 30 days or less) all waivers issued under this section to individuals, to ascertain that the conditions upon which the waivers were granted continue to exist. In any case in which the conditions have changed—i.e., training has become feasible and appropriate—then the waiver must be revoked, and a written notice of revocation shall be furnished to the individual involved.

(2) In addition to the periodic reviews required by paragraph (c)(1) of this section, State agencies must have a procedure for revoking waivers in individual cases promptly whenever a change in circumstances occurs. For example, a written notice of revocation shall be issued to the individual concurrent with the approval of the training in which the individual has enrolled (if such training is scheduled to commence within 30 days), and shall not be issued prior to such approval.

(3) State agencies may incorporate a revocation section in the waiver form or on a separate revocation form. Any determination under paragraph (c) of this section shall be a determination to which §§617.50 and 617.51 apply. The information included in a written notice of revocation issued under this paragraph (c) shall include all of the information required for written notices issued under paragraph (a)(2) of this section.

(d) *Recordkeeping and reporting.* (1) State agencies must develop procedures for compiling and reporting on the number of waivers issued and revoked, by reason, as specified in paragraphs (b) and (c) of this section, and report such data to the Department of Labor as requested by the Department.

(2) State agencies are not required to forward copies of individual waiver and revocation notices to the Department of Labor, unless specifically requested by the Department. However, each State agency shall retain a copy of every individual waiver and revocation notice issued by the State, for such period of time as the Department requires.

(Approved by the Office of Management and Budget under control number 1205–0016)

[59 FR 932, Jan. 6, 1994]

Subpart C—Reemployment Services

§ 617.20 Responsibilities for the delivery of reemployment services.

(a) *State agency referral.* Cooperating State agencies shall be responsible for:

(1) Advising each adversely affected worker to apply for training with the State agency responsible for reemployment services, while the worker is receiving UI payments, and at the time the individual files an initial claim for TRA; and

(2) Referring each adversely affected worker to the State agency responsible for training and other reemployment services in a timely manner.

(b) *State agency responsibilities.* The responsibilities of cooperating State

agencies under subpart C of this part include, but are not limited to:

(1) Interviewing each adversely affected worker regarding suitable training opportunities reasonably available to each individual under subpart C of this part, reviewing such opportunities with each individual, informing each individual of the requirement for participation in training as a condition for receiving TRA, and accepting each individual's application for training. Such training may be approved for any adversely affected worker at any time after a certification is issued and the worker is determined to be covered without regard to whether the worker has exhausted all rights to unemployment insurance;

(2) Registering adversely affected workers for work;

(3) Informing adversely affected workers of the reemployment services and allowances available under the Act and this Part 617, the application procedures, the filing date requirements for such reemployment services and the training requirement for receiving TRA;

(4) Determining whether suitable employment, as defined in § 617.22(a)(1), is available;

(5) Providing counseling, testing, placement, and supportive services;

(6) Providing or procuring self-directed job search training, when necessary;

(7) Providing training, job search and relocation assistance;

(8) Developing a training plan with the individual;

(9) Determining which training institutions offer training programs at a reasonable cost and with a reasonable expectation of employment following the completion of such training, and procuring such training;

(10) Documenting the standards and procedures used to select occupations and training institutions in which training is approved;

(11) Making referrals and approving training programs;

(12) Monitoring the progress of workers in approved training programs;

(13) Developing, and periodically reviewing and updating reemployment plans for adversely affected workers;

(14) Developing and implementing a procedure for reviewing training waivers and revocations at least every 30 days to determine whether the conditions under which they are issued have changed; and

(15) Coordinating the administration and delivery of employment services, benefits, training, and supplemental assistance for adversely affected workers with programs under the Act and under Title III of the Job Training Partnership Act.

[59 FR 934, Jan. 6, 1994]

§ 617.21 Reemployment services and allowances.

Reemployment services and allowances shall include, as appropriate, the services and allowances as set forth in this section, provided that those services included within the scope of paragraphs (a) through (e) of this section shall be provided for under any other Federal law other than the Act.

(a) *Employment registration.* To ensure, so far as practical, that individuals are placed in jobs which utilize their highest skills and that applicants qualified for job openings are appropriately referred, applications for registration shall be taken on adversely affected workers who apply for reemployment services.

(b) *Employment counseling.* When local job opportunities are not readily available, counseling shall be used to assist individuals to gain a better understanding of themselves in relation to the labor market so that they can more realistically choose or change an occupation or make a suitable job adjustment.

(c) *Vocational testing.* Testing shall be used to determine which individual skills or potentials can be developed by appropriate training.

(d) *Job development.* A State agency shall develop jobs for individuals by soliciting job interviews from public or private employers and shall work with potential employers to customize or restructure particular jobs to meet individual needs.

(e) *Supportive services.* Supportive services shall be provided so individuals can obtain or retain employment or participate in employment and training programs leading to eventual

placement in permanent employment. Such services may include work orientation, basic education, communication skills, child care, and any other services necessary to prepare an individual for full employment in accordance with the individual's capabilities and employment opportunities.

(f) *On-the-job training (OJT).* OJT is training, in the public or private sector, and may be provided to an individual who meets the conditions for approval of training, as provided in §617.22(a), and who has been hired by the employer, while the individual is engaged in productive work which provides knowledge or skills essential to the full and adequate performance of the job.

(g) *Classroom training.* This training activity is any training of the type normally conducted in a classroom setting, including vocational education, and may be provided to individuals when the conditions for approval of training are met, as provided in §617.22(a), to impart technical skills and information required to perform a specific job or group of jobs. Training designed to enhance the employability of individuals by upgrading basic skills, through the provision of courses such as remedial education or English-as-a-second-language, shall be considered as remedial education approvable under §617.22(a) if the criteria for approval of training under §617.22(a) are met.

(h) *Self-directed job search.* Self-directed job search programs shall be initiated to assist individuals in developing skills and techniques for finding a job. Such programs vary in design and operation and call for a carefully structured approach to individual needs. There are basic elements or activities common to all approaches. These include:

(1) *Job search workshop.* A short (1–3 days) seminar designed to provide participants with knowledge on how to find jobs, including labor market information, applicant resume writing, interviewing techniques, and finding job openings.

(2) *Job finding club.* Encompasses all elements of the Job Search Workshop plus a period (1–2 weeks) of structured, supervised application where participants actually seek employment.

(i) *Job search allowances.* The individual, if eligible, shall be provided job search allowances under subpart D of this part 617 to defray the cost of seeking employment outside of the commuting area.

(j) *Relocation allowances.* The individual, if eligible, shall be provided relocation allowances under subpart E of this part 617 to defray the cost of moving to a new job outside of the commuting area.

[51 FR 45848, Dec. 22, 1986, as amended at 59 FR 934, Jan. 6, 1994]

§ 617.22 Approval of training.

(a) *Conditions for approval.* Training shall be approved for an adversely affected worker if the State agency determines that:

(1) *There is no suitable employment (which may include technical and professional employment) available for an adversely affected worker.*

(i) This means that for the worker for whom approval of training is being considered under this section, no suitable employment is available at that time for that worker, either in the commuting area, as defined in §617.3(k), or outside the commuting area in an area in which the worker desires to relocate with the assistance of a relocation allowance under subpart E of this part, and there is no reasonable prospect of such suitable employment becoming available for the worker in the foreseeable future. For the purposes of paragraph (a)(1) of this section only, the term ''suitable employment'' means, with respect to a worker, work of a substantially equal or higher skill level than the worker's past adversely affected employment, and wages for such work at not less that 80 percent of the worker's average weekly wage.

(2) *The worker would benefit from appropriate training.* (i) This means that there is a direct relationship between the needs of the worker for skills training or remedial education and what would be provided by the training program under consideration for the worker, and that the worker has the mental and physical capabilities to undertake, make satisfactory progress in, and complete the training. This includes

the further criterion that the individual will be job ready on completion of the training program.

(3) *There is a reasonable expectation of employment following completion of such training.* (i) This means that, for that worker, given the job market conditions expected to exist at the time of the completion of the training program, there is, fairly and objectively considered, a reasonable expectation that the worker will find a job, using the skills and education acquired while in training, after completion of the training. Any determination under this criterion must take into account that ''a reasonable expectation of employment'' does not require that employment opportunities for the worker be available, or offered, immediately upon the completion of the approved training. This emphasizes, rather than negates, the point that there must be a fair and objective projection of job market conditions expected to exist at the time of completion of the training.

(4) *Training approved by the Secretary is reasonably available to the worker from either governmental agencies or private sources (which may include area vocational education schools, as defined in section 195(2) of the Vocational Education Act of 1963, and employers).* (i) This means that training is reasonably accessible to the worker within the worker's commuting area at any governmental or private training (or education) provider, particularly including on-the-job training with an employer, and it means training that is suitable for the worker and meets the other criteria in paragraph (a) of this section. It also means that emphasis must be given to finding accessible training for the worker, although not precluding training outside the commuting area if none is available at the time within the worker's commuting area. Whether the training is within or outside the commuting area, the training must be available at a reasonable cost as prescribed in paragraph (a)(6) of this section.

(ii) In determining whether or not training is reasonably available, first consideration shall be given to training opportunities available within the worker's normal commuting area. Training at facilities outside the worker's normal commuting area should be approved only if such training is not available in the area or the training to be provided outside the normal commuting area will involve less charges to TAA funds.

(5) *The worker is qualified to undertake and complete such training.* (i) This emphasizes the worker's personal qualifications to undertake and complete approved training. Evaluation of the worker's personal qualifications must include the worker's physical and mental capabilities, educational background, work experience and financial resources, as adequate to undertake and complete the specific training program being considered.

(ii) Evaluation of the worker's financial ability shall include an analysis of the worker's remaining weeks of UI and TRA payments in relation to the duration of the training program. If the worker's UI and TRA payments will be exhausted before the end of the training program, it shall be ascertained whether personal or family resources will be available to the worker to complete the training. It must be noted on the worker's record that financial resources were discussed with the worker before the training was approved.

(iii) When adequate financial resources will not be available to the worker to complete a training program which exceeds the duration of UI and TRA payments, the training shall not be approved and consideration shall be given to other training opportunities available to the worker.

(6) *Such training is suitable for the worker and available at a reasonable cost.* (i) Such training means the training being considered for the worker. Suitable for the worker means that paragraph (a)(5) of this section is met and that the training is appropriate for the worker given the worker's capabilities, background and experience.

(ii) Available at a reasonable cost means that training may not be approved at one provider when, all costs being considered, training substantially similar in quality, content and results can be obtained from another provider at a lower total cost within a similar time frame. It also means that training may not be approved when the

costs of the training are unreasonably high in comparison with the average costs of training other workers in similar occupations at other providers. This criterion also requires taking into consideration the funding of training costs from sources other than TAA funds, and the least cost to TAA funding of providing suitable training opportunities to the worker. Greater emphasis will need to be given to these elements in determining the reasonable costs of training, particularly in view of the requirements in §617.11(a)(2) and (3) that TRA claimants be enrolled in and participate in training.

(iii) For the purpose of determining reasonable costs of training, the following elements shall be considered:

(A) Costs of a training program shall include tuition and related expenses (books, tools, and academic fees), travel or transportation expenses, and subsistence expenses;

(B) In determining whether the costs of a particular training program are reasonable, first consideration must be given to the lowest cost training which is available within the commuting area. When training, substantially similar in quality, content and results, is offered at more than one training provider, the lowest cost training shall be approved; and

(C) Training at facilities outside the worker's normal commuting area that involves transportation or subsistence costs which add substantially to the total costs shall not be approved if other appropriate training is available.

(b) *Allowable amounts for training.* In approving a worker's application for training, the conditions for approval in paragraph (a) of this section must be found to be satisfied, including assurance that the training is suitable for the worker, is at the lowest reasonable cost, and will enable the worker to obtain employment within a reasonable period of time. An application for training shall be denied if it is for training in an occupational area which requires an extraordinarily high skill level and for which the total costs of the training are substantially higher than the costs of other training which is suitable for the worker.

(c) *Previous approval of training under State law.* Training previously approved for a worker under State law or other authority is not training approved under paragraph (a) of this section. Any such training may be approved under paragraph (a) of this section, if all of the requirements and limitations of paragraph (a) of this section and other provisions of Subpart C of this part are met, but such approval shall not be retroactive for any of the purposes of this Part 617, including payment of the costs of the training and payment of TRA to the worker participating in the training. However, in the case of a redetermination or decision reversing a determination denying approval of training, for the purposes of this Part 617 such redetermination or decision shall be given effect retroactive to the issuance of the determination that was reversed by such redetermination or decision; but no costs of training may be paid unless such costs actually were incurred for training in which the individual participated, and no additional TRA may be paid with respect to any week the individual was not actually participating in the training.

(d) *Applications.* Applications for, selection for, approval of, or referral to training shall be filed in accordance with this subpart C and on forms which shall be furnished to individuals by the State agency.

(e) *Determinations.* Selection for, approval of, or referral of an individual to training under this subpart C, or a decision with respect to any specific training or non-selection, non-approval, or non-referral for any reason shall be a determination to which §§617.50 and 617.51 apply.

(f) *Length of training and hours of attendance.* The State agency shall determine the appropriateness of the length of training and the hours of attendance as follows:

(1) The training shall be of suitable duration to achieve the desired skill level in the shortest possible time;

(2) *Length of training.* The maximum duration for any approvable training program is 104 weeks (during which training is conducted) and no individual shall be entitled to more than one training program under a single certification.

(3) *Training program.* (i) For purposes of this Part 617, a training program may consist of a single course or group of courses which is designed and approved by the State agency for an individual to meet a specific occupational goal.

(ii) When an approved training program involves more than one course and involves breaks in training (within or between courses, or within or between terms, quarters, semesters and academic years), all such breaks in training are subject to the ''14-day break in training'' provision in §617.15(d), for purposes of receiving TRA payments. An individual's approved training program may be amended by the State agency to add a course designed to satisfy unforeseen needs of the individual, such as remedial education or specific occupational skills, as long as the length of the amended training program does not exceed the 104-week training limitation in paragraph (f)(2) of this section.

(4) *Full-time training.* Individuals in TAA approved training shall attend training full time, and when other training is combined with OJT attendance at both shall be not less than full-time. The hours in a day and days in a week of attendance in training shall be full-time in accordance with established hours and days of training of the training provider.

(g) *Training of reemployed workers.* Adversely affected workers who obtain new employment which is not suitable employment, as described in §617.22(a)(1), and have been approved for training may elect to:

(1) Terminate their jobs, or

(2) Continue in full- or part-time employment, to undertake such training, and shall not be subject to ineligibility or disqualification for UI or TRA as a result of such termination or reduction in employment.

(h) *Fees prohibited.* In no case shall an individual be approved for training under this subpart C for which the individual is required to pay a fee or tuition.

(i) *Training outside the United States.* In no case shall an individual be approved for training under this subpart C which is conducted totally or partially at a location outside the United States.

[51 FR 45848, Dec. 22, 1986, as amended at 53 FR 32350, Aug. 24, 1988; 59 FR 935, Jan. 6, 1994]

§ 617.23 Selection of training methods and programs.

(a) *State agency responsibilities.* If suitable employment as described in §617.22(a)(1), is not otherwise available to an individual or group of individuals, it is the responsibility of the State agency to explore, identify, develop and secure training opportunities and to establish linkages with other public and private agencies, Private Industry Councils (PICs), employers, and Job Training Partnership Act (JTPA) service delivery area (SDA) grant recipients, as appropriate, which return adversely affected workers to employment as soon as possible.

(b) *Firm-specific retraining program.* To the extent practicable before referring an adversely affected worker to approved training, the State agency shall consult with the individual's adversely affected firm and certified or recognized union, or other authorized representative, to develop a retraining program that meets the firm's staffing needs and preserves or restores the employment relationship between the individual and the firm. The fact that there is no need by other employers in the area for individuals in a specific occupation for which training is undertaken shall not preclude the development of an individual retraining program for such occupation with the adversely affected firm.

(c) *Methods of training.* Adversely affected workers may be provided either one or a combination of the following methods of training:

(1) Insofar as possible, priority will be given to on-the-job training, which includes related education necessary to acquire skills needed for a position within a particular occupation, in the firm or elsewhere pursuant to §§617.24, 617.25, and 617.26, including training for which the firm pays the costs. This ensures that on-the-job training provides the skills necessary for the individual to obtain employment in an occupation rather than a particular job at a specific site; and

(2) Institutional training, with priority given to providing the training in public area vocational education schools if it is determined that such schools are at least as effective and efficient as other institutional alternatives, pursuant to §§ 617.24, 617.25, and 617.26.

(d) *Standards and procedures.* The State agency shall document the standards and procedures used to select occupations and training institutions in which training is approved. Such occupations and training shall offer a reasonable expectation (not necessarily a prior guarantee) of employment following such training.

(1) *Standards.* The State agency shall approve training in occupations for which an identifiable demand exists either in the local labor market or in other labor markets for which relocation planning has been implemented. If practicable, placement rates and employer reviews of curriculum shall be used as guides in the selection of training institutions.

(2) *Procedures.* In determining the types of training to be provided, the State agency shall consult with local employers, appropriate labor organizations, Job Service Improvement Program Committees, JTPA SDA grant recipients, PICs, local educational organizations, local apprenticeship programs, local advisory councils established under the Carl D. Perkins Vocational Education Act, and post-secondary institutions.

(3) *Exclusions.* In determining suitable training the State agency shall exclude certain occupations, where:

(i) Lack of employment opportunities exist as substantiated by job orders and other pertinent labor market data; or

(ii) The occupation provides no reasonable expectation of permanent employment.

§ 617.24 Preferred training.

Training programs that may be approved under § 617.22(a) include, but are not limited to—

(a) On-the-job training,

(b) Any training program provided by a State pursuant to Title III of the Job Training Partnership Act,

(c) Any training program approved by a private industry council established under the Job Training Partnership Act,

(d) Any program of remedial education,

(e) Any training program (other than a training program described in paragraph (c) of § 617.25) for which all, or any portion, of the costs of training the worker are paid—

(1) Under any other Federal or State program other than this Subpart C, or

(2) From any other source other than this section, but not including sources personal to the individual, such as self, relatives, or friends, and

(f) Any other training program approved by the Department.

[59 FR 936, Jan. 6, 1994]

§ 617.25 Limitations on training under Subpart C of this part.

The second sentence of amended section 236(a)(1) of the Act provides that an adversely affected worker shall be entitled to have payment of the costs of training approved under the Act paid on the worker's behalf, subject, however, ''to the limitations imposed by'' section 236. The limitations in section 236 which are implemented in this section concern the restrictions on approval of training which are related directly or indirectly to the conditions on training which are approvable or on the funding of training costs.

(a) *On-the-job training.* The costs of on-the-job training approved Subpart C of this part for a worker, which are paid from TAA funds, shall be paid in equal monthly installments. Such costs may be paid from TAA funds, and such training may be approved under subpart C of this part, however, only if the State agency determines that:

(1) No currently employed individual is displaced by such eligible worker, including partial displacement such as a reduction in the hours of non-overtime work, wages, or employment benefits;

(2) Such training does not impair existing contracts for services or collective bargaining agreements;

(3) In the case of training which would be inconsistent with the terms of a collective bargaining agreement, written concurrence has been obtained from the concerned labor organization;

(4) No other individual is on layoff from the same or any substantially equivalent job for which such eligible worker is being trained;

(5) The employer has not terminated the employment of any regular employee or otherwise reduced the work force with the intention of filling the vacancy so created by hiring the eligible worker;

(6) The job for which the eligible worker is being trained is not being created in a promotional line that will infringe in any way upon the promotional opportunities of currently employed individuals;

(7) Such training is not for the same occupation from which the worker was separated and with respect to which such worker's group was certified pursuant to section 222 of the Act;

(8) The employer certifies to the State agency that the employer will continue to employ the eligible worker for at least 26 weeks after completing the training if the worker desires to continue such employment and the employer does not have due cause to terminate such employment;

(9) The employer has not received payment under this Subpart C or under any other Federal law for any other on-the-job training provided by such employer which failed to meet the requirements of paragraphs (a)(1) through (a)(6) of this section or such other Federal law; and

(10) The employer has not taken, at any time, any action which violated the terms of any certification described in paragraph (a)(8) of this section made by the employer with respect to any other on-the-job training provided by the employer for which the employer has received a payment under Subpart C of this part (or the prior provisions of Subpart C of this part).

(b) *Other authority and restrictions on funding*—

(1) *In general.* Section 236(a) contains several provisions which allow the costs of a training program approved under the Act to be paid—

(i) Solely from TAA funds,

(ii) Solely from other public or private funds, or

(iii) Partly from TAA funds and partly from other public or private funds,

but also precludes the use of TAA funds or funds under another Federal law where such use of funds would result in duplication of payment of training costs. Those authorities and restrictions are spelled out in paragraph (b) of this section: *Provided,* that, private funds may not include funds from sources personal to the individual, such as self, relatives, or friends.

(2) *Section 236(a)(5)(E) of the Act.* (i) *In general.* Paragraph (5)(E) of section 236(a) of the Act specifies one of the types of training programs approvable under the Act, as including a program (other than a training program described in section 236(a)(7) (paragraph (b)(5) of this section)) for which all, or any portion, of the costs of the training program are paid—

(A) Under any Federal or State program other than the Act, or

(B) From any source other than TAA funds.

(ii) *Application.* Paragraph (E) of section 236(a)(5) of the Act thus authorizes prearrangements between cooperating State agencies administering the TAA program and the authorities administering any other Federal, State, or private funding source, to agree upon any mix of TAA funds and other funds for paying the costs of a training program approved under Subpart C of this part. Any such prearrangement must contain specific commitments from the other authorities to pay the costs they agree to assume.

(3) *Section 236(a)(6) of the Act.* (i) *In general.* Paragraph (6) of section 236(a) of the Act is related to section 236(a)(5)(E) in providing that the costs of a training program approved under the Act are not required to be paid from TAA funds to the extent that such costs are paid under any Federal or State program other than the Act or from any source other than the Act.

(ii) *Application.* (A) Although paragraph (6) of section 236(a) of the Act is expressed in terms of the costs not being *required* to be paid from TAA funds, it authorizes the mixing of TAA funds and funds from any other Federal, State or private source. Therefore, sharing the future costs of training is authorized where prior costs were paid from another Federal, State

or private source, but this does not authorize reimbursement from TAA funds of any training costs which were incurred and for which payment became due prior to the approval of the training program under Subpart C of this part. In utilizing the authority under paragraph (b)(3) of this section for sharing training costs, prearrangements shall be entered into as required under paragraph (b)(2) of this section before any TAA funds are obligated.

(B) Paragraph (6) of section 236(a) contains a special restriction on the authority derived thereunder to use TAA funds in sharing training costs. Therefore, before approving any training program under Subpart C of this part, which may involve sharing of the training costs under the authority of paragraph (b)(3) of this section, the cooperating State agencies for the TAA program shall require the worker to enter into a written agreement with the State under which TAA funds will not be applied for or used to pay any portion of the costs of the training the worker has reason to believe will be paid by any other governmental or private source.

(4) *Section 236(a)(4) of the Act.* (i) *In general.* (A) Paragraph (4) of section 236(a) of the Act (paragraph (3) of section 236(a) before August 23, 1988) continues to provide, as it did before the addition of paragraphs (5)(E), (6), and (7) to section 236(a), that:

(*1*) When the costs of training are paid from TAA funds under subpart C of this part, no other payment for such costs of training may be made under any other Federal law; and

(*2*) When the payment of the costs of training has already been made under any other Federal law, or the costs are reimbursable under any other Federal law and a portion of the costs has already been paid under such other Federal law, payment of such training costs may not be made from TAA funds.

(B) Paragraph (4) of section 236(a) also requires that: The provisions of paragraphs (b)(4)(i) (A)(*1*) and (A)(*2*) of this section shall not apply to, or take into account, any funds provided under any other provision of Federal law which are used for any purpose other than the direct payment of the identical costs incurred in training the adversely affected worker under the TAA Program, even if such other use has the effect of indirectly paying or reducing any portion of the costs involved in training the adversely affected worker.

(ii) *Application.* (A) Although the prohibition on duplicate payments in the first part of section 236(a)(4) remains fully implemented in this section, the second part of section 236(a)(4) on the sharing of costs from TAA funds and other Federal fund sources is modified by the explicit provisions of paragraphs (5)(E) and (6) of section 236(a), as set forth in paragraphs (b)(2) and (b)(3) of this section.

(B) When the direct costs of a training program approvable under subpart C of this part are payable from TAA funds and are also wholly or partially payable under another Federal law, or under any State law or from private, nongovernmental sources, the TAA Program agencies shall establish procedures which ensure that TAA funds shall not be utilized to duplicate funds available from another source, but this preclusion of duplication does not prohibit and shall not discourage sharing of costs under prearrangements authorized under paragraphs (b)(2) and (b)(3) of this section.

(C)(*1*) Therefore, pursuant to paragraph (4) of section 236(a), paragraph (b)(4) of this section continues to prohibit duplicate payment of training costs, which is consistent with the general prohibition expressed in subpart C of this part, against any use of TAA funds to duplicate payment of training costs in any circumstances. Paragraph (b)(4) of this section also continues to prohibit taking into account, in determining whether training costs are payable from TAA funds, any payments to the worker under any other Federal law which may have the effect of indirectly paying all or a portion of the training costs. Such indirect payments include Veterans Educational Assistance, Pell Grants, and Supplemental Educational Opportunity Grants, which are paid to the individual. However, any payments to the individual under these programs are deductible from TRA payable to the individual under § 617.13(c)(2).

(*2*) When payments of Veterans Educational Assistance, Pell Grants, and Supplemental Educational Opportunity Grants are made to the training provider, instead of the individual, and are used for training costs, such payments shall be taken into account as direct payment of the training costs under other Federal law for the purposes of this section.

(5) *Section 236(a)(7) of the Act.* (i) *In general.* Paragraph (7) of section 236(a) of the Act provides that a training program shall not be approved under the Act if—

(A) all or a portion of the costs of such training program are paid under any nongovernmental plan or program,

(B) the adversely affected worker has a right to obtain training or funds for training under such plan or program, and

(C) such plan or program requires the worker to reimburse the plan or program from funds provided under the Act, or from wages paid under such training program, for any portion of the costs of such training program paid under the plan or program.

(ii) *Application.* Paragraph (7) of section 236(a), which is implemented in paragraph (b)(5) of this section, reinforces the prohibition in § 617.22(h) against approval of a training program under subpart C of this part if the worker is required to pay a fee or tuition. The provisions of paragraph (b) and paragraph (h) of this section shall be given effect as prohibiting the approval under subpart C of this part of any training program if the worker would be requested or required, at any time or under any circumstances, to pay any of the costs of a training program, however small, from any TAA funds given to the worker or from any other funds belonging to the worker from any source whatever. Aside from this stringent limitation, however, paragraph (7) of section 236(a) of the Act implicitly authorizes training approved under this subpart C to be wholly or partly funded from nongovernmental (i.e., employer, union or other private) sources.

[59 FR 936, Jan. 6, 1994]

§ 617.26 Liable and agent State responsibilities.

(a) *Liable State.* The liable State means, for any individual, the State which administers the applicable State law (as determined under § 617.16). The liable State is responsible for making all determinations, redeterminations, and decisions on appeals on all claims for program benefits under this part 617, including waivers and revocations of waivers pursuant to § 617.19, subsistence payments pursuant to § 617.27, and transportation payments pursuant to § 617.28. Upon receiving a copy of a certification issued by the Department, with respect to an affected firm in the State, the liable State also is responsible for publishing newspaper notices as provided in § 617.4(d), furnishing information and assistance to workers as provided in § 617.4, furnishing reemployment services under subparts C, D, and E of this part to all eligible workers covered by such certification, and carrying out other activities and functions required by the State's Agreement with the Secretary entered into pursuant to § 617.59. All determinations pertaining to any individual's eligibility for or entitlement to any program benefit under this part 617 shall be subject to the provisions of §§ 617.50 and 617.51.

(b) *Agent State.* Agent State means, for any individual, any State other than the liable State for the individual. Agent States shall be responsible for cooperating fully with the liable State and assisting the liable State in carrying out its activities and functions. These agent State responsibilities shall be part of the activities and functions undertaken by the agent States under their Agreements entered into pursuant to § 617.59. Agent State responsibilities include cooperating with liable States in taking applications and claims for TAA, providing reemployment services to certified workers in accordance with subparts B, C, D and E of this part, providing interstate claimants with TAA program information and assistance, assisting applicants or claimants to file claims for TAA program benefits and services, cooperating with the liable State by providing information needed to issue determinations, redeterminations, and decisions

on appeals, and procuring and paying the cost of any approved training, including subsistence and transportation costs, according to determinations issued by the liable State.

[59 FR 938, Jan. 6, 1994]

§ 617.27 Subsistence payments.

(a) *Eligibility.* A trainee under this subpart C shall be afforded supplemental assistance necessary to pay costs of separate maintenance when the training facility is located outside the commuting area, but may not receive such supplemental assistance for any period for which the trainee receives such a payment under the JTPA, or any other law, or for any day referred to under § 617.28(c)(3) pursuant to which a transportation allowance is payable to the individual, or to the extent the individual is entitled to be paid or reimbursed for such expenses from any other source.

(b) *Amount.* Subsistence payments shall not exceed the lesser of:

(1) The individual's actual per diem expenses for subsistence; or

(2) 50 percent of the prevailing per diem rate authorized under the Federal travel regulations (*see* 41 CFR part 101–7) for the locale of the training.

(c) *Applications.* Applications for subsistence payments shall be filed in accordance with this subpart C and on forms which shall be furnished to trainees by the State agency. Such payments shall be made on completion of a week of training, except that at the beginning of a training project a State agency may advance a payment for a week if it determines that such advance is necessary to enable a trainee to accept training. An adjustment shall be made if the amount of an advance is less or more than the amount to which the trainee is entitled under paragraph (b) of this section. A determination as to an application made under this section shall be subject to §§ 617.50 and 617.51.

(d) *Unexcused absences.* No subsistence payment shall be made to an individual for any day of unexcused absence as certified by the responsible training facility.

§ 617.28 Transportation payments.

(a) *Eligibility.* A trainee under this subpart C shall be afforded supplemental assistance necessary to pay transportation expenses if the training is outside the commuting area, but may not receive such assistance if transportation is arranged for the trainee as part of a group and paid for by the State agency or to the extent the trainee receives a payment of transportation expenses under another Federal law, or to the extent the individual is entitled to be paid or reimbursed for such expenses from any other source.

(b) *Amount.* A transportation allowance shall not exceed the lesser of:

(1) The actual cost for travel by the least expensive means of transportation reasonably available between the trainee's home and the training facility; or

(2) The cost per mile at the prevailing mileage rate authorized under the Federal travel regulations. *See* 41 CFR part 101–7.

(c) *Travel included.* Travel for which a transportation allowance shall be paid includes travel:

(1) At the beginning and end of the training program;

(2) When the trainee fails for good cause, as described in § 617.18(b)(2), to complete the training program; and

(3) For daily commuting, in lieu of subsistence, but not exceeding the amount otherwise payable as subsistence for each day of commuting.

(d) *Applications.* Applications for transportation payments shall be filed in accordance with this subpart C and on forms which shall be furnished to trainees by the State agency. Payments may be made in advance. An adjustment shall be made if the amount of an advance is less or more than the amount to which the trainee is entitled under paragraph (b) of this section. A determination as to an application made under this section shall be subject to §§ 617.50 and 617.51.

§ 617.29 Application of EB work test.

(a) *Registration for employment.* Adversely affected workers who have exhausted all rights to UI and who otherwise qualify for TRA under § 617.11,

shall, except as provided in paragraph (b) of this section:

(1) Register for work and be referred to work by the State agency in the same manner as required for EB claimants under the applicable State law provisions which are consistent with section 202(a)(3) of the Federal-State Extended Unemployment Compensation Act of 1970; and

(2) Be subject to the work test requirements for EB claimants under the applicable State law provisions which are consistent with section 202(a)(3) of the Federal-State Extended Unemployment Compensation Act of 1970.

(b) *Exceptions.* Paragraph (a) of this section shall not apply to any week an individual is undergoing training approved under this subpart C.

Subpart D—Job Search Allowances

§ 617.30 General.

A job search allowance shall be granted an adversely affected worker to assist the individual in securing a job within the United States as provided in this subpart D.

§ 617.31 Applications.

(a) *Forms.* Applications for job search allowances shall be filed in accordance with this subpart D and on forms which shall be furnished to individuals by the State agency.

(b) *Submittal.* An application may be submitted to a State agency at any time by an individual who has been totally or partially separated whether or not a certification covering the individual has been made. However, an application must be submitted to a State agency before the job search begins for the job search allowance to be granted, and the job search may not be approved until after the individual is covered under a certification.

(c) *Time limits.* Notwithstanding paragraph (b) of this section, a job search allowance application may be approved only if submitted before:

(1) The 365th day after the date of the certification under which the individual is covered, or the 365th day after the date of the individual's last total separation, whichever is later; or

(2) The 182d day after the concluding date of training approved under subpart C of this part 617, or approved under the regulations superseded by this part 617.

§ 617.32 Eligibility.

(a) *Conditions.* Job search allowance eligibility requires:

(1) A timely filed application;

(2) Total separation from adversely affected employment at the time the job search commences;

(3) Registration with the State agency which shall furnish the individual such reemployment services as are appropriate under subpart C of this part 617.

(4) A determination by the State agency that the individual has no reasonable expectation of securing suitable employment in the commuting area, and has a reasonable expectation of obtaining suitable employment of long-term duration outside the commuting area and in the area where the job search will be conducted. For the purposes of this section, the term ''suitable employment'' means suitable work as defined in § 617.3(kk) (1) or (2), whichever is applicable to the individual; and

(5) Completion of the job search within a reasonable period not exceeding 30 days after the day on which the job search began.

(b) *Completion of job search.* A job search is deemed completed when the individual either secures employment or has contacted each employer to whom referred by the State agency in connection with a job search.

(c) *Verification of employer contacts.* The State agency shall verify contacts with employers certified by the individual.

[51 FR 45848, Dec. 22, 1986, as amended at 59 FR 938, Jan. 6, 1994]

§ 617.33 Findings required.

(a) *Findings by liable State.* Before final payment of a job search allowance may be approved, the following findings shall be made by the liable State:

(1) The individual meets the eligibility requirements for a job search allowance specified in § 617.32(a) (1) through (4);

(2) The application for a job search allowance was submitted by the individual within the time limits specified in §617.31(c); and

(3) The individual completed the job search within the time limits stated in §617.32(a)(5), and the requirements of paragraphs (b) and (c) of §617.32 have been met.

(b) *Agent State.* (1) When an individual files an application for a job search allowance with respect to a job search conducted in a State other than the liable State, the State agency of the State in which the individual conducts the job search shall serve as the agent State and be responsible for assisting the individual in conducting the job search and in filing an application for a job search allowance with the liable State, and for assisting the liable State by furnishing to it any information required for the liable State's determination of the claim.

(2) The agent State shall cooperate fully with the liable State in carrying out its activities and functions with regard to such applications.

[59 FR 938, Jan. 6, 1994]

§ 617.34 Amount.

(a) *Computation.* The amount of a job search allowance shall be 90 percent of the total costs of each of the following allowable transportation and subsistence items:

(1) *Travel.* The more cost effective mode of travel reasonably available shall be approved by using:

(i) The actual cost of round trip travel by the most economical public transportation the individual reasonably can be expected to take from the individual's residence to the area of job search; or

(ii) The cost per mile at the prevailing mileage rate authorized under the Federal travel regulations (*see* 41 CFR part 101–7) for such roundtrip travel by the usual route from the individual's residence to the area of job search.

(2) *Lodging and meals.* The cost allowable for lodging and meals shall not exceed the lesser of:

(i) The actual cost to the individual of lodging and meals while engaged in the job search; or

(ii) 50 percent of the prevailing per diem allowance rate authorized under the Federal travel regulations (*see* 41 CFR part 101–7) for the locality where the job search is conducted.

(b) *Limit.* The total job search allowances paid to an individual under a certification may not exceed $800, regardless of the number of job searches undertaken by the individual. The amounts otherwise payable under paragraph (a) of this section shall be reduced by any amounts the individual is entitled to be paid or reimbursed for such expenses from any other source.

[51 FR 45848, Dec. 22, 1986, as amended at 51 FR 45869, Dec. 22, 1986; 53 FR 32351, Aug. 24, 1988; 59 FR 939, Jan. 6, 1994]

§ 617.35 Time and method of payment.

(a) *Determinations.* A State agency shall promptly make and record determinations necessary to assure entitlement of an individual to a job search allowance at any time, before or after a certification covering the individual is made. No job search allowance may be paid or advanced to an individual until the State agency determines that the individual is covered under a certification. A State agency shall make payment as promptly as possible upon determining that the individual is covered under a certification and is otherwise eligible.

(b) *Payment.* Unless paragraph (a) of this section applies, a job search allowance shall be paid promptly after an individual completes a job search and complies with paragraph (d) of this section.

(c) *Advances.* A State agency may advance an individual (except an individual not yet covered under a certification) 60 percent of the estimated amount of the job search allowance payable on completion of the job search, but not exceeding $360, within 5 days prior to commencement of a job search. Such advance shall be deducted from any payment under paragraph (b) of this section.

(d) *Worker evidence.* On completion of a job search, the individual shall certify on forms furnished by the State agency as to employer contacts made and amounts expended daily for lodging and meals. Receipts shall be required for all lodging and purchased

transportation expenses incurred by the individual pursuant to the job search. An adjustment shall be made if the amount of an advance is less or more than the amount to which the individual is entitled under § 617.34.

Subpart E—Relocation Allowances

§ 617.40 General.

A relocation allowance shall be granted an adversely affected worker to assist the individual and the individual's family, if any, to relocate within the United States as stated in this subpart E. A relocation allowance may be granted an individual only once under a certification. A relocation allowance shall not be granted to more than one member of a family with respect to the same relocation. If applications for a relocation allowance are made by more than one member of a family as to the same relocation, the allowance shall be paid to the head of the family if otherwise eligible.

§ 617.41 Applications.

(a) *Forms.* Applications for a relocation allowance shall be filed in accordance with this subpart E and on forms which shall be furnished by the State agency.

(b) *Submittal.* An application may be submitted to the State agency at any time by an individual who has been totally or partially separated regardless of whether a certification covering the individual has been made. However, an application must be submitted to a State agency before the relocation begins for the relocation allowance to be granted, and the relocation may not be approved until after the individual is covered under a certification.

(c) *Time limits.* Notwithstanding paragraph (b) of this section, an application for a relocation allowance may not be approved unless submitted before:

(1) The 425th day after the date of the certification under which the individual is covered, or the 425th day after the date of the individual's last total separation, whichever is later; or

(2) The 182d day after the concluding date of training approved under subpart C of this part 617, or approved under the regulations superseded by this part 617.

§ 617.42 Eligibility.

(a) *Conditions.* Eligibility for a relocation allowance requires:

(1) A timely filed application;

(2) Total separation from adversely affected employment at the time relocation commences;

(3) No prior receipt of a relocation allowance under the same certification;

(4) Relocation within the United States and outside the individual's present commuting area;

(5) Registration with the State agency which shall furnish the individual such reemployment services as are appropriate under subpart C of this part 617;

(6) A determination by the State agency that the individual has no reasonable expectation of securing suitable employment in the commuting area, and has obtained suitable employment affording a reasonable expectation of employment of long-term duration, or a bona fide offer of such suitable employment, outside the commuting area and in the area of intended relocation. For the purposes of this section, the term ''suitable employment'' means suitable work as defined in § 617.3(kk) (1) and (2), whichever is applicable to the individual; and

(7) Relocation beginning within a reasonable period, as determined under § 617.43(b), and completion of such relocation within a reasonable period of time as determined in accordance with Federal travel regulations and § 617.43(a).

(b) *Job search.* Applications for a relocation allowance and a job search allowance may not be approved concurrently, but the prior payment of a job search allowance shall not otherwise preclude the payment of a relocation allowance.

[51 FR 45848, Dec. 22, 1986, as amended at 59 FR 939, Jan. 6, 1994]

§ 617.43 Time of relocation.

(a) *Applicable considerations.* In determining whether an individual's relocation is completed in a reasonable period of time, a State agency, among other factors, shall consider whether:

(1) Suitable housing is available in the area of relocation;

(2) The individual can dispose of the individual's residence;

(3) The individual or a family member is ill; and

(4) A member of the individual's family is attending school and when the member can best be transferred to a school in the area of relocation.

(b) *Time limits.* The reasonable period for actually beginning a relocation move shall expire 182 days after the date of application for a relocation allowance, or 182 days after the conclusion of training approved under subpart C of this part 617, or approved under the regulations in former 29 CFR part 91, in effect prior to its redesignation as this 20 CFR part 617 and its concurrent revision.

§ 617.44 Findings required.

(a) *Findings by liable State.* Before final payment of a relocation allowance may be approved, the following findings shall be made by the liable State:

(1) The individual meets the eligibility requirements for a relocation allowance specified in § 617.42(a) (1) to (6) and § 617.42(b).

(2) The application for a relocation allowance was submitted by the individual within the time limits specified in § 617.41(c);

(3) The individual began and completed the relocation within the limitations specified in § 617.42(a)(7) and § 617.43; and

(4) The liable State has verified (directly or through the agent State) with the employer, and finds, that the individual has obtained suitable employment affording a reasonable expectation of employment of long-term duration, or a bona fide offer of such suitable employment, in the area of intended relocation, in accordance with § 617.42(a)(6).

(b) *Agent State.* (1) When an individual relocates in a State other than the liable State, the State agency of the State in which the individual relocates shall serve as the agent State and be responsible for:

(i) Assisting the individual in relocating to the State, and in filing an application for a relocation allowance with the liable State, and

(ii) Assisting the liable State by furnishing to it any information required for the liable State's determination on the claim.

(2) The agent State shall cooperate with the liable State in carrying out its activities and functions with regard to such applications. When requested by the liable State, the agent State shall verify with the employer and report to the liable State whether the individual has obtained suitable employment affording a reasonable expectation of employment of long-term duration, or a bona fide offer of such suitable employment.

[59 FR 939, Jan. 6, 1994]

§ 617.45 Amount.

(a) *Items allowable.* The amount payable as a relocation allowance shall include the following items:

(1) 90 percent of the travel expenses for the individual and family, if any, from the individual's place of residence to the area of relocation, as determined under § 617.46;

(2) 90 percent of the expenses of moving household goods and personal effects of the individual and family, if any, not to exceed the maximum number of pounds net weight authorized under the Federal travel regulations (*see* 41 CFR part 101-7), between such locations, as determined under § 617.47; and

(3) A lump sum payment, equal to 3 times the individual's average weekly wage, not to exceed $800.

(b) *Reduction.* The amount otherwise payable under paragraphs (a)(1) and (a)(2) of this section shall be reduced by any amount the individual is entitled to be paid or reimbursed for such expenses from any other source.

[51 FR 45848, Dec. 22, 1986, as amended at 51 FR 45869, Dec. 22, 1986]

§ 617.46 Travel allowance.

(a) *Computation.* The amount of travel allowance (including lodging and meals) payable under § 617.45(a)(1) shall be 90 percent of the total costs of each of the following allowable transportation and subsistence items:

(1) *Transportation.* The more cost effective mode of transportation reasonably available shall be approved by using:

(i) The actual cost of transportation for the individual and family, if any, by the most economical public transportation the individual and family reasonably can be expected to take from the individual's old residence to the individual's new residence in the area of relocation; or

(ii) The cost per mile at the prevailing mileage rate authorized under the Federal travel regulations (*see* 41 CFR part 101-7) for the usually traveled route from the individual's old residence to the individual's new residence in the area of relocation. No additional mileage shall be payable for family members traveling on the same trip in the same vehicle.

(2) *Lodging and meals.* The cost allowable for lodging and meals for an individual or each member of the individual's family shall not exceed the lesser of:

(i) The actual cost to the individual for lodging and meals while in travel status; or

(ii) 50 percent of the prevailing per diem allowance rate authorized under the Federal travel regulations (*see* 41 CFR part 101-7) for the locality to which the relocation is made.

(b) *Separate travel.* If, for good cause, a member or members of an individual's family must travel separately to the individual's new residence, 90 percent of the total costs of such separate travel, computed in accordance with paragraph (a) of this section, shall be included in calculating the total amount the individual is entitled to be paid under this subpart E. For purposes of this paragraph (b), good cause means such reasons as would justify the family member's inability to relocate with the other members of the individual's family, including but not limited to reasons related to the family member's health, schooling or economic circumstances.

(c) *Limitation.* In no case may the individual be paid a travel allowance for the individual or a member of the individual's family more than once in connection with a single relocation.

[51 FR 45848, Dec. 22, 1986, as amended at 53 FR 32351, Aug. 24, 1988]

§617.47 Moving allowance.

(a) *Computation.* The amount of a moving allowance payable under §617.45(a)(2) shall be 90 percent of the total of the allowable costs under either (1), (2), or (3) of this paragraph, and 90 percent of the total allowable costs under (4) of this paragraph:

(1) *Commercial carrier.* Allowable costs for moving household goods and personal effects of an individual and family, if any, shall not exceed the maximum number of pounds net weight authorized under the Federal travel regulations (*see* 41 CFR part 101-7) by commercial carrier from the individual's old residence to the individual's new residence in the area of relocation, including reasonable and necessary accessorial charges, by the most economical commercial carrier the individual reasonably can be expected to use. Before undertaking such move, the individual must submit to the State agency an estimate from a commercial carrier as to the cost thereof. Accessorial charges shall include the cost of insuring such goods and effects for their actual value or $10,000, whichever is least, against loss or damage in transit, if a bid from a licensed insurer is obtained by the individual and approved by the State agency before departure. If a State agency finds it is more economical to pay a carrier an extra charge to assume the responsibility of a common carrier for such goods and effects, 90 percent of such extra charge, but not exceeding $50, shall be paid in lieu of the cost of insurance.

(2) *Trailer or rental truck*—(i) *Trailer.* If household goods and personal effects are moved by trailer, the allowable costs shall be:

(A) If the trailer is hauled by private vehicle, the cost per mile for the use of the private vehicle at the prevailing mileage rate authorized under the Federal travel regulations (*see* 41 CFR part 101-7) for the usually traveled route from the individual's old residence to the individual's new residence in the area of relocation; and

(B) lf the trailer is rented, and of the type customarily used for moving household goods and personal effects, the rental fee for each day reasonably required to complete the move; or

(C) The actual charge if hauling is by commercial carrier,

(ii) *Rental truck.* If household goods and personal effects are moved by rental truck of the type customarily used for moving household goods and personal effects, the allowable costs shall be:

(A) The rental fee for each day reasonably required to complete the move; and

(B) The necessary fuel for such rental truck paid by the individual.

(3) *House trailer.* If a house trailer or mobile home was used as the individual's place of residence in the old area and will be so used in the new area, the allowable costs of moving such house trailer or mobile home shall be:

(i) The commercial carrier's charges for moving the house trailer or mobile home;

(ii) Charges for unblocking and reblocking;

(iii) Ferry charges, bridge, road, and tunnel tolls, taxes, fees fixed by a State or local authority for permits to transport the unit in or through its jurisdiction, and retention of necessary flagmen; and

(iv) The cost of insuring the house trailer or mobile home, and the personal effects of the individual and family, against loss or damage in transit, in accordance with the provisions in paragraph (a)(1) of this section.

(4) *Temporary storage.* If temporary storage of household goods and personal effects is necessary, the cost of such temporary storage for a period not to exceed 60 days.

(b) *Travel.* Payments under this section shall be in addition to payments for travel expenses for the individual and family, if any, under §617.45(a)(1), except that the allowable cost for a private vehicle used to haul a trailer may not be paid under this section if any cost with respect to such private vehicle is payable under any other provisions of this subpart E.

§617.48 Time and method of payment.

(a) *Determinations.* A State agency shall promptly make and record determinations necessary to assure an individual's entitlement to a relocation allowance at any time, before or after a certification covering the individual is made. No relocation allowance may be paid or advanced to an individual until the State agency determines that the individual is covered under a certification. A State agency shall make payment as promptly as possible upon determining that the individual is covered under a certification and is otherwise eligible.

(b) *Travel and moving allowances.* Allowances computed under §§617.46 and 617.47 shall be paid as follows:

(1) *Travel*—(i) *Transportation and subsistence.* The amounts estimated under §617.46 at 90 percent of the lowest allowable costs shall be paid in advance at the time an individual departs from the individual's residence to begin relocation or within 10 days prior thereto. An amount payable for a family member approved for separate travel shall be paid to the individual at the time of such family member's departure or within 10 days prior thereto.

(ii) *Worker evidence.* On completion of a relocation, the individual shall certify on forms furnished by the State agency as to the amount expended daily for lodging and meals. Receipts shall be required for all lodging and purchased transportation expenses incurred by the individual and family, if any, pursuant to the relocation. An adjustment shall be made if the amount of an advance is less or more than the amount to which the individual is entitled under §617.46.

(2) *Moving.* The amount estimated under §617.47 at 90 percent of the lowest allowable costs shall be paid:

(i) *Commercial carrier.* (A) If household goods and personal effects are moved by commercial carrier, 90 percent of the amount of the estimate submitted by the individual under §617.47(a)(1) and approved by the State agency for covering the cost of such move, and 90 percent of the other charges approved by the State agency under §617.47(a)(1) shall be advanced by check or checks payable to the carrier and insurer, and delivered to the individual at the time

of the scheduled shipment or within 10 days prior thereto. On completion of the move, the individual shall promptly submit to the State agency a copy of the bill of lading prepared by the carrier, including a receipt evidencing payment of moving costs. The individual shall with such submittal reimburse the State agency the amount, if any, by which the advance made under this paragraph (b)(2)(i) exceeds 90 percent of the actual moving costs approved by the State agency. The individual shall be paid the difference if the amount advanced was less than 90 percent of the actual moving costs approved by the State agency.

(B) If more economical, a State agency may make direct arrangements for moving and insuring an individual's household goods and personal effects with a carrier and insurer selected by the individual and may make payment of 90 percent of moving and insurance costs directly to the carrier and insurer. No such arrangement shall release a carrier from liability otherwise provided by law or contract for loss or damage to the individual's goods and effects. The United States shall not be or become liable to either party for personal injury or property loss damage under any circumstances.

(ii) *Trailer or rental truck*—(A) *Private vehicle with trailer.* If the move is by private vehicle and trailer, the allowable cost for the use of the private vehicle shall be made at the time payment is made under paragraph (b)(1) of this section.

(B) *Rental trailer or rental truck.* If the move is by rental trailer or rental truck:

(*1*) The individual shall submit an estimate of the rental cost from the rental agency; and

(*2*) 90 percent of such estimated rental cost may be advanced by check payable to the order of the individual and the rental agency at the time payment is made under paragraph (b)(1) of this section; and

(*3*) On completion of the move the individual shall submit promptly to the State agency a receipted bill itemizing and evidencing payment of the rental charges for the trailer or truck and fuel costs, and shall reimburse the State agency for the amount, if any, by which the advance made for the trailer or truck exceeds 90 percent of the rental charges approved by the State agency. If the amount of the advance was less than 90 percent of the rental charges, the individual shall be paid the difference.

(iii) *House trailer.* If a house trailer or mobile home is moved by commercial carrier, the individual shall submit to the State agency an estimate of the cost of the move by the commercial carrier. A check for 90 percent of the amount of the estimate, if approved, payable to the individual and the carrier, may be delivered to the individual at the time of the scheduled move or within 10 days prior thereto.

(c) *Lump sum allowance.* The lump sum allowance provided in §617.45(a)(3) shall be paid when arrangements are completed for relocation of the individual and family, if any, but not more than 10 days before the earlier of the individual's anticipated departure from the individual's residence to begin relocation or the anticipated date of shipment of the individual's household goods and personal effects.

(d) *Relocation completed.* A relocation is completed when an individual and family, if any, and their household goods and personal effects arrive at the individual's residence in the area of relocation. If no household goods and personal effects are moved, a relocation is completed when the individual and family, if any, arrive in the area of relocation and establish a residence in the new area. The later arrival of a family member approved for separate travel shall not alter the date a relocation was completed.

Subpart F—Job Search Program

§617.49 Job Search Program.

(a) *Program requirements.* (1) A worker, after being separated from adversely affected employment, must participate in an approved job search program (JSP), or have completed a JSP, as a condition for receiving TRA, except where the State agency determines that an acceptable JSP is not reasonably available.

(2) A TRA claimant is subject to participation in a JSP as a condition for

receiving TRA for weeks of unemployment which begin after the date the claimant is notified of the requirement and has filed an initial claim for TRA. The claimant is not subject to the JSP as a condition for receiving TRA for weeks which begin prior to that date.

(3) When the State agency determines that the worker has failed to begin participation in an approved JSP, or ceased to participate in such a JSP before completion, and there is no justifiable cause for such failure or cessation, no TRA may be paid to the worker for weeks beginning with the week that failure or cessation occurred when it is determined that such failure or cessation was without justifiable cause. TRA may be paid thereafter to an otherwise eligible worker only for weeks beginning with the week the worker begins or resumes participation in an approved JSP or complete the JSP. For purposes of this paragraph (a)(3), justifiable cause means such reasons as would justify an individual's conduct when measured by conduct expected of a reasonable individual in like circumstances, including but not limited to reasons beyond the individual's control and reasons related to the individual's capability to enroll in an approved JSP or complete the JSP.

(4) A worker in training approved under §§617.22 through 617.26, or approved by the State agency under State law, is excepted from the JSP qualifying requirement while the worker is attending and making satisfactory progress in the training. This exception applies whether training begins before or after entitlement to basic TRA commences, and also applies after training begins for a worker who is attending a JSP program. Exceptions to the JSP qualifying requirement must be documented in the worker's claim file by the State agency.

(b) *Approved JSPs.* A job search program may be approved if:

(1) The JSP is provided through the JTPA, the public employment service, or any other Federal or State funded program, and complies with paragraphs (w), (x), and (y) of §617.3.

(2) The JSP is sponsored by a company or firm from which the worker has been separated, and complies with paragraphs (w), (x), and (y) of §617.3.

(c) *Determination of reasonably available.* (1) Reasonably available means an existing approved JSP that is located in the worker's normal commuting area, as defined in §617.3, and has sufficient capacity to accommodate the worker.

(2) When the State determines that a JSP is not reasonably available for a worker, the requirement is not a condition of qualifying for TRA for the weeks involved. When a determination is made with respect to a worker, the State agency must document its determination, and the weeks involved, in the worker's claim file, prior to making TRA payments to the worker.

(3) The State agency may issue a blanket waiver of the JSP qualifying requirement for TRA for groups of workers, where deemed appropriate, when it is determined that there is no functioning JSP.

(4) All determinations that a JSP is not reasonably available should extend only for that period of time that a JSP is not reasonably available, and the exception for workers in approved training should extend until the completion of training. If the State determines that a JSP is reasonably available at a later date, then the JSP qualifying requirement must be met for entitlement to basic TRA for weeks of unemployment beginning with the week in which JSP becomes reasonably available.

(d) *JSP allowances.* Subsistence and transportation costs shall be approved for workers participating in JSPs when deemed appropriate and within available State funding levels. Costs incurred may not exceed those allowable for training under §§617.27 and 617.28, if, and when, the State refers a worker to a JSP outside the normal commuting area.

(e) *Termination of requirement.* The job search program requirement set out in this section shall not be a condition of entitlement to TRA for any week which begins after November 20, 1988.

[53 FR 32351, Aug. 24, 1988, as amended at 54 FR 22277, May 23, 1989; 59 FR 939, Jan. 6, 1994]

Subpart G—Administration by Applicable State Agencies

§617.50 Determinations of entitlement; notices to individuals.

(a) *Determinations of initial applications for TRA or other TAA.* The State Agency whose State law is the applicable State law under §617.16 shall upon the filing of an initial application for TRA or other TAA promptly determine the individual's entitlement to such TRA or other TAA under this part 617, and may accept for such purposes information and findings supplied by another State agency under this part 617.

(b) *Determinations of subsequent applications for TRA or other TAA.* The State agency shall, upon the filing of an application for payment of TRA, or subsistence and transportation under §§617.27 and 617.28, with respect to a week, promptly determine whether the individual is eligible for a payment of TRA, or subsistence and transportation, with respect to such week, and, if eligible, the amount of TRA, or subsistence and transportation, for which the individual is eligible. In addition, the State agency promptly shall, upon the filing of a subsequent application for job search allowances (where the total of previous job search allowances paid the individual was less than $600), determine whether the individual is eligible for job search allowances, and, if eligible, the amount of job search allowances for which the individual is eligible.

(c) *Redeterminations.* The provisions of the applicable State law concerning the right to request, or authority to undertake, reconsideration of a determination pertaining to a claim for UI under the applicable State law shall apply to determinations pertaining to all forms of TAA under this part 617.

(d) *Use of State law.* In making determinations or redeterminations under this section, or in reviewing such determinations or redeterminations under §617.51, a State agency shall apply the regulations in this part 617. As to matters committed by this part 617 to the applicable State law, a State agency, a hearing officer, or a State court shall apply the applicable State law and regulations thereunder, including procedural requirements of such State law or regulations, except so far as such State law or regulations are inconsistent with this part 617 or the purpose of this part 617: *Provided,* that, no provision of State law or regulations on good cause for waiver of any time limit, or for late filing of any claim, shall apply to any time limitation referred to or specified in this part 617, unless such State law or regulation is made applicable by a specific provision of this part 617.

(e) *Notices to individual.* The State agency shall notify the individual in writing of any determination or redetermination as to entitlement to TAA. Each determination or redetermination shall inform the individual of the reason for the determination or redetermination and of the right to reconsideration or appeal in the same manner as determinations of entitlement to UI are subject to redetermination or appeal under the applicable State law.

(f) *Promptness.* Full payment of TAA when due shall be made with the greatest promptness that is administratively feasible.

(g) *Procedure.* Except where otherwise required by the Act or this part 617, the procedures for making and furnishing determinations and written notices of determinations to individuals, shall be consistent with the Secretary's ''Standard for Claim Determinations—Separation Information,'' *Employment Security Manual,* part V, sections 6010–6015 (appendix B of this part).

[51 FR 45848, Dec. 22, 1986, as amended at 59 FR 939, 943, Jan. 6, 1994]

§617.51 Appeals and hearings.

(a) *Applicable State law.* A determination or redetermination under this part 617 shall be subject to review in the same manner and to the same extent as determinations and redeterminations under the applicable State law, and only in that manner and to that extent. Proceedings for review of a determination or redetermination may be consolidated or joined with proceedings for review of a determination or redetermination under the State law where convenient or necessary. Procedures as to the right of appeal and opportunity for fair hearing shall be consistent with sections 303(a) (1) and (3) of the

Social Security Act (42 U.S.C. 503(a) (1) and (3)).

(b) *Appeals promptness.* Appeals under paragraph (a) of this section shall be decided with a degree of promptness meeting the Secretary's ''Standard on Appeals Promptness—Unemployment Compensation'' (part 650 of this chapter). Any provisions of the applicable State law for advancement or priority of UI cases on judicial calendars, or otherwise intended to provide for prompt payment of UI when due, shall apply to proceedings involving entitlement to TAA under this part 617.

§ 617.52 Uniform interpretation and application.

(a) *First rule of construction.* The Act and the implementing regulations in this part 617 shall be construed liberally so as to carry out the purpose of the Act.

(b) *Second rule of construction.* The Act and the implementing regulations in this part 617 shall be construed so as to assure insofar as possible the uniform interpretation and application of the Act and this part 617 throughout the United States.

(c) *Effectuating purpose and rules of construction.* (1) To effectuate the purpose of the Act and this part 617 and to assure uniform interpretation and application of the Act and this part 617 throughout the United States, a State agency shall forward, not later than 10 days after issuance, to the Department a copy of any judicial or administrative decision ruling on an individual's entitlement to TAA under this part 617. On request of the Department, a State agency shall forward to the Department a copy of any determination or redetermination ruling on an individual's entitlement to TAA under this part 617.

(2) If the Department believes that a determination, redetermination, or decision is inconsistent with the Department's interpretation of the Act or this part 617, the Department may at any time notify the State agency of the Department's view. Thereafter, the State agency shall issue a redetermination or appeal if possible, and shall not follow such determination, redetermination, or decision as a precedent; and, in any subsequent proceedings which involve such determination, redetermination, or decision, or wherein such determination, redetermination, or decision is cited as precedent or otherwise relied upon, the State agency shall inform the claims deputy or hearing officer or court of the Department's view and shall make all reasonable efforts, including appeal or other proceedings in an appropriate forum, to obtain modification, limitation, or overruling of the determination, redetermination, or decision.

(3) If the Department believes that a determination, redetermination, or decision is patently and flagrantly violative of the Act or this part 617, the Department may at any time notify the State agency of the Department's view. If the determination, redetermination, or decision in question denies TAA to an individual, the steps outlined in paragraph (c)(2) of this section shall be followed by the State agency. If the determination, redetermination, or decision in question awards TAA to an individual, the benefits are ''due'' within the meaning of section 303(a)(1) of the Social Security Act (42 U.S.C. 503(a)(1)), and therefore must be paid promptly to the individual. However, the State agency, shall take the steps outlined in paragraph (c)(2) of this section, and payments to the individual may be temporarily delayed if redetermination or appeal action is taken not more than one business day following the day on which the first payment otherwise would be issued to the individual; and the redetermination action is taken or appeal is filed to obtain a reversal of the award of TAA and a ruling consistent with the Department's view; and the redetermination action or appeal seeks an expedited redetermination or appeal within not more than two weeks after the redetermination action is taken or the appeal is filed. If redetermination action is not taken or appeal is not filed within the above time limit, or a redetermination or decision is not obtained within the two-week limit, or any redetermination or decision or order is issued which affirms the determination, redetermination, or decision awarding TAA or allows it to stand in whole or in part, the benefits awarded must be paid promptly to the individual.

(4)(i) If any determination, redetermination, or decision, referred to in paragraph (c)(2) or paragraph (c)(3) of this section, is treated as a precedent for any future application for TAA, the Secretary will decide whether the Agreement with the State entered into under the Act and this part 617 shall be terminated and §617.59(f) applied.

(ii) In the case of any determination, redetermination, or decision that is not legally warranted under the Act or this part 617, including any determination, redetermination, or decision referred to in paragraph (c)(2) or paragraph (c)(3) of this section, the Secretary will decide whether the State shall be required to restore the funds of the United States for any sums paid under such a determination, redetermination, or decision, and whether, in the absence of such restoration, the Agreement with the State shall be terminated and §617.59(f) applied and whether other action shall be taken to recover such sums for the United States.

(5) A State agency may request reconsideration of a notice issued pursuant to paragraph (c)(2) or paragraph (c)(3) of this section, and shall be given an opportunity to present views and arguments if desired. Such request shall be made to the Secretary and may include views and arguments on the matters to be decided by the Secretary under paragraph (c)(4) of this section.

(6) Concurrence of the Department in a determination, redetermination, or decision shall not be presumed from the absence of a notice issued pursuant to this section.

(Approved by the Office of Management and Budget under control number 1205–0222)

§ 617.53 Subpoenas.

A State agency may issue subpoenas for attendance of witnesses and production of records on the same terms and conditions as under the State law. Compliance may be enforced on the same terms and conditions as under the State law, or, if a State court declines to enforce a subpoena issued under this section, the State agency may petition for an order requiring compliance with such subpoena to the United States District Court within the jurisdiction of which the relevant proceeding under this part 617 is conducted.

§ 617.54 State agency rulemaking.

A State agency may establish supplemental procedures not inconsistent with the Act or this part 617 or procedures prescribed by the Department to further effective administration of this part 617. The exact text of such supplemental procedure or procedures, certified as accurate by a responsible official, employee, or counsel of the State agency, shall be submitted to the Department, on a form supplied by the Department. No supplemental procedure shall be effective unless and until approved by the Department. Approval may be granted on a temporary basis, not to exceed 90 days, in cases of administrative necessity. On reasonable notice to a State agency, approval of a supplemental procedure may be withdrawn at any time. If public notice and opportunity for hearing would be required under a State law for adoption of a similar or analogous procedure involving UI, such public notice and opportunity for hearing shall be afforded by the State agency as to the supplemental procedure.

(Approved by the Office of Management and Budget under control number 1205–0222)

§ 617.55 Overpayments; penalties for fraud.

(a) *Determination and repayment.* (1) If a State agency or a court of competent jurisdiction determines that any person or individual has received any payment under this part 617 to which the person or individual was not entitled, including a payment referred to in paragraph (b) or paragraph (c) of this section, such person or individual shall be liable to repay such amount to the State agency, and the State agency shall recover any such overpayment in accordance with the provisions of this part 617; except that the State agency may waive the recovery of any such overpayment if the State agency determines, in accordance with the guidelines prescribed in paragraph (a)(2) of this section, that:

(i) The payment was made without fault on the part of such person or individual; and

(ii) Requiring such repayment would be contrary to equity and good conscience.

(2)(i)(A) In determining whether fault exists for purposes of paragraph (a)(1)(i) of this section, the following factors shall be considered:

(*1*) Whether a material statement or representation was made by the person or individual in connection with the application for TAA that resulted in the overpayment, and whether the person or individual knew or should have known that the statement or representation was inaccurate.

(*2*) Whether the person or individual failed or caused another to fail to disclose a material fact, in connection with an application for TAA that resulted in the overpayment, and whether the person or individual knew or should have known that the fact was material.

(*3*) Whether the person or individual knew or could have been expected to know, that the person or individual was not entitled to the TAA payment.

(*4*) Whether, for any other reason, the overpayment resulted directly or indirectly, and partially or totally, from any act or omission of the person or individual or of which the person or individual had knowledge, and which was erroneous or inaccurate or otherwise wrong.

(*5*) Whether there has been a determination of fraud under paragraph (b) of this section or section 243 of the Act.

(B) An affirmative finding on any one of the factors in paragraphs (a)(2)(i)(A) of this section precludes waiver of overpayment recovery.

(ii)(A) In determining whether equity and good conscience exists for purposes of paragraph (a)(1)(ii) of this section, the following factors shall be considered:

(*1*) Whether the overpayment was the result of a decision on appeal, whether the State agency had given notice to the person or individual that the case has been appealed and that the person or individual may be required to repay the overpayment in the event of a reversal on appeal, and whether recovery of the overpayment will not cause extraordinary and lasting financial hardship to the person or individual.

(*2*) Whether recovery of the overpayment will not cause extraordinary financial hardship to the person or individual, and there has been no affirmative finding under paragraph (a)(2)(ii)(A) of this section with respect to such person or individual and such overpayment.

(B) An affirmative finding on either of the foregoing factors in paragraphs (a)(2)(ii)(A) of this section precludes waiver of overpayment recovery.

(C)(*1*) For the purpose of paragraph (a)(2)(ii) of this section, an extraordinary financial hardship shall exist if recovery of the overpayment would result directly in the person's or individual's loss of or inability to obtain minimal necessities of food, medicine, and shelter for a substantial period of time; and an extraordinary and lasting financial hardship shall be extraordinary as described above and may be expected to endure for the foreseeable future.

(*2*) In applying this test in the case of attempted recovery by repayment, a substantial period of time shall be 30 days, and the foreseeable future shall be at least three months. In applying this test in the case of proposed recoupment from other benefits, a substantial period of time and the foreseeable future shall be the longest potential period of benefit entitlement as seen at the time of the request for a waiver determination. In making these determinations, the State agency shall take into account all potential income of the person or individual and the person's or individual's firm, organization, or family and all cash resources available or potentially available to the person or individual and the person's or individual's firm, organization, or family in the time period being considered.

(*3*) Determinations granting or denying waivers of overpayments shall be made only on request for a waiver determination. Such request shall be made on a form which shall be furnished to the person or individual by the State agency. Notices of determination of overpayments shall include an accurate description of the waiver provisions of paragraph (a) of this section, if the State agency has elected to allow waivers of TAA overpayments.

(*4*) Each State shall have the option to establish a policy as to whether the waiver provisions of this section shall be applied to TAA overpayments. A State's decision on its policy shall not be controlled by whether it waives UI overpayments, but the State's decision shall be published for the information of the public and the Department.

(*5*)(i) Unless an overpayment is otherwise recovered, or is waived under paragraph (a) of this section, the State agency shall recover the overpayment by deduction from any sums payable to such person or individual under:

(A) This part 617;

(B) Any Federal unemployment compensation law administered by the State agency; or

(C) Any other Federal law administered by the State agency which provides for the payment of unemployment assistance or an allowance with respect to unemployment.

(ii) In addition, a State agency may recover the overpayment from unemployment insurance payable to such person or individual under the State law.

(b) *Fraud.* If a State agency or a court of competent jurisdiction finds that any person or individual:

(1) Knowingly has made, or caused another to make, a false statement or representation of a material fact; or

(2) Knowingly has failed, or caused another to fail, to disclose a material fact; and as a result of such false statement or representation, or of such nondisclosure, such individual has received any payment under this part 617 to which the person or individual was not entitled, such person or individual shall, in addition to any other penalty provided by law, be ineligible for any further payments under this part 617.

(c) *Training, job search and relocation allowances.* (1) If an individual fails, with good cause, to complete training, a job search, or a relocation, any payment or portion of a payment made under this part 617 to such individual or any person that is not properly and necessarily expended in attempting to complete such training, job search, or relocation, shall constitute an overpayment.

(2) If an individual fails, without good cause, to complete training, a job search, or a relocation, any payment made under this part 617 to such individual or any person shall constitute an overpayment.

(3) Such overpayment shall be recovered or waived as provided in paragraph (a) of this section.

(d) *Final determination.* Except for overpayments determined by a court of competent jurisdiction, no repayment may be required, and no deduction may be made, under this section until a determination under paragraph (a) of this section by the State agency has been made, notice of the determination and an opportunity for a fair hearing thereon has been given to the person or individual concerned, and the determination has become final.

(e) *Deposit.* Any amount recovered by a State agency under this section shall be deposited into the Federal fund or account from which payment was made.

(f) *Procedural requirements.* (1) The provisions of paragraphs (c), (e), and (g) of §617.50 shall apply to determinations and redeterminations made pursuant to this section.

(2) The provisions of §617.51 shall apply to determinations and redeterminations made pursuant to this section.

(g) *Fraud detection and prevention.* State procedures for the detection and prevention of fraudulent overpayments of TAA shall be, as a minimum, commensurate with the procedures adopted by the State with respect to State unemployment compensation and consistent with the Secretary's ''Standard for Fraud and Overpayment Detection,'' Employment Security Manual, Part V, sections 7510–7515 (Appendix C of this part).

(h) *Debts due the United States or Others.* (1) Notwithstanding any provision of this part 617, TAA payable to a person or an individual under this part 617 shall be applied by the State agency for the recovery by offset of any debt due the United States from the person or individual.

(2) TAA shall not be applied or used by the State agency in any manner for the payment of any debt of any person or individual to any State or any other entity or person, except that TRA payable to an individual shall be payable

to someone other than the individual if required by State law and Federal law to satisfy the individual's obligation for child support or alimony.

(i) *Definition of person.* For purposes of this section, a person includes any employer or other entity or organization as well as the officers and officials thereof who may bear individual responsibility.

[59 FR 939, Jan. 6, 1994, as amended at 59 FR 943, Jan. 6, 1994]

§ 617.56 Inviolate rights to TAA.

Except as specifically provided in this part 617, the rights of individuals to TAA shall be protected in the same manner and to the same extent as the rights of persons to UI are protected under the applicable State law. Such measures shall include protection of applicants for TAA from waiver, release, assignment, pledge, encumbrance, levy, execution, attachment, and garnishment of their rights to TAA, except as provided in §617.55. In the same manner and to the same extent, individuals shall be protected from discrimination and obstruction in regard to seeking, applying for, and receiving any right to TAA.

§ 617.57 Recordkeeping; disclosure of information.

(a) *Recordkeeping.* Each State agency will make and maintain records pertaining to the administration of the Act as the Secretary requires and will make all such records available for inspection, examination and audit by such Federal officials as the Secretary may designate or as may be required by law. Such recordkeeping will be adequate to support the reporting of TAA activity on reporting form ETA 563 approved under OMB control number 1205–0016.

(b) *Disclosure of information.* Information in records maintained by a State agency in administering the Act shall be kept confidential, and information in such records may be disclosed only in the same manner and to the same extent as information with respect to UI and the entitlement of individuals thereto may be disclosed under the applicable State law. Such information shall not, however, be disclosed to an employer or any other person except to the extent necessary to obtain information from the employer or other person for the purposes of this part 617. This provision on the confidentiality of information maintained in the administration of the Act shall not apply, however, to the Department or for the purposes of §617.55 or paragraph (a) of this section, or in the case of information, reports and studies required pursuant to §617.61, or where the result would be inconsistent with the Freedom of Information Act (5 U.S.C. 552), the Privacy Act of 1974 (5 U.S.C. 552a), or regulations of the Department promulgated thereunder (*see* 29 CFR parts 70 and 70a).

§ 617.58 Unemployment insurance.

Unemployment insurance payable to an adversely affected worker shall not be denied or reduced for any week by reason of any right to a payment of TAA under the Act and this part 617.

§ 617.59 Agreements with State agencies.

(a) *Authority.* Before performing any function or exercising any jurisdiction under the Act and this part 617, a State or State agency (as defined in §617.3(ii)) shall execute an Agreement with the Secretary meeting the requirements of the Act.

(b) *Execution.* An Agreement under paragraph (a) of this section shall be signed on behalf of a State or State agency by an authorized official of the State or such State agency, and the signature shall be dated. The authority of the State or State agency official shall be certified by the Attorney General of the State or counsel for the State agency, unless the Agreement is signed by the Governor of the State. An agreement will be executed on behalf of the United States by the Secretary.

(c) *Public access to Agreements.* The State agency will make available to any individual or organization an accurate copy of the Agreement with the Agency for inspection and copying. Copies of an Agreement may be furnished on request to any individual or organization upon payment of the same charges, if any, as apply to the furnishing of copies of other records of the State agency.

(d) *Amended Agreement.* A State or State agency shall execute an amended Agreement with the Secretary prior to administering any amendments to the TAA provisions of the Trade Act of 1974.

(e) *Agent of United States.* In making determinations, redeterminations, and in connection with proceedings for review thereof, a State or State agency which has executed an Agreement as provided in this section shall be an agent of the United States and shall carry out fully the purposes of the Act and this part 617.

(f) *Breach.* If the Secretary finds that a State or State agency has not fulfilled its commitments under its Agreement under this section, section 3302(c)(3) of the Internal Revenue Code of 1986 shall apply. A State or State agency shall receive reasonable notice and opportunity for hearing before a finding is made under section 3302(c)(3) whether there has been a failure to fulfill the commitments under the Agreement.

(g) *Secretary's review of State agency compliance.* The appropriate Regional Administrator shall be initially responsible for the periodic monitoring and reviewing of State and State agency compliance with the Agreement entered into under this section.

(h) *Program coordination.* State agencies providing employment services, training and supplemental assistance under Subpart C of this part shall, in accordance with their Agreements under this section, coordinate such services and payments with programs and services provided by State Service Delivery Areas, Private Industry Councils, and substate grantees under the Job Training Partnership Act and with the State agency administering the State law.

(i) *Administration absent State Agreement.* In any State in which no Agreement under this section is in force, the Secretary shall administer the Act and this part 617 and pay TAA hereunder through appropriate arrangements made by the Department, and for this purpose the Secretary or the Department shall be substituted for the State or cooperating State agency wherever appropriate in this part 617. Such arrangements shall include the requirement that TAA be administered in accordance with this part 617, and the provisions of the applicable State law except to the extent that such State law is inconsistent with any provision of this part 617 or section 303 of the Social Security Act (42 U.S.C. 503) or section 3304(a) of the Internal Revenue Code of 1986 (26 U.S.C. 3304(a)), and shall also include provision for a fair hearing for any individual whose application for TAA is denied. A final determination under paragraph (i) of this section as to entitlement to TAA shall be subject to review by the courts in the same manner and to the same extent as is provided by section 205(g) of the Social Security Act (42 U.S.C. 405(g)).

[51 FR 45848, Dec. 22, 1986, as amended at 53 FR 32351, Aug. 24, 1988; 59 FR 941, Jan. 6, 1994]

§ 617.60 Administration requirements. [Reserved]

§ 617.61 Information, reports, and studies.

A State agency shall furnish to the Secretary such information and reports and conduct such studies as the Secretary determines are necessary or appropriate for carrying out the purposes of the Act and this part 617.

§ 617.62 Transitional procedures.

The procedures for administering the Trade Act of 1974 before and after the amendments made by title XXV of the Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97–35) are as follows:

(a) *TRA.* The provisions contained in subpart B of this part 617 shall apply with respect to the qualifying requirements for TRA for adversely affected workers who are separated on or after October 1, 1981, and were not entitled to TRA for any week of unemployment beginning before October 1, 1981. In addition, such provisions shall apply to TRA payable for weeks of unemploymant beginning after September 30, 1981, to adversely affected workers separated before October 1, 1981. Any adversely affected worker entitled to TRA for any week of unemployment beginning before October 1, 1981, shall be entitled to TRA as follows:

(1) *Weeks before October 1, 1981.* For weeks of unemployment beginning before October 1, 1981, TRA eligibility shall be determined under the provisions of the law and regulations in effect before the amendments made by title XXV of the Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97–35).

(2) *Weeks after September 30, 1981.* (i) *Basic weeks (UI exhaustion).* For any week of unemployment beginning after September 30, 1981, TRA eligibility for an individual who has exhausted all rights to UI prior to such week shall be determined under subpart B of this part 617, except that the maximum amount of basic TRA payable to the individual for any such week of unemployment shall be an amount equal to the product of the amount of TRA payable to the individual for a week of total unemployment (as determined under §617.13(a)) multiplied by a factor determined by subtracting from fifty-two the sum of:

(A) The number of weeks preceding the first week which begins after September 30, 1981, including all weeks in the individual's first benefit period, and which are within the period covered by the same certification as such week of unemployment, for which the individual was entitled to a payment of TRA or UI (or would have been entitled to a payment of TRA or UI if the individual had applied therefor); plus

(B) The number of weeks preceding such first week that are deductible under section 232(d) of the Trade Act of 1974 in effect before the amendments made by the Omnibus Budget Reconciliation Act of 1981.

(C) The amount of TRA payable to an individual under this paragraph (a)(2)(i) shall be subject to adjustment on a week-to-week basis as may be required by §617.13(b).

(ii) *Basic weeks UI entitlement.* For any week of unemployment beginning after September 30, 1981, TRA eligibility for an individual who still has entitlement to UI shall be discontinued until the individual exhausts all rights to UI as provided in §6.17.11(a)(5). After exhaustion of all rights to UI, payment of TRA shall be determined under subpart B of this part 617, except that the maximum amount of basic TRA payable to the individual for ensuing weeks of unemployment shall be an amount equal to the remainder of:

(A) The maximum amount of basic TRA as computed under paragraph (a)(2)(i) of this section; *minus*

(B) The total sum of UI to which the individual was entitled (or would have been entitled if the individual had applied therefor) for weeks beginning after September 30, 1981.

(iii) *Additional weeks.* With respect to any week of unemployment beginning after September 30, 1981, for an individual who is in training approved under section 236 of the Trade Act of 1974, and who was receiving TRA for basic or additional weeks beginning before October 1, 1981, the weekly amount of TRA for any additional weeks beginning after September 30, 1981, shall be determined under subpart B of this part 617.

(3) *Transitional eligibility period.* (i) *Basic weeks.* Any individual who was eligible for a basic TRA payment for any week beginning before October 1, 1981, shall not be eligible for a basic TRA payment for any week beginning after September 30, 1981, and which begins more than 52 weeks after the individual has exhausted all rights to regular compensation in the first benefit period (as provided in §617.15(a)).

(ii) *Additional weeks.* Any individual who was eligible for a TRA payment for an additional week beginning before October 1, 1981, shall not be eligible for a TRA payment for any additional week beginning after September 30, 1981, unless such additional week begins wtthin:

(A) 26 weeks after the last week of the individual's entitlement to basic TRA, or

(B) 78 weeks after the individual exhausted regular compensation in the first benefit period, whichever occurs first (as provided in §617.15).

(b) *Training, other reemployment services, and allowances.* (1) Applications for training filed before October 1, 1981, concerning the approval of such training after September 30, 1981, shall be determined under subpart C of this part 617.

(2) Applications for transportation and subsistence payments while in training, and job search and relocation allowances filed after September 30,

1981, shall be determined under the applicable subpart C, D, or E of this part 617.

(3) Individuals who have had self-financed training approved prior to October 1, 1981, shall not be reimbursed for training and related expenses incurred while in such training. However, such individuals may have their eligibility for approved training considered under the criteria outlined in the amended section 236 of the Act and in § 617.22, and, if approved, shall be entitled to have post-approval training costs paid.

(c) *Fraud and recovery of overpayments.* The fraud and overpayment recovery provisions of this subpart G shall take effect on August 13, 1981, and shall apply to all overpayments outstanding on that date or determined on or after that date.

(d) *Required amendments to State law.* The provisions of section 2514(a)(2)(D) of the Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97–35) (relating to amendment of State laws) shall apply to State laws for the purposes of certifications under section 3304(c) of the Internal Revenue Code of 1984 on October 31 of any taxable year after 1981; except that, in any State in which the legislature of that State—

(1) Does not meet in a session which begins after August 13, 1981, and before September 1, 1982, and

(2) If in session on August 13, 1981, and does not remain in session for at least 25 calendar days thereafter, the date of ''1981'' in this paragraph (d) shall be deemed to be ''1982.''

[51 FR 45848, Dec. 22, 1986, as amended at 53 FR 32352, Aug. 24, 1988]

§ 617.63 Savings clause.

The amendments to the Act made by title XXV of the Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97–35) shall not abate or otherwise affect entitlement to TAA under the Trade Act of 1974 or any appeal which was pending on October 1, 1981, or on the date of enactment of any such amendment, as applicable, or prevent any appeal from any determination thereunder which did not become final prior to such applicable date if appeal or petition is filed within the time allowed for appeal or petition.

§ 617.64 Termination of TAA program benefits.

The following rules are applicable to the termination of TAA benefits under the Act:

(a) No application for TRA, or transportation or subsistence payment while in training approved under subpart C of this part 617, shall be approved, and no payment of TRA or payment for transportation or subsistence occurring on or before the termination date shall be made after the termination date specified in the Act, unless the claim for TRA or an invoice for transportation and subsistence is presented to the State agency and a final determination is made on the amount payable on or before the termination date in the Act.

(b) No payment of job search or relocation allowances shall be made after the termination date specified in the Act, unless an application for such allowances was approved, such job search or relocation was completed, and a final determination made on the amount payable for such benefits by the State agency on or before the termination date in the Act.

(c) No training under subpart C of this part shall be approved unless a determination regarding the approval of such training was made on or before the termination date in the Act, and such training commenced on or before such termination date. Consistent with the requirements of section 236(a)(1) of the Act, and the termination provisions of paragraph (c) of this section, a final determination must be made on the invoice for the training costs by the State agency on or before the termination date specified in the Act to cover tuition related expenses. Determinations on tuition bills shall be limited to the training term, quarter, semester or other period beginning on or before the termination date in the Act. The training period should be in accord with normal billing practices of the training provider and/or State agency approval practices.

[59 FR 941, Jan. 6, 1994]

§ 617.65 Transition procedures for amendments in sections 2671 and 2672 of Pub. L. 98–369 (Deficit Reduction Act of 1984).

The procedures for administering the Trade Act of 1974 as amended by the Deficit Reduction Act of 1984 are as follows:

(a) *TRA.* (1) The provisions in subpart B of this part 617 shall apply to workers who would lose additional weeks of TRA payments because of delays in approving applications for training. Workers who filed timely, bona fide applications for training shall be eligible to receive additional weeks of TRA payments beginning the first week of training when their applications for training are approved on or after July 18, 1984, and the first week of such training begins later than the first week which follows the last week of entitlement to basic TRA.

(2) Workers whose applications for training were approved prior to July 18, 1984, are covered under the provisions of the Trade Act of 1974 as in effect prior to July 18, 1984, and are not entitled to additional weeks of TRA by reason of the amendment in section 2671 of the Deficit Reduction Act of 1984 or § 617.15(b) of this part.

(b) *Job Search Allowances.* (1) The provisions in subpart D of this part 617 shall apply to timely applications for job search allowances that are approved on or after July 18, 1984.

(2) Workers whose applications for job search allowances that were filed timely but were approved before July 18, 1984, in the aggregate authorized amount of $600, are covered under the provisions of the Trade Act of 1974 in effect prior to July 18, 1984, and are not entitled to receive the increase in the allowance level provided in section 2672(a) of the Deficit Reduction Act of 1984 and § 617.34(b) of this part.

(c) *Relocation allowances.* (1) The provisions in subpart E of this part 617 shall apply to timely applications for relocation allowances that are approved on or after July 18, 1984.

(2) Workers whose applications for relocations allowances were filed timely but were approved before July 18, 1984, are covered under the provisions of the Trade Act of 1974 in effect prior to July 18, 1984, and are not entitled to receive the increase in the lump sum allowance level provided in section 2672(b) of the Deficit Reduction Act of 1984 and § 617.45(a)(3) of this part.

[51 FR 45870, Dec. 22, 1986]

§ 617.66 Transition procedures for amendments in sections 13002 through 13009 of Pub. L. 99–272 (the Consolidated Omnibus Budget Reconciliation Act of 1985).

The procedures for administering the Trade Act of 1974 before and after the amendments made by the Pub. L. 99–272 are as follows:

(a) *Duration of TRA.* The provisions contained in § 617.15 expanding the eligibility period for payment of basic TRA benefits from 52 weeks to 104 weeks shall apply only to those claimants whose eligibility periods begin on or after April 7, 1986, or who have a previously established 52-week TRA eligibility period that ends on or after April 7, 1986. Workers with 52-week eligibility periods that end before April 7, 1986, will not have their eligibility periods extended to 104 weeks.

(b) *TRA payments*—(1) Retroactive TRA payments. Retroactive claims of eligible workers may be approved for weeks of unemployment beginning with the first week after the week which includes December 18, 1985. Claims for weeks beginning before April 7, 1986 (or, if later, before claimants are notified of their potential entitlement and have filed claims for retroactive benefits) are not subject to the application of the Extended Benefits (EB) work test, nor to the State timely filing requirement. Claimants shall be subject to those requirements for weeks of unemployment beginning after the date eligible workers are notified of such requirements and have filed claims for such benefits.

(2) *Employer-authorized leave, disability leave and union service.* The change to § 617.11(a)(3) for crediting weeks of specified leave to qualify for TRA will apply only to initial claims for basic TRA filed with the State agency by eligible workers on or after April 7, 1986.

(c) *Job search program.* The job search program requirement applies to workers certified under petitions for trade

adjustment assistance filed with the Department on or after April 7, 1986.

(d) *Training and other amendments.* Other amendments in Pub. L. 99–272 are effective on April 7, 1986, and apply to applications for TAA benefits approved on or after April 7, 1986.

(e) *Application of Gramm-Rudman.* TRA payments to workers made under part 1 of chapter 2 of title II of the Trade Act of 1974 and this part shall be reduced by a percentage equal to the non-defense sequester percentage applied in the Sequestration Report (submitted under the Balanced Budget and Emergency Deficit Control Act of 1985 and dated January 21, 1986) of the Comptroller General of the United States for Fiscal Year 1986, for the period from March 1, 1986 to October 1, 1986.

[53 FR 32352, Aug. 24, 1988]

§ 617.67 Transition guidelines for the 1988 Amendments.

The provisions of part 3 of subtitle D of title I of the Omnibus Trade and Competitiveness Act of 1988 (the ''OTCA''), Public Law 100–418, approved on August 23, 1988, made material changes in the TAA Program for workers that are reflected in the amended regulations published with this new section on transition guidelines for the 1988 Amendments. States and cooperating State agencies shall be guided by the following paragraphs of this section in the transition to the TAA Program as modified by the 1988 Amendments and reflected in the preceding provisions of this part 617, as well as in the interim operating instructions issued by the Department which are superseded by these regulations. The operating instructions in GAL 15–90, and the Changes thereto, shall continue in effect as guidance on the proper application of the 1988 Amendments except as modified in these final regulations. (GAL 15–90 is available from the Office of Trade Adjustment Assistance, U.S. Department of Labor, 200 Constitution Ave., NW., room C–4318, Washington, DC 20210.)

(a) *Oil and gas workers—prospective.* Workers in firms or appropriate subdivisions of firms engaged in exploration or drilling for oil or natural gas are newly covered under the TAA Program by an amendment to section 222 of the Trade Act of 1974. This is a permanent change in the Act having prospective effect, and became effective on August 23, 1988. Oil and gas workers covered by a certification issued pursuant to section 223 of the Act and the regulations at 29 CFR part 90 shall be entitled to basic and additional TRA and other TAA Program benefits on precisely the same terms and conditions as apply to other workers covered by other certifications and which are specifically set forth in this part 617.

(b) *Oil and gas workers—retroactive.* Oil and gas workers referred to in paragraph (a) of this section, who were separated from adversely affected employment after September 30, 1985, are covered retroactively under section 1421(a)(1)(B) of the OTCA, if they are covered by a certification issued pursuant to section 223 of the Act which is in response to a petition filed in the Office of Trade Adjustment Assistance on or before November 18, 1988. Administration of TAA Program benefits to these workers shall be on precisely the same terms and conditions as apply to other workers covered by other certifications, except that the limitations of the impact date provision of section 223(b) and the 60-day preclusion in section 231(a) may not be applied to these workers.

(c) *Benefit information to workers.* (1) An amendment to section 225 of the Act requires individualized and published notices to workers covered by certifications issued pursuant to section 223 of the Act. This amendment became effective as a requirement on September 22, 1988, and is applicable to all certifications issued on and after that date. Individualized notices and published notices shall contain the information specifically set forth in this part 617.

(2) Section 239(f) of the Act requires cooperating State agencies to furnish four discrete items of information and advice to individuals about TAA Program benefits, commencing with such advice and information to every individual who applies for unemployment insurance under each State's unemployment compensation law. See § 617.4(e). This amendment became effective on August 23, 1988. Information

and advice required by section 239(f) shall be provided in accordance with this part 617.

(d) *Training and eligibility requirements for TRA.* Effective on November 21, 1988, in general, enrollment and participation in, or completion of, a training program approved under subpart C is required as a condition of entitlement to basic TRA. Amendments to sections 231(a)(5), 231(b), and 231(c) of the Act incorporate this new requirement, replacing the job search program requirement which remains in effect through November 20, 1988. Continuation of the job search program requirement through November 20, 1988, and installation of the training program requirement on and after November 21, 1988, is required of all applicants for basic TRA.

(e) *Eligibility period for basic TRA.* (1) Effective on August 23, 1988, and with respect to all decisions (i.e., all determinations, redeterminations, and decisions on appeals) issued on or after that date, the eligibility period for basic TRA is changed from the prior law. Prior to the OTCA amendments, section 233(a)(2) provided that the eligibility period for an individual was a fixed 104-week period that immediately followed the week with respect to which the individual first exhausted all rights to regular benefits after the individual's first qualifying separation. Under section 233(a)(2) the new eligibility period is movable, and is the 104-week period that immediately follows the week in which the worker's most recent total qualifying separation occurs under the same, single certification. Under the effective date provisions of the OTCA, section 233(a)(2) applies to all decisions (i.e., determinations, redeterminations, and decisions on appeals) issued on and after August 23, 1988. Further, the law to be applied in making any such decision is the law as in effect on the date such a decision is made. These interpretative rules apply in all cases, regardless of whether the total qualifying separation occurred before, on, or after August 23, 1988, except as noted in paragraph (e)(3) of this section.

(2) The major significance of the change in section 233(a)(2) is that, effective for all decisions (i.e., determinations, redeterminations, and decisions on appeals) issued on or after August 23, 1988, it applies to the ''most recent'' total qualifying separation. This means that, after the first qualifying separation before August 23, 1988, or the first total qualifying separation on and after August 23, 1988, with each subsequent total qualifying separation of an individual under the same certification the individual's eligibility period must be redetermined as the 104-week period that immediately follows the week in which such subsequent separation occurred.

(3) Section 1430(g) of the OTCA requires that the new eligibility period not be applied with respect to any total qualifying separation occurring before August 23, 1988, if as a result of applying section 233(a)(2) the individual would have an eligibility period with an earlier expiration date than the expiration date of the eligibility period established under the prior law and based on a first qualifying separation which occurred under the same certification before August 23, 1988. Therefore, for decisions (i.e., determinations, redeterminations, and decisions on appeals) issued on or after August 23, 1988, for a worker who had a first qualifying separation under the same certification before August 23, 1988, it must be determined what the individual's eligibility period is based upon the prior law, and, if the individual also had a subsequent total qualifying separation, what the individual's eligibility period is based on the amended law. Only if the subsequent total qualifying separation occurred before August 23, 1988, and the expiration date of the new eligibility period ends on the same date or a later date than the expiration date of the old eligibility period may the new eligibility period be applied to the individual, and in that event it must be applied; if the new eligibility period would end on a date earlier than the ending date of the eligibility period based on the worker's first qualifying separation, section 1430(g) operates to preclude the application of amended section 233(a)(2).

(4) Computation of the weekly and maximum amounts of basic TRA do not change under the 1988 Amendments in the OTCA. They must continue to be

based upon the first benefit period which is related to the worker's first total or partial separation under the same certification regardless of whether such first separation occurs before, on, or after August 23, 1988. Upon the occurrence of a second or subsequent separation under the same certification which is a total qualifying separation under this part 617, the individual's eligibility period will be 104 weeks after the week of such second or subsequent (total qualifying) separation, but no change will be made in the weekly or maximum amounts of basic TRA as computed in relation to the first separation. Therefore, for any decision (i.e., determination, redetermination, or decision on appeal) issued on or after August 23, 1988, whenever an individual files a new TRA claim it will be necessary to determine whether the individual's most recent separation was a total qualifying separation, and, if so, whether the individual had a prior partial or total separation within the certification period of the same certification which was a first qualifying separation. If such most recent (total qualifying) separation occurred before August 23, 1988, and was not the individual's first qualifying separation, then:

(i) The eligibility period will be the 104 weeks beginning with the week following the week in which the most recent total qualifying separation occurred *or* 104 weeks after the first exhaustion of regular UI following the first qualifying separation, whichever is longer, and

(ii) The individual's weekly amount of basic TRA, as computed under §617.13, and the individual's maximum amount of basic TRA, as computed under §617.14, are established or remain fixed as determined with respect to the individual's first benefit period following the first separation which is within the certification period of the certification covering the individual.

(f) *Eligibility period for additional TRA.* One technical and one conforming change are made by the OTCA in section 233(a)(3) of the Act, but have no effect on the 26-week eligibility period for additional TRA as the statute has been interpreted and applied in the past. Therefore, the 26-week eligibility period begins with the first week of training if the training begins after exhaustion of basic TRA. Further, if the training begins before approval is obtained under this part 617, the 26-week eligibility period begins with the week in which the determination of approval is issued, if there is any scheduled training session in that week after the date of the determination.

(g) *Eligibility for TRA during breaks in training.* (1) Paragraph (f) of section 233 of the Act, added by the OTCA, provides for the payment, under specified conditions, of both basic and additional TRA during scheduled breaks in a training program, provided the conditions for such payments are met as expressed in this part 617. By making this provision applicable to basic TRA as well as additional TRA, paragraph (f) of section 233 of the Act changes the prior law for both. Previously, basic TRA was payable during training breaks, but additional TRA was payable solely with respect to weeks of training. Under new section 233(f), both basic and additional TRA are payable during training breaks, but only if the break does not exceed 14 days. Now, as under the prior law, weeks when TRA is not payable will still count against the eligibility periods for both basic and additional TRA, and in the case of additional TRA it will also count against the number of weeks payable.

(2) Paragraph (f) of section 233 of the Act is effective with regard to all decisions (i.e., all determinations, redeterminations, and decisions on appeals) made on or after August 23, 1988, regardless of when the training was approved under section 236 of the Trade Act, or whether the training was approved or is approvable under section 236 as amended by the 1988 Amendments, or when the break in training began or ended. In making any decision involving paragraph (f) of section 233 of the Act, the law to be applied is the law as in effect on the date the decision is made.

(h) *Retroactive eligibility for TRA.* (1) Effective on August 23, 1988, section 1425(b) of the OTCA provides for an open-ended waiver of the time limit in section 233(a)(2) on the eligibility period for basic TRA, and the 210-day time limit in section 233(b) on filing a

bona fide application for training in order to qualify for additional TRA. This waiver provision applies solely to workers who experienced a total qualifying separation in the period which began on August 13, 1981 and ended on April 7, 1986. Other conditions must be met that are specified in section 1425(b) and in this part 617.

(2) Altogether, nine conditions must be met for workers to obtain TRA payments under this special provision. (See §617.11(a)(3).) Further, this special provision applies solely to weeks which begin after August 23, 1988; no retroactive payments may be made under this special provision. Finally, only the two specific time limitations are waived, and all other requirements of the prior and amended law apply, including the first separation rule (relating to computation of the weekly and maximum amounts of basic TRA payable), the 26-week eligibility period for additional TRA, and the break provision of section 233(f).

(i) *Training for adversely affected workers.* Extensive amendments to section 236 are made in the OTCA which, except for some technical and conforming changes that take effect on November 21, 1988, all became effective on August 23, 1988. These changes must be effectuated in accordance with this part 617.

(j) *Agreements with States.* Section 239 also was amended by the OTCA, to require new terms and conditions in the section 239 agreements. This requires new agreements to be executed between the States and the Secretary of Labor, and gives new emphasis to the contractual nature of the obligations entered into by the States to administer the TAA Program in strict accordance with the Act and the regulations and operating instructions issued by the Department.

(k) *Other.* Other matters covered by the OTCA amendments, as well as the matters discussed in the preceding paragraphs of this section, shall, to the extent that the States may be involved in their implementation, be effectuated in strict accordance with the Act and the regulations and operating instructions issued by the Department, and as of the respective effective dates of the various provisions of the OTCA.

[59 FR 941, Jan. 6, 1994]

APPENDIX A TO PART 617—STANDARD FOR CLAIM FILING, CLAIMANT REPORTING, JOB FINDING, AND EMPLOYMENT SERVICES

EMPLOYMENT SECURITY MANUAL (Part V, Sections 5000–5004)

5000–5099 Claims Filing

5000 *Standard for Claim Filing, Claimant Reporting, Job Finding, and Employment Services*

A. *Federal law requirements.* Section 3304(a)(1) of the Federal Unemployment Tax Act and section 303(a)(2) of the Social Security Act require that a State law provide for:

''Payment of unemployment compensation solely through public employment offices or such other agencies as the Secretary may approve.''

Section 3304(a)(4) of the Federal Unemployment Tax and section 303(a)(5) of the Social Security Act require that a State law provide for:

''Expenditure of all money withdrawn from an unemployment fund of such State, in the payment of unemployment compensation * * *''

Section 303(a)(1) of the Social Security Act requires that the State law provide for:

''Such methods of administration * * * as are found by the Secretary to be reasonably calculated to insure full payment of unemployment compensation when due.''

B. *Secretary's interpretation of federal law requirements.*

1. The Secretary interprets section 3304(a)(1) of the Federal Unemployment Tax Act and section 303(a)(2) of the Social Security Act to require that a State law provide for payment of unemployment compensation solely through public employment offices or claims offices administered by the State employment security agency if such agency provides for such coordination in the operations of its public employment offices and claims offices as will insure (a) the payment of benefits only to individuals who are unemployed and who are able to work and available for work, and (b) that individuals claiming unemployment compensation (claimants) are afforded such placement and other employment services as are necessary and appropriate to return them to suitable work as soon as possible.

2. The Secretary interprets all the above sections to require that a State law provide for:

a. Such contact by claimants with public employment offices or claims offices or both, (1) as will reasonably insure the payment of

unemployment compensation only to individuals who are unemployed and who are able to work and available for work, and (2) that claimants are afforded such placement and other employment services as are necessary and appropriate to facilitate their return to suitable work as soon as possible; and

b. Methods of administration which do not unreasonably limit the opportunity of individuals to establish their right to unemployment compensation due under such States law.

5001 *Claim Filing and Claimant Reporting Requirements Designed to Satisfy Secretary's Interpretation*

A. *Claim filing—total or part-total unemployment*

1. Individuals claiming unemployment compensation for total or part-total unemployment are required to file a claim weekly or biweekly, in person or by mail, at a public employment office or a claims office (these terms include offices at itinerant points) as set forth below.

2. Except as provided in paragraph 3, a claimant is required to file in person.

a. His new claim with respect to a benefit year, or his continued claim for a waiting week or for his first compensable week of unemployment in such year; and

b. Any other claim, when requested to do so by the claims personnel at the office at which he files his claim(s) because questions about his right to benefits are raised by circumstances such as the following:

(1) The conditions or circumstances of his separation from employment;

(2) The claimant's answers to questions on mail claim(s) indicate that he may be unable to work or that there may be undue restrictions on his availability for work or that his search for work may be inadequate or that he may be disqualified;

(3) The claimant's answers to questions on mail claims create uncertainty about his credibility or indicate a lack of understanding of the applicable requirements; or

(4) The claimant's record shows that he has previously filed a fraudulent claim.

In such circumstances, the claimant is required to continue to file claims in person each week (or biweekly) until the State agency determines that filing claims in person is no longer required for the resolution of such questions.

3. A claimant must be permitted to file a claim by mail in any of the following circumstances:

a. He is located in an area requiring the expenditure of an unreasonable amount of time or money in traveling to the nearest facility established by the State agency for filing claims in person;

b. Conditions make it impracticable for the agency to take claims in person;

c. He has returned to full-time work on or before the scheduled date for his filing a claim, unless the agency makes provision for in-person filing at a time and place that does not interfere with his employment;

d. The agency finds that he has good cause for failing to file a claim in person.

4. A claimant who has been receiving benefits for partial unemployment may continue to file claims as if he were a partially unemployed worker for the first four consecutive weeks of total or part-total unemployment immediately following his period of partial unemployment so long as he remains attached to his regular employer.

B. *Claim filing—partial unemployment.* Each individual claiming unemployment compensation for a week (or other claim period) during which, because of lack of work, he is working less than his normal customary full-time hours for his regular employer and is earning less than the earnings limit provided in the State law, shall not be required to file a claim for such week or other claim period earlier than 2 weeks from the date that wages are paid for such claim period or, if a low earnings report is required by the State law, from the date the employer furnished such report to the individual. State agencies may permit claims for partial unemployment to be filed either in person or by mail, except that in the circumstances set forth in section A 3, filing by mail must be permitted, and in the circumstances set forth in section A 2 b, filing in person may be required.

5002 *Requirement for Job Finding, Placement, and Other Employment Services Designed to Satisfy Secretary's Interpretation*

A. Claims personnel are required to assure that each claimant is doing what a reasonable individual in his circumstances would do to obtain suitable work.

B. In the discretion of the State agency:

1. The claims personnel are required to give each claimant such necessary and appropriate assistance as they reasonably can in finding suitable work and at their discretion determine when more complete placement and employment services are necessary and appropriate for a claimant; and if they determine more complete services are necessary and appropriate, the claims personnel are to refer him to employment service personnel in the public employment office in which he has been filing claim(s), or, if he has been filing in a claims office, in the public employment office most accessible to him; *or*

2. All placement and employment services are required to be afforded to each claimant by employment service personnel in the public employment office most accessible to him in which case the claims personnel in the office in which the claimant files his claim are

to refer him to the employment service personnel when placement or other employment services are necessary and appropriate for him.

C. The personnel to whom the State agency assigns the responsibilities outlined in paragraph B above are required to give claimants such job-finding assistance, placement, and other employment services as are necessary and appropriate to facilitate their return to suitable work as soon as possible.

In some circumstances, no such services or only limited services may be required. For example, if a claimant is on a short-term temporary layoff with a fixed return date, the only service necessary and appropriate to be given to him during the period of the layoff is a referral to suitable temporary work if such work is being performed in the labor market area.

Similarly, claimants whose unemployment is caused by a labor dispute presumably will return to work with their employer as soon as the labor dispute is settled. They generally do not need services, nor do individuals in occupations where placement customarily is made by other nonfee charging placement facilities such as unions and professional associations.

Claimants who fall within the classes which ordinarily would require limited services or no services shall, if they request placement and employment services, be afforded such services as are necessary and appropriate for them to obtain suitable work or to achieve their reasonable employment goals.

On the other hand, a claimant who is permanently separated from his job is likely to require some services. He may need only some direction in how to get a job; he may need placement services if he is in an occupation for which there is some demand in the labor market area; if his occupation is outdated, he may require counseling and referral to a suitable training course. The extent and character of the services to be given any particular claimant may change with the length of his unemployment and depend not only on his own circumstances and conditions, but also on the condition of the labor market in the area.

D. Claimants are required to report to employment service personnel, as directed, but such personnel and the claims personnel required to so arrange and coordinate the contacts required of a claimant as not to place an unreasonable burden on him or unreasonably limit his opportunity to establish his rights to compensation. As a general rule, a claimant is not required to contact in person claims personnel or employment service personnel more frequently than once a week, unless he is directed to report more frequently for a specific service such as referral to a job or a training course or counseling which cannot be completed in one visit.

E. Employment service personnel are required to report promptly to claims personnel in the office in which the claimant files his claim(s): (1) his failure to apply for or accept work to which he was referred by such personnel or when known, by any other nonfee-charging placement facility such as a union or a professional association; and (2) any information which becomes available to it that may have a bearing on the claimant's ability to work or availability for work, or on the suitability of work to which he was referred or which was offered to him.

5004 *Evaluation of Alternative State Provisions*

If the State law provisions do not conform to the ''suggested State law requirements'' set forth in sections 5001 and 5002, but the State law contains alternative provisions, the Manpower Administrator, in collaboration with the State agency, will study the actual or anticipated affect of the alternative provisions. If the Manpower Administrator concludes that the alternative provisions satisfy the requirements of the Federal law as construed by the Secretary (see section 5000 B) he will so notify the State agency. If he does not so conclude, he will submit the matter to the Secretary. If the Secretary concludes that the alternative provisions satisfy such requirements, the State agency will be so notified. If the Secretary concludes that there is a question as to whether the alternative provisions satisfy such requirements, the State agency will be advised that unless the State law provisions are appropriately revised, a notice of hearing will be issued as required by the Code of Federal Regulations, title 20, section 601.3.

[59 FR 943, Jan. 6, 1994]

APPENDIX B TO PART 617—STANDARD FOR CLAIM DETERMINATIONS—SEPARATION INFORMATION

6010 *Federal Law Requirements.* Section 303(a)(1) of the Social Security Act requires that a State law include provision for:

''Such methods of administration . . . as are found by the Secretary to be reasonably calculated to insure full payment of unemployment compensation when due.''

Section 303(a)(3) of the Social Security Act requires that a State law include provision for:

''Opportunity for a fair hearing before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied.''

Section 3304(a)(4) of the Federal Unemployment Tax Act and section 303(a)(5) of the Social Security Act require that a State law include provision for:

''Expenditure of all money withdrawn from an unemployment fund of such State, in the

payment of unemployment compensation. . . .

Section 3306(h) of the Federal Unemployment Tax Act defines ''compensation'' as ''cash benefits payable to individuals with respect to their unemployment.''

6011 *Secretary's Interpretation of Federal Law Requirements.* The Secretary interprets the above sections to require that a State law include provisions which will insure that:

A. Individuals who may be entitled to unemployment compensation are furnished such information as will reasonably afford them an opportunity to know, establish, and protect their rights under the unemployment compensation law of such State, and

B. The State agency obtains and records in time for the prompt determination and review of benefit claims such information as will reasonably insure the payment of benefits to individuals to whom benefits are due.

6012 *Criteria for Review of State Law Conformity with Federal Requirements:*

In determining the conformity of a State law with the above requirements of the Federal Unemployment Tax Act and the Social Security Act as interpreted by the Secretary, the following criteria will be applied:

A. Is it required that individuals who may be entitled to unemployment compensation be furnished such information of their potential rights to benefits, including the manner and places of filing claims, the reasons for determinations, and their rights of appeal, as will insure them a reasonable opportunity to know, establish, and protect their rights under the law of the State?

B. Is the State agency required to obtain, in time for prompt determination of rights to benefits such information as will reasonably insure the payment of benefits to individuals to whom benefits are due?

C. Is the State agency required to keep records of the facts considered in reaching determinations of rights to benefits?

6013 *Claim Determinations Requirements Designed To Meet Department of Labor Criteria:*

A. *Investigation of claims.* The State agency is required to obtain promptly and prior to a determination of an individual's right to benefits, such facts pertaining thereto as will be sufficient reasonably to insure the payment of benefits when due.

This requirement embraces five separate elements:

1. It is the responsibility of the agency to take the initiative in the discovery of information. This responsibility may not be passed on to the claimant or the employer. In addition to the agency's own records, this information may be obtained from the worker, the employer, or other sources. If the information obtained in the first instance discloses no essential disagreement and provides a sufficient basis for a fair determination, no further investigation is necessary. If the information obtained from other sources differs essentially from that furnished by the claimant, the agency, in order to meet its responsibility, is required to inform the claimant of such information from other sources and to afford the claimant an opportunity to furnish any further facts he may have.

2. Evidentiary facts must be obtained as distinguished from ultimate facts or conclusions. That a worker was discharged for misconduct is an ultimate fact or conclusion; that he destroyed a machine upon which he was working is a primary or evidentiary fact, and the sort of fact that the requirement refers to.

3. The information obtained must be sufficient reasonably to insure the payment of benefits when due. In general, the investigation made by the agency must be complete enough to provide information upon which the agency may act with reasonable assurance that its decision is consistent with the unemployment compensation law. On the other hand, the investigation should not be so exhaustive and time-consuming as unduly to delay the payment of benefits and to result in excessive costs.

4. Information must be obtained promptly so that the payment of benefits is not unduly delayed.

5. If the State agency requires any particular evidence from the worker, it must give him a reasonable opportunity to obtain such evidence.

B. *Recording of facts.* The agency must keep a written record of the facts considered in reaching its determinations.

C. *Determination notices:*

1. The agency must give each claimant a written notice of:

a. Any monetary determination with respect to his benefit year;

b. Any determination with respect to purging a disqualification if, under the State law, a condition or qualification must be satisfied with respect to each week of disqualification; but in lieu of giving written notice of each determination for each week in which it is determined that the claimant has met the requirements for purging, the agency may inform the claimant that he has purged the disqualification for a week by notation on his applicant identification card or otherwise in writing.

c. Any other determination which adversely affects his rights to benefits, except that written notice of determination need not be given with respect to:

(1) A week in a benefit year for which the claimant's weekly benefit amount is reduced in whole or in part by earnings if, the first time in the benefit year that there is such a reduction, he is required to be furnished a booklet or leaflet containing the information set forth below in paragraph 2f(1). However, a written notice of determination is required if: (a) there is a dispute concerning

the reduction with respect to any week (e.g., as to the amount computed as the appropriate reduction, etc.); or (b) there is a change in the State law (or in the application thereof) affecting the reduction; or

(2) Any week in a benefit year subsequent to the first week in such benefit year in which benefits were denied, or reduced in whole or in part for reasons other than earnings, if denial or reduction for such subsequent week is based on the same reason and the same facts as for the first week, and if written notice of determination is required to be given to the claimant with respect to such first week, and with such notice of determination, he is required to be given a booklet or pamphlet containing the information set forth below in paragraph 2f(2) and 2h. However, a written notice of determination is required if: (a) there is a dispute concerning the denial or reduction of benefits with respect to such week; or (b) there is a change in the State law (or in the application thereof) affecting the denial or reduction; or (c) there is a change in the amount of the reduction except as to the balance covered by the last reduction in a series of reductions.

NOTE: This procedure may be applied to determinations made with respect to any subsequent weeks for the same reason and on the basis of the same facts: (a) that claimant is unable to work, unavailable for work, or is disqualified under the labor dispute provision; and (b) reducing claimant's weekly benefit amount because of income other than earnings or offset by reason of overpayment.

2. The agency must include in written notices of determinations furnished to claimants sufficient information to enable them to understand the determinations, the reasons therefor, and their rights to protest, request reconsideration, or appeal.

The written notice of monetary determination must contain the information specified in the following items (except h) unless an item is specifically not applicable. A written notice of any other determination must contain the information specified in as many of the following items as are necessary to enable the claimant to understand the determination and to inform him of his appeal rights. Information specifically applicable to the individual claimant must be contained in the written notice of determination. Information of general application such as (but not limited to) the explanation of benefits for partial unemployment, information as to deductions, seasonality factors, and information as to the manner and place of taking an appeal, extension of the appeal period, and where to obtain information and assistance may be contained in a booklet or leaflet which is given the claimant with his monetary determination.

a. *Base period wages.* The statement concerning base-period wages must be in sufficient detail to show the basis of computation of eligibility and weekly and maximum benefit amounts. (If maximum benefits are allowed, it may not be necessary to show details of earnings.)

b. *Employer name.* The name of the employer who reported the wage is necessary so that the worker may check the wage transcript and know whether it is correct. If the worker is given only the employer number, he may not be able to check the accuracy of the wage transcript.

c. *Explanation of benefit formula—weekly and maximum benefit amounts.* Sufficient information must be given the worker so that he will understand how his weekly benefit amount, including allowances for dependents, and his maximum benefit amount were figured. If benefits are computed by means of a table contained in the law, the table must be furnished with the notice of determination whether benefits are granted or denied.

The written notice of determination must show clearly the weekly benefit amount and the maximum potential benefits to which the claimant is entitled.

The notice to a claimant found ineligible by reason of insufficient earnings in the base period must inform him clearly of the reason for ineligibility. An explanation of the benefit formula contained in a booklet or pamphlet should be given to each claimant at or prior to the time he receives written notice of a monetary determination.

d. *Benefit year.* An explanation of what is meant by the benefit year and identification of the claimant's benefit year must be included in the notice of determination.

e. *Information as to benefits for partial unemployment.* There must be included either in the written notice of determination or in a booklet or pamphlet accompanying the notice an explanation of the claimant's rights to partial benefits for any week with respect to which he is working less than his normal customary full-time workweek because of lack of work and for which he earns less than his weekly benefit amount or weekly benefit amount plus earnings, whichever is provided by the State law. If the explanation is contained in the notice of determination, reference to the item in the notice in which his weekly benefit amount is entered should be made.

f. *Deductions from weekly benefits:*

(1) *Earnings.* Although written notice of determinations deducting earnings from a claimant's weekly benefit amount is generally not required (see paragraph 1 c (1) above), where written notice of determination is required (or given) it shall set forth the amount of earnings, the method of computing the deduction in sufficient detail to enable the claimant to verify the accuracy of the deduction, and his right to protest, request redetermination, and appeal. Where a written notice of determination is given to

the claimant because there has been a change in the State law or in the application of the law, an explanation of the change shall be included.

When claimant is not required to receive a written notice of determination, he must be given a booklet or pamphlet the first time in his benefit year that there is a deduction for earnings which shall include the following information:

(a) The method of computing deductions for earnings in sufficient detail to enable the claimant to verify the accuracy of the deduction;

(b) That he will not automatically be given a written notice of determination for a week with respect to which there is a deduction for earnings (unless there is a dispute concerning the reduction with respect to a week or there has been a change in the State law or in the application of the law affecting the deduction) but that he may obtain such a written notice upon request; and

(c) A clear statement of his right to protest, request a redetermination, and appeal from any determination deducting earnings from his weekly benefit amount even though he does not automatically receive a written notice of determination; and if the State law requires written notice of determination in order to effectuate a protest, redetermination, or appeal, he must be so advised and advised also that he must request a written notice of determination before he takes any such action.

(2) *Other deductions:*

(a) A written notice of determination is required with respect to the first week in claimant's benefit year in which there is a reduction from his benefits for a reason other than earnings. This notice must describe the deduction made from claimant's weekly benefit amount, the reason for the deduction, the method of computing it in sufficient detail to enable him to verify the accuracy of such deduction, and his right to protest, request redetermination, or appeal.

(b) A written notice of determination is not required for subsequent weeks that a deduction is made for the same reason and on the basis of the same facts, if the notice of determination pursuant to (2) (a), or a booklet or pamphlet given him with such notice explains (i) the several kinds of deductions which may be made under the State law (e.g., retirement pensions, vacation pay, and overpayments); (ii) the method of computing each kind of deduction in sufficient detail that claimant will be able to verify the accuracy of deductions made from his weekly benefit payments; (iii) any limitation on the amount of any deduction or the time in which any deduction may be made; (iv) that he will not automatically be given a written notice of determination for subsequent weeks with respect to which there is a deduction for the same reason and on the basis of the same facts, but that he may obtain a written notice of determination upon request; (v) his right to protest, request redetermination, or appeal with respect to subsequent weeks for which there is a reduction from his benefits for the same reason, and on the basis of the same facts even though he does not automatically receive a written notice of determination; and (vi) that if the State law requires written notice of determination in order to effectuate a protest, redetermination, or appeal, he must be so advised and advised also that he must request a written notice of determination before he takes any such action.

g. *Seasonality factors.* If the individual's determination is affected by seasonality factors under the State law, an adequate explanation must be made. General explanations of seasonality factors which may affect determinations for subsequent weeks may be included in a booklet or pamphlet given claimant with his notice of monetary determinations.

h. *Disqualification or ineligibility*. If a disqualification is imposed, or if the claimant is declared ineligible for one or more weeks, he must be given not only a statement of the period of disqualification or ineligibility and the amount of wage-credit reductions, if any, but also an explanation of the reason for the ineligibility or disqualification. This explanation must be sufficiently detailed so that he will understand why he is ineligible or why he has been disqualified, and what he must do in order to requalify for benefits or purge the disqualification. The statement must be individualized to indicate the facts upon which the determination was based, e.g., state, ''It is found that you left your work with Blank Company because you were tired of working; the separation was voluntary, and the reason does not constitute good cause,'' rather than merely the phrase ''voluntary quit.'' Checking a box as to the reason for the disqualification is not a sufficiently detailed explanation. However, this statement of the reason for the disqualification need not be a restatement of all facts considered in arriving at the determination.

i. *Appeal rights.* The claimant must be given information with respect to his appeal rights.

(1) The following information shall be included in the notice of determination:

(a) A statement that he may appeal or, if the State law requires or permits a protest or redetermination before an appeal, that he may protest or request a redetermination.

(b) The period within which an appeal, protest, or request for redetermination must be filed. The number of days provided by statute must be shown as well as either the beginning date or ending date of the period. (It is recommended that the ending date of the appeal period be shown, as this is the more understandable of the alternatives.)

(2) The following information must be included either in the notice of determination or in separate informational material referred to in the notice:

(a) The manner in which the appeal, protest, or request for redetermination must be filed, e.g., by signed letter, written statement, or on a prescribed form, and the place or places to which the appeal, protest, or request for redetermination may be mailed or hand-delivered.

(b) An explanation of any circumstances (such as nonworkdays, good cause, etc.) which will extend the period for the appeal, protest, or request for redetermination beyond the date stated or identified in the notice of determination.

(c) That any further information claimant may need or desire can be obtained together with assistance in filing his appeal, protest, or request for redetermination from the local office.

If the information is given in separate material, the notice of determination would adequately refer to such material if it said, for example, ''For other information about your (appeal), (protest), (redetermination) rights, see pages ____ to ____ of the ____ (name of pamphlet or booklet) heretofore furnished to you.''

6014 *Separation Information Requirements Designed To Meet Department of Labor Criteria:*

A. *Information to agency.* Where workers are separated, employers are required to furnish the agency promptly, either upon agency request or upon such separation, a notice describing the reasons for and the circumstances of the separation and any additional information which might affect a claimant's right to benefits. Where workers are working less than full time, employers are required to furnish the agency promptly, upon agency request, information concerning a claimant's hours of work and his wages during the claim periods involved, and other facts which might affect a claimant's eligibility for benefits during such periods.

When workers are separated and the notices are obtained on a request basis, or when workers are working less than full time and the agency requests information, it is essential to the prompt processing of claims that the request be sent out promptly after the claim is filed and the employer be given a specific period within which to return the notice, preferably within 2 working days.

When workers are separated and notices are obtained upon separation, it is essential that the employer be required to send the notice to the agency with sufficient promptness to insure that, if a claim is filed, it may be processed promptly. Normally, it is desirable that such a notice be sent to the central office of the agency, since the employer may not know in which local office the worker will file his claim. The usual procedure is for the employer to give the worker a copy of the notice sent by the employer to the agency.

B. *Information to worker:*

1. *Information required to be given.* Employers are required to give their employees information and instructions concerning the employees' potential rights to benefits and concerning registration for work and filing claims for benefits.

The information furnished to employees under such a requirement need not be elaborate; it need only be adequate to insure that the worker who is separated or who is working less than full time knows he is potentially eligible for benefits and is informed as to what he is to do or where he is to go to file his claim and register for work. When he files his claim, he can obtain more detailed information.

In States that do not require employers to furnish periodically to the State agency detailed reports of the wages paid to their employees, each employer is required to furnish to his employees information as to (a) the name under which he is registered by the State agency, (b) the address where he maintains his payroll records, and (c) the workers' need for this information if and when they file claims for benefits.

2. *Methods for giving information.* The information and instructions required above may be given in any of the following ways:

a. *Posters prominently displayed in the employer's establishment.* The State agency should supply employers with a sufficient number of posters for distribution throughout their places of business and should see that the posters are conspicuously displayed at all times.

b. *Leaflets.* Leaflets distributed either periodically or at the time of separation or reduction of hours. The State agency should supply employers with a sufficient number of leaflets.

c. *Individual notices.* Individual notices given to each employee at the time of separation or reduction in hours.

It is recommended that the State agency's publicity program be used to supplement the employer-information requirements. Such a program should stress the availability and location of claim-filing offices and the importance of visiting those offices whenever the worker is unemployed, wishes to apply for benefits, and to seek a job.

6015 *Evaluation of Alternative State Provisions with Respect to Claim Determinations and Separation Information.* If the State law provisions do not conform to the suggested requirements set forth in sections 6013 and 6014, but the State law contains alternative provisions, the Bureau of Employment Security, in collaboration with the State agency, will study the actual or anticipated effects of

the alternative provisions. If the Administrator of the Bureau concludes that the alternative provisions satisfy the criteria in section 6012, he will so notify the State agency. If the Administrator of the Bureau does not so conclude, he will submit the matter to the Secretary. If the Secretary concludes that the alternative provisions satisfy the criteria in section 6012, the State agency will be so notified. If the Secretary concludes that there is a question as to whether the alternative provisions satisfy the criteria, the State agency will be advised that unless the State law provisions are appropriately revised, a notice of hearing will be issued as required by the Code of Federal Regulations, title 20, §601.5.

[51 FR 45848, Dec. 22, 1986. Redesignated at 59 FR 943, Jan. 6, 1994]

APPENDIX C TO PART 617—STANDARD FOR FRAUD AND OVERPAYMENT DETECTION

7510 *Federal Law Requirements.* Section 303(a)(1) of the Social Security Act requires that a State law include provision for:

''Such methods of administration . . . as are found by the Secretary to be reasonably calculated to insure full payment of unemployment compensation when due.''

Section 1603(a)(4) of the Internal Revenue Code and section 3030(a)(5) of the Social Security Act require that a State law include provision for:

''Expenditure of all money withdrawn from an unemployment fund of such State, in the payment of unemployment compensation . . .''

Section 1607(h) of the Internal Revenue Code defines ''compensation'' as ''cash benefits payable to individuals with respect to their unemployment.''

7511 *The Secretary's Interpretation of Federal Law Requirements.* The Secretary of Labor interprets the above sections to require that a State law include provision for such methods of administration as are, within reason, calculated (1) to detect benefits paid through error by the agency or through willful misrepresentation or error by the claimant or others, and (2) to deter claimants from obtaining benefits through willful misrepresentation.

7513 *Criteria for Review of State Conformity With Federal Requirements.* In determining State conformity with the above requirements of the Internal Revenue Code and the Social Security Act, as interpreted by the Secretary of Labor, the following criteria will be applied:

A. *Are investigations required to be made after the payment of benefits, (or, in the case of interstate claims, are investigations made by the agent State after the processing of claims) as to claimants' entitlement to benefits paid to them in a sufficient proportion of cases to test the effectiveness of the agency's procedures for the prevention of payments which are not due? To carry out investigations, has the agency assigned to some individual or unit, as a basic function, the responsibility of making or functionally directing such investigations?*

Explanation: It is not feasible to prescribe the extent to which the above activities are required; however, they should always be carried on to such an extent that they will show whether or not error or willful misrepresentation is increasing or decreasing, and will reveal problem areas. The extent and nature of the above activities should be varied according to the seriousness of the problem in the State. The responsible individual or unit should:

1. Check paid claims for overpayment and investigate for willful misrepresentation or, alternatively, advise and assist the operating units in the performance of such functions, or both;

2. Perform consultative services with respect to methods and procedures for the prevention and detection of fraud; and

3. Perform other services which are closely related to the above.

Although a State agency is expected to make a full-time assignment of responsibility to a unit or individual to carry on the functions described above, a small State agency might make these functions a part-time responsibility of one individual. In connection with the detection of overpayments, such a unit or individual might, for example:

(a) Investigate information on suspected benefit fraud received from any agency personnel, and from sources outside the agency, including anonymous complaints;

(b) Investigate information secured from comparisons of benefit payments with employment records to detect cases of concurrent working (whether in covered or noncovered work) and claiming of benefits (including benefit payments in which the agency acted as agent for another State).

The benefit fraud referred to herein may involve employers, agency employees, and witnesses, as well as claimants.

Comparisons of benefit payments with employment records are comonly made either by post-audit or by industry surveys. The so-called ''post-audit'' is a matching of central office wage-record files against benefit payments for the same period. ''Industry surveys'' or ''mass audits'' are done in some States by going directly to employers for pay-roll information to be checked against concurrent benefit lists. A plan of investigation based on a sample post-audit will be considered as partial fulfillment of the investigation program; it would need to be supplemented by other methods capable of detecting overpayments to persons who have moved into noncovered occupations or are claiming interstate benefits.

B. *Are adequate records maintained by which the results of investigations may be evaluated?*

Explanation. To meet this criterion, the State agency will be expected to maintain records of all its activities in the detection of overpayments, showing whether attributable to error or willful misrepresentation, measuring the results obtained through various methods, and noting the remedial action taken in each case. The adequacy and effectiveness of various methods of checking for willful misrepresentation can be evaluated only if records are kept of the results obtained. Internal reports on fraudulent and erroneous overpayments are needed by State agencies for self-evaluation. Detailed records should be maintained in order that the State agency may determine, for example, which of several methods of checking currently used are the most productive. Such records also will provide the basis for drawing a clear distinction between fraud and error.

C. *Does the agency take adequate action with respect to publicity concerning willful misrepresentation and its legal consequences to deter fraud by claimants?*

Explanation. To meet this criterion, the State agency must issue adequate material of claimant eligibility requirements and must take necessary action to obtain publicity on the legal consequences of willful misrepresentation or willful nondisclosure of facts.

Public announcements on convictions and resulting penalties for fraud are generally considered necessary as a deterrent to other persons, and to inform the public that the agency is carrying on an effective program to prevent fraud. This alone is not considered adequate publicity. It is important that information be circulated which will explain clearly and understandably the claimant's rights, and the obligations which he must fulfill to be eligible for benefits. Leaflets for distribution and posters placed in local offices are appropriate media for such information.

*7515 *Evaluation of Alternative State Provisions with Respect to Erroneous and Illegal Payments.* If the methods of administration provided for by the State law do not conform to the suggested methods of meeting the requirements set forth in section 7511, but a State law does provide for alternative methods of administration designed to accomplish the same results, the Bureau of Employment Security, in collaboration with the State agency, will study the actual or anticipated effect of the alternative methods of administration. If the Bureau concludes that the alternative methods satisfy the criteria in section 7513, it will so notify the State agency. If the Bureau does not so conclude, it will submit to the Secretary the results of the study for his determination of whether the State's alternative methods of administration meet the criteria.

[51 FR 45848, Dec. 22, 1986. Redesignated at 59 FR 943, Jan. 6, 1994]

PART 618—621—[RESERVED]

PART 625—DISASTER UNEMPLOYMENT ASSISTANCE

Sec.

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APPENDIX A TO PART 625—STANDARD FOR CLAIM FILING, CLAIMANT REPORTING, JOB FINDING, AND EMPLOYMENT SERVICES

APPENDIX B TO PART 625—STANDARD FOR CLAIM DETERMINATIONS—SEPARATION INFORMATION

APPENDIX C TO PART 625—STANDARD FOR FRAUD AND OVERPAYMENT DETECTION

AUTHORITY: 42 U.S.C. 1302; 42 U.S.C. 5164; 42 U.S.C. 5189a(c); 42 U.S.C. 5201(a); Executive Order 12673 of March 23, 1989 (54 FR 12571); delegation of authority from the Director of the Federal Emergency Management Agency to the Secretary of Labor, effective December 1, 1985 (51 FR 4988); Secretary's Order No. 4–75 (40 FR 18515).

SOURCE: 42 FR 46712, Sept. 16, 1977, unless otherwise noted.

§ 625.1 Purpose; rules of construction.

(a) *Purpose.* Section 410 of ''The Robert T. Stafford Disaster Relief and Emergency Assistance Act'' amended the program for the payment of unemployment assistance to unemployed individuals whose unemployment is caused by a major disaster, and to provide reemployment assistance services to those individuals. The unemployment assistance provided for in section 410 of the Act is hereinafter referred to as Disaster Unemployment Assistance, or DUA. The regulations in this part are issued to implement sections 410 and 423 of the Act.

(b) *First rule of construction.* Sections 410 and 423 of the Act and the implementing regulations in this part shall be construed liberally so as to carry out the purposes of the Act.

(c) *Second rule of construction.* Sections 410 and 423 of the Act and the implementing regulations in this part shall be construed so as to assure insofar as possible the uniform interpretation and application of the Act throughout the United States.

(d) *Effectuating purpose and rules of construction.* (1) In order to effectuate the provisions of this section, each State agency shall forward to the United States Department of Labor, on receipt of a request from the Department, a copy of any determination or redetermination ruling on an individual's entitlement to DUA.

(2) If the Department believes a determination or redetermination is inconsistent with the Secretary's interpretation of the Act, the Department may at any time notify the State agency of the department's view. Thereafter, the State agency shall appeal if possible, and shall not follow such determination or redetermination as a precedent; and in any subsequent proceedings which involve such determination or redetermination, or wherein such determination or redetermination is cited as precedent or otherwise relied upon, the State agency shall inform the hearing officer of the Department's view and shall make all reasonable efforts to obtain modification, limitation, or overruling of the determination or redetermination.

(3) A State agency may request reconsideration of a notice that a determination or redetermination is inconsistent with the Act, and shall be given an opportunity to present views and arguments if desired. If a determination or redetermination setting a precedent becomes final, which the Department believes to be inconsistent with the Act, the Secretary will decide whether the Agreement with the State shall be terminated.

(4) Concurrence of the Department in a determination or redetermination shall not be presumed from the absence of a notice issued pursuant to this paragraph.

[42 FR 46712, Sept. 16, 1977, as amended at 55 FR 554, Jan. 5, 1990]

§ 625.2 Definitions.

For the purposes of the Act and this part:

(a) *Act* means sections 410 and 423 of *The Robert T. Stafford Disaster Relief and Emergency Assistance Act* (formerly section 407 of the ''Disaster Relief Act of 1974'', Pub. L. 93–288, 88 Stat. 143, 156, approved May 22, 1974), 42 U.S.C. 5177, 5189a, as amended by The Disaster Relief and Emergency Assistance Amendments of 1988, Pub. L. 100–707, 102 Stat. 4689, 4704, 4705, approved November 23, 1988.

(b) *Agreement* means the Agreement entered into pursuant to the Act, between a State and the Secretary of Labor of the United States, under which the State agency of the State agrees to make payments of Disaster Unemployment Assistance in accordance with the Act and the regulations and procedures thereunder prescribed by the Secretary.

(c) *Announcement date* means the first day on which the State agency publicly announces the availability of Disaster Unemployment Assistance in the State, pursuant to § 625.17.

(d) *Compensation* means unemployment compensation as defined in section 85(b) of the Internal Revenue Code of 1986, and shall include any assistance or allowance payable to an individual with respect to such individual's unemployment under any State law or Federal unemployment compensation

law unless such governmental unemployment compensation program payments are not considered ''compensation'' by ruling of the Internal Revenue Service or specific provision of Federal and/or State law because such payments are based on employee contributions which are not deductible from Federal income tax liability until the total nondeductible contributions paid by the employee to such program has been paid or are not ''compensation'' as defined under paragraph (d)(5) of this section. Governmental unemployment compensation programs include (but are not limited to) programs established under: a State law approved by the Secretary of Labor pursuant to section 3304 of the Internal Revenue Code, chapter 85 of title 5 of the United States Code, the Railroad Unemployment Insurance Act (45 U.S.C. 351 *et seq.*), any Federal supplementary compensation law, and trade readjustment allowances payable under chapter 2 of title II of the Trade Act of 1974 (19 U.S.C. 2271 *et seq.*). ''Compensation'' also includes ''regular compensation'', ''additional compensation'', ''extended compensation'', ''Federal supplementary compensation'', and ''disability payments'' defined as follows:

(1) *Regular compensation* means compensation payable to an individual under any State law or the unemployment compensation plan of a political subdivision of a State and, when so payable, includes compensation payable pursuant to 5 U.S.C. chapter 85 (parts 609 and 614 of this chapter), but not including extended compensation or additional compensation.

(2) *Additional compensation* means compensation totally financed by a State and payable under a State law by reason of conditions of high unemployment or by reason of other special factors, and, when so payable, includes compensation payable pursuant to 5 U.S.C. chapter 85.

(3) *Extended compensation* means compensation payable to an individual for weeks of unemployment in an extended benefit period, under those provisions of a State law which satisfy the requirements of the Federal-State Extended Unemployment Compensation Act of 1970 (title II, Pub. L. 91–373; 84 Stat. 695, 708; part 615 of this chapter), as amended with respect to the payment of extended compensation, and, when so payable, includes additional compensation and compensation payable pursuant to 5 U.S.C. chapter 85.

(4) *Federal supplementary compensation* means supplemental compensation payable under a temporary Federal law after exhaustion of regular and extended compensation.

(5) *Disability payments* means cash disability payments made pursuant to a governmental program as a substitute for cash unemployment payments to an individual who is ineligible for such payments solely because of the disability, except for payments made under workmen's compensation acts for personal injuries or sickness.

(e) *Date the major disaster began* means the date a major disaster first occurred, as specified in the understanding between the Federal Emergency Management Agency and the Governor of the State in which the major disaster occurred.

(f) *Disaster Assistance Period* means the period beginning with the first week following the date the major disaster began, and ending with [the 26th week subsequent to the date the major disaster was declared.

(g) *Disaster Unemployment Assistance* means the assistance payable to an individual eligible for the assistance under the Act and this part, and which is referred to as DUA.

(h) *Federal Coordinating Officer* means the official appointed pursuant to section 302 of The Robert T. Stafford Disaster Relief and Emergency Assistance Act, to operate in the affected major disaster area.

(i) *Governor* means the chief executive of a State.

(j) *Initial application* means the first application for DUA filed by an individual, on the basis of which the individual's eligibility for DUA is determined.

(k) *Major disaster* means a major disaster as declared by the President pursuant to section 401 of The Robert T. Stafford Disaster Relief and Emergency Assistance Act.

(l) *Major disaster area* means the area identified as eligible for Federal assistance by the Federal Emergency Management Agency, pursuant to a Presidential declaration of a major disaster.

(m) *Secretary* means the Secretary of Labor of the United States.

(n) *Self-employed individual* means an individual whose primary reliance for income is on the performance of services in the individual's own business, or on the individual's own farm.

(o) *Self-employment* means services performed as a self-employed individual.

(p) *State* means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, the Territory of Guam, American Samoa, Commonwealth of the Northern Mariana Islands, Federated States of Micronesia, Republic of the Marshall Islands, and the Trust Territory of the Pacific Islands.

(q) *State agency* means——

(1) In all States except the Territory of Guam, American Samoa, Commonwealth of the Northern Mariana Islands, Federated States of Micronesia, Republic of the Marshall Islands and the Trust Territory of the Pacific Islands, the agency administering the State law; and

(2) In the Territory of Guam, American Samoa, Commonwealth of the Northern Mariana Islands, Federated States of Micronesia, Republic of the Marshall Islands and the Trust Territory of the Pacific Islands, the agency designated in the Agreement entered into by the State.

(r)(1) *State law* means, with respect to——

(i) The States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands, the unemployment compensation law of the State which has been approved under section 3304(a) of the Internal Revenue Code of 1986 (26 U.S.C. 3304(a)); and

(ii) The Territory of Guam, American Samoa, Commonwealth of the Northern Mariana Islands, Federated States of Micronesia, Republic of the Marshall Islands and the Trust Territory of the Pacific Islands, the Hawaii Employment Security Law.

(2) *Applicable State law* means, for an individual, the State law of the applicable State for an individual as provided in §625.12.

(s) *Unemployed worker* means an individual who was employed in or was to commence employment in the major disaster area at the time the major disaster began, and whose principal source of income and livelihood is dependent upon the individual's employment for wages, and whose unemployment is caused by a major disaster as provided in §625.5(a).

(t) *Unemployed self-employed individual* means an individual who was self-employed in or was to commence self-employment in the major disaster area at the time the major disaster began, and whose principal source of income and livelihood is dependent upon the individual's performance of service in self-employment, and whose unemployment is caused by a major disaster as provided in §625.5(b).

(u) *Wages* means remuneration for services performed for another, and, with respect to a self-employed individual, net income from services performed in self-employment.

(v) *Week* means a week as defined in the applicable State law.

(w) *Week of unemployment* means—

(1) For an unemployed worker, any week during which the individual is totally, part-totally, or partially unemployed. A week of total unemployment is a week during which the individual performs no work and earns no wages, or has less than full-time work and earns wages not exceeding the minimum earnings allowance prescribed in the applicable State law. A week of part-total unemployment is a week of otherwise total unemployment during which the individual has odd jobs or subsidiary work and earns wages not exceeding the maximum earnings allowance prescribed in the applicable State law. A week of partial unemployment is a week during which the individual works less than regular, full-time hours for the individual's regular employer, as a direct result of the major disaster, and earns wages not exceeding the maximum earnings allowance prescribed by the applicable State law.

(2) For an unemployed self-employed individual, any week during which the individual is totally, part-totally, or partially unemployed. A week of total unemployment is a week during which the individual performs no services in self-employment or in an employer-employee relationship, or performs services less than full-time and earns wages not exceeding the minimum earnings allowance prescribed in the applicable State law. A week of part-total unemployment is a week of otherwise total unemployment during which the individual has odd jobs or subsidiary work and earns wages not exceeding the maximum earnings allowance prescribed in the applicable State law. A week of partial unemployment is a week during which the individual performs less than the customary full-time services in self-employment, as a direct result of the major disaster, and earns wages not exceeding the maximum earnings allowance prescribed by the applicable State law, or during which the only activities or services performed are for the sole purpose of enabling the individual to resume self-employment.

(3) If the week of unemployment for which an individual claims DUA is a week with respect to which the individual is reemployed in a suitable position or has commenced services in self-employment, that week shall be treated as a week of partial unemployment if the week qualifies as a week of partial unemployment as defined in this paragraph.

[42 FR 46712, Sept. 16, 1977, as amended at 55 FR 554, Jan. 5, 1990; 56 FR 22805, May 16, 1991]

§ 625.3 Reemployment assistance.

(a) *State assistance.* Except as provided in paragraph (b) of this section, the applicable State shall provide, without reimbursement from any funds provided under the Act, reemployment assistance services under any other law administered by the State to individuals applying for DUA and all other individuals who are unemployed because of a major disaster. Such services shall include, but are not limited to, counseling, referrals to suitable work opportunities, and suitable training, to assist the individuals in obtaining reemployment in suitable positions as soon as possible.

(b) *Federal assistance.* In the case of American Samoa, Commonwealth of the Northern Mariana Islands, Federated States of Micronesia, Republic of the Marshall Islands, and the Trust Territory of the Pacific Islands, the Department of Labor, in consultation with the Federal Emergency Management Agency, will determine what reemployment services are needed by DUA applicants, and if any available Federal programs of reemployment assistance services can be implemented in that jurisdiction.

[55 FR 554, Jan. 5, 1990; as amended at 56 FR 22806, May 16, 1991]

§ 625.4 Eligibility requirements for Disaster Unemployment Assistance.

An individual shall be eligible to receive a payment of DUA with respect to a week of unemployment, in accordance with the provisions of the Act and this part if:

(a) That week begins during a Disaster Assistance Period;

(b) The applicable State for the individual has entered into an Agreement which is in effect with respect to that week;

(c) The individual is an unemployed worker or an unemployed self-employed individual;

(d) The individual's unemployment with respect to that week is caused by a major disaster, as provided in §625.5;

(e) The individual has filed a timely initial application for DUA and, as appropriate, a timely application for a payment of DUA with respect to that week;

(f) That week is a week of unemployment for the individual;

(g) The individual is able to work and available for work within the meaning of the applicable State law: *Provided,* That an individual shall be deemed to meet this requirement if any injury caused by the major disaster is the reason for inability to work or engage in self-employment; or, in the case of an unemployed self-employed individual, the individual performs service or activities which are solely for the purpose of enabling the individual to resume self-employment;

(h) The individual has not refused a bona fide offer of employment in a suitable position, or refused without good cause to resume or commence suitable self-employment, if the employment or self-employment could have been undertaken in that week or in any prior week in the Disaster Assistance Period; and

(i) The individual is not eligible for compensation (as defined in § 625.2(d)) or for waiting period credit for such week under any other Federal or State law, except that an individual determined ineligible because of the receipt of disqualifying income shall be considered eligible for such compensation or waiting period credit. An individual shall be considered ineligible for compensation or waiting period credit (and thus potentially eligible for DUA) if the individual is under a disqualification for a cause that occurred prior to the individual's unemployment due to the disaster, or for any other reason is ineligible for compensation or waiting period credit as a direct result of the major disaster.

[42 FR 46712, Sept. 16, 1977, as amended at 55 FR 555, Jan. 5, 1990]

§ 625.5 Unemployment caused by a major disaster.

(a) *Unemployed worker.* The unemployment of an unemployed worker is caused by a major disaster if—

(1) The individual has a ''week of unemployment'' as defined in § 625.2(w)(1) following the ''date the major disaster began'' as defined in § 625.2(e), and such unemployment is a direct result of the major disaster; or

(2) The individual is unable to reach the place of employment as a direct result of the major disaster; or

(3) The individual was to commence employment and does not have a job or is unable to reach the job as a direct result of the major disaster; or

(4) The individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of the major disaster; or

(5) The individual cannot work because of an injury caused as a direct result of the major disaster.

(b) *Unemployed self-employed individual.* The unemployment of an unemployed self-employed individual is caused by a major disaster if—

(1) The individual has a ''week of unemployment'' as defined in § 625.2(w)(2) following the ''date the major disaster began'' as defined in § 625.2(e), and such unemployment is a direct result of the major disaster; or

(2) The individual is unable to reach the place where services as a self-employed individual are performed, as a direct result of the major disaster; or

(3) The individual was to commence regular services as a self-employed individual, but does not have a place or is unable to reach the place where the services as a self-employed individual were to be performed, as a direct result of the major disaster; or

(4) The individual cannot perform services as a self-employed individual because of an injury caused as a direct result of the major disaster.

[42 FR 46712, Sept. 16, 1977, as amended at 55 FR 555, Jan. 5, 1990; 56 FR 22806, May 16, 1991]

§ 625.6 Weekly amount; jurisdictions; reductions.

(a) In all States, except as provided in paragraphs (c) and (d) of this section, the amount of DUA payable to an unemployed worker or unemployed self-employed individual for a week of total unemployment shall be the weekly amount of compensation the individual would have been paid as regular compensation, as computed under the provisions of the applicable State law for a week of total unemployment. In no event shall such amount be in excess of the maximum amount of regular compensation authorized under the applicable State law for that week.

(1) Except as provided in paragraph (a)(2) or (b) of this section, in computing an individual's weekly amount of DUA, qualifying employment and wage requirements and benefit formula of the applicable State law shall be applied; and for purposes of this section, employment, wages, and self-employment which are not covered by the applicable State law shall be treated in the same manner and with the same effect as covered employment and wages, but shall not include employment or self-employment, or wages earned or

paid for employment or self-employment, which is contrary to or prohibited by any Federal law, such as, but not limited to, section 3304(a)(14)(A) of the Federal Unemployment Tax Act (26 U.S.C. 3304(a)(14)(A)).

(2) For purposes of paragraph (a)(1) of this section, the base period to be utilized in computing the DUA weekly amount shall be the most recent tax year that has ended for the individual (whether an employee or self-employed) prior to the individual's unemployment that was a direct result of the major disaster. The self-employment income to be treated as wages for purposes of computing the weekly amount under this paragraph (a) shall be the net income reported on the tax return of the individual as income from all self-employment that was dependent upon the performance of services by the individual. If an individual has not filed a tax return for the most recent tax year that has ended at the time of such individual's initial application for DUA, such individual shall have a weekly amount determined in accordance with paragraph (e)(3) of this section.

(3) As of the date of filing an initial application for DUA, family members over the age of majority, as defined under the statutes of the applicable State, who were customarily or routinely employed or self-employed as a family unit or in the same self-employment business prior to the individuals' unemployment that was a direct result of the major disaster, shall have the wages from such employment or net income from the self-employment allocated equally among such adult family members for purposes of computing a weekly amount under this paragraph (a), unless the documentation to substantiate employment or self-employment and wages earned or paid for such employment or self-employment submitted as required by paragraph (e) of this section supports a different allocation. Family members under the age of majority as of the date of filing an initial application for DUA shall have a weekly amount computed under this paragraph (a) based on the actual wages earned or paid for employment or self-employment rather than an equal allocation.

(b) If the weekly amount computed under paragraph (a) of this section is less than 50 percent of the average weekly payment of regular compensation in the State, as provided quarterly by the Department, or, if the individual has insufficient wages from employment or insufficient or no net income from self-employment (which includes individuals falling within paragraphs (a)(3) and (b)(3) of §625.5) in the applicable base period to compute a weekly amount under paragraph (a) of this section, the individual shall be determined entitled to a weekly amount equal to 50 percent of the average weekly payment of regular compensation in the State.

(1) If an individual was customarily or routinely employed or self-employed less than full-time prior to the individual's unemployment as a direct result of the major disaster, such individual's weekly amount under this paragraph (b)(1) shall be determined by calculating the percent of time the individual was employed or self-employed compared to the customary and usual hours per week that would constitute the average per week hours for year-round full-time employment or self-employment for the occupation, then applying the percentage to the determined 50 percent of the average weekly amount of regular compensation paid in the State. The State agency shall utilize information furnished by the applicant at the time of filing an initial application for DUA and any labor market or occupational information available within the State agency to determine the average per week hours for full-time employment or self-employment for the occupation. If the weekly amount computed for an individual under this paragraph (b)(1) is less than the weekly amount computed under paragraph (a) of this section for the individual, the individual shall be entitled to the higher weekly amount.

(2) The weekly amount so determined under paragraph (b)(1) of this section, if not an even dollar amount, shall be rounded in accordance with the applicable State law.

(c) In the Territory of Guam and the Commonwealth of the Northern Mariana Islands, the amount of DUA payable to an unemployed worker or unemployed self-employed individual for a week of total unemployment shall be the average of the payments of regular compensation made under all State laws referred to in §625.2(r)(1)(i) for weeks of total unemployment in the first four of the last five completed calendar quarters immediately preceding the quarter in which the major disaster began. The weekly amount so determined, if not an even dollar amount, shall be rounded to the next higher dollar.

(d) In American Samoa, Federated States of Micronesia, Republic of the Marshall Islands and the Trust Territory of the Pacific Islands, the amount of DUA payable to an unemployed worker or unemployed self-employed individual for a week of total unemployment shall be the amount agreed upon by the Regional Administrator, Employment and Training Administration, for Region IX (San Francisco), and the Federal Coordinating Officer, which shall approximate 50 percent of the area-wide average of the weekly wages paid to individuals in the major disaster area in the quarter immediately preceding the quarter in which the major disaster began. The weekly amount so determined, if not an even dollar amount, shall be rounded to the next higher dollar.

(e) The State agency shall immediately determine, upon the filing of an initial application for DUA, a weekly amount under the provisions of paragraphs (a) through (d) of this section, as the case may be, based on the individual's statement of employment or self-employment preceding the individual's unemployment that was a direct result of the major disaster, and wages earned or paid for such employment or self-employment. An immediate determination of a weekly amount shall also be made where, in conjunction with the filing of an initial application for DUA, the individual submits documentation substantiating employment or self-employment and wages earned or paid for such employment or self-employment, or, in the absence of documentation, where any State agency records of employment or self-employment and wages earned or paid for such employment or self-employment, justify the determination of a weekly amount. An immediate determination shall also be made based on the individual's statement or in conjunction with the submittal of documentation in those cases where the individual was to commence employment or self-employment on or after the date the major disaster began but was prevented from doing so as a direct result of the disaster.

(1) In the case of a weekly amount determined in accordance with paragraph (e) of this section, based only on the individual's statement of earnings, the individual shall furnish documentation to substantiate the employment or self-employment or wages earned from or paid for such employment or self-employment or documentation to support that the individual was to commence employment or self-employment on or after the date the major disaster began. In either case, documentation shall be submitted within 21 calendar days of the filing of the initial application for DUA.

(2) Any individual who fails to submit documentation to substantiate employment or self-employment or the planned commencement of employment or self-employment in accordance with paragraph (e)(1) of this section, shall be determined ineligible for the payment of DUA for any week of unemployment due to the disaster. Any weeks for which DUA was already paid on the application prior to the date of the determination of ineligibility under this paragraph (e)(2) are overpaid and a determination shall be issued in accordance with §625.14(a). In addition, the State agency shall consider whether the individual is subject to a disqualification for fraud in accordance with the provisions set forth in §625.14(i).

(3) For purposes of a computation of a weekly amount under paragraph (a) of this section, if an individual submits documentation to substantiate employment or self-employment in accordance with paragraph (e)(1), but not documentation of wages earned or paid during the base period set forth in paragraph (a)(2) of this section, including those cases where the individual has

not filed a tax return for the most recent tax year that has ended, the State agency shall immediately redetermine the weekly amount of DUA payable to the individual in accordance with paragraph (b) of this section.

(4) Any individual determined eligible for a weekly amount of DUA under the provisions of paragraph (e)(3) of this section may submit necessary documentation to substantiate wages earned or paid during the base period set forth in paragraph (a)(2) of this section, including those cases where the individual has not filed a tax return for the most recent tax year that has ended, at any time prior to the end of the disaster assistance period. A redetermination of the weekly amount payable, as previously determined under paragraph (b) of this section, shall immediately be made if the wages earned or paid for services performed in employment or self-employment reflected in such documentation is sufficient to permit a computation under paragraph (a) of this section of a weekly amount higher than was determined under paragraph (b) of this section. Any higher amount so determined shall be applicable to all weeks during the disaster assistance period for which the individual was eligible for the payment of DUA.

(f)(1) The weekly amount of DUA payable to an unemployed worker or unemployed self-employed individual for a week of partial or part-total unemployment shall be the weekly amount determined under paragraph (a), (b), (c) or (d) of this section, as the case may be, reduced (but not below zero) by the amount of wages that the individual earned in that week as determined by applying to such wages the earnings allowance for partial or part-total employment prescribed by the applicable State law.

(2) The weekly amount of DUA payable to an unemployed self-employed individual for a week of unemployment shall be the weekly amount determined under paragraph (a), (b), (c) or (d) of this section, as the case may be, reduced (but not below zero) by the full amount of any income received during the week for the performance of services in self-employment, regardless of whether or not any services were performed during the week, by applying the earnings allowance as set forth in paragraph (f)(1) of this section. Notwithstanding the definition of ''wages'' for a self-employed individual under §625.2(u), the term ''any income'' for purposes of this paragraph (f)(2) means gross income.

[60 FR 25568, May 11, 1995]

§ 625.7 Disaster Unemployment Assistance: Duration.

DUA shall be payable to an eligible unemployed worker or eligible unemployed self-employed individual for all weeks of unemployment which begin during a Disaster Assistance Period.

§ 625.8 Applications for Disaster Unemployment Assistance.

(a) *Initial application.* An initial application for DUA shall be filed by an individual with the State agency of the applicable State within 30 days after the announcement date of the major disaster as the result of which the individual became unemployed, and on a form prescribed by the Secretary which shall be furnished to the individual by the State agency. An initial application filed later than 30 days after the announcement date of the major disaster shall be accepted as timely by the State agency if the applicant had good cause for the late filing, but in no event shall an initial application be accepted by the State agency if it is filed after the expiration of the Disaster Assistance Period. If the 30th day falls on a Saturday, Sunday, or a legal holiday in the major disaster area, the 30-day time limit shall be extended to the next business day.

(b) *Weekly applications.* Applications for DUA for weeks of unemployment shall be filed with respect to the individual's applicable State at the times and in the manner as claims for regular compensation are filed under the applicable State law, and on forms prescribed by the Secretary which shall be furnished to the individual by the State agency.

(c) *Filing in person.* (1) Except as provided in paragraph (c)(2) of this section, all applications for DUA, including initial applications, shall be filed in person.

(2) Whenever an individual has good cause for not filing any application for DUA in person, the application shall be filed at such time, in such place, and in such a manner as directed by the State agency and in accordance with this part and procedures prescribed by the Secretary.

(d) *IBPP.* The ''Interstate Benefit Payment Plan'' shall apply, where appropriate, to an individual filing applications for DUA.

(e) *Wage combining.* The ''Interstate Arrangement for Combining Employment and Wages'' (part 616 of this chapter) shall apply, where appropriate, to an individual filing applications for DUA: *Provided,* That the ''Paying State'' shall be the applicable State for the individual as prescribed in § 625.12.

(f) *Procedural requirements.* (1) The procedures for reporting and filing applications for DUA shall be consistent with this part, and with the Secretary's ''Standard for Claim Filing, Claimant Reporting, Job Finding and Employment Services,'' *Employment Security Manual.* Part V, sections 5000 *et seq.* (appendix A of this part), insofar as such standard is not inconsistent with this part.

(2) The provisions of the applicable State law which apply hereunder to applications for and the payment of DUA shall be applied consistent with the requirements of title III of the Social Security Act and the Federal Unemployment Tax Act which are pertinent in the case of regular compensation, including but not limited to those standards and requirements specifically referred to in the provisions of this part.

(Approved by the Office of Management and Budget under control number 1205–0051)

(Pub. L. No. 96–511)

[42 FR 46712, Sept. 16, 1977, as amended at 49 FR 18295, Apr. 30, 1984; 55 FR 555, Jan. 5, 1990]

§ 625.9 Determinations of entitlement; notices to individual.

(a) *Determination of initial application.* (1) The State agency shall promptly, upon the filing of an initial application for DUA, determine whether the individual is eligible, and if the individual is found to be eligible, the weekly amount of DUA payable to the individual and the period during which DUA is payable.

(2) An individual's eligibility for DUA shall be determined, where a reliable record of employment, self-employment and wages is not obtainable, on the basis of an affidavit submitted to the State agency by the individual, and on a form prescribed by the Secretary which shall be furnished to the individual by the State agency.

(b) *Determinations of weekly applications.* The State agency shall promptly, upon the filing of an application for a payment of DUA with respect to a week of unemployment, determine whether the individual is entitled to a payment of DUA with respect to that week, and, if entitled, the amount of DUA to which the individual is entitled.

(c) *Redetermination.* The provisions of the applicable State law concerning the right to request, or authority to undertake, reconsideration of a determination pertaining to regular compensation under the applicable State law shall apply to determinations pertaining to DUA.

(d) *Notices to individual.* The State agency shall give notice in writing to the individual, by the most expeditious method, of any determination or redetermination of an initial application, and of any determination of an application for DUA with respect to a week of unemployment which denies DUA or reduces the weekly amount initially determined to be payable, and of any redetermination of an application for DUA with respect to a week of unemployment. Each notice of determination or redetermination shall include such information regarding the determination or redetermination and notice of right to reconsideration or appeal, or both, as is furnished with written notices of determination and written notices of redeterminations with respect to claims for regular compensation.

(e) *Promptness.* Full payment of DUA when due shall be made with the greatest promptness that is administratively feasible.

(f) *Secretary's Standard.* The procedures for making determinations and

redeterminations, and furnishing written notices of determinations, redeterminations, and rights of appeal to individuals applying for DUA, shall be consistent with this part and with the Secretary's ''Standard for Claim Determinations—Separation Information,'' *Employment Security Manual.* Part V, sections 6010 *et seq.* (Appendix B of this part).

(Approved by the Office of Management and Budget under control number 1205–0051)

(Pub. L. No. 96–511)

[42 FR 46712, Sept. 16, 1977, as amended at 49 FR 18295, Apr. 30, 1984; 55 FR 555, Jan. 5, 1990]

§ 625.10 Appeal and review.

(a) *States of the United States.* (1) Any determination or redetermination made pursuant to § 625.9, by the State agency of a State (other than the State agency of the Territory of Guam, American Samoa, Commonwealth of the Northern Mariana Islands, Federated States of Micronesia, Republic of the Marshall Islands, or the Trust Territory of the Pacific Islands) may be appealed by the applicant in accordance with the applicable State law to the first-stage administrative appellate authority in the same manner and to the same extent as a determination or redetermination of a right to regular compensation may be appealed under the applicable State law, except that the period for appealing shall be 60 days from the date the determination or redetermination is issued or mailed instead of the appeal period provided for in the applicable State law. Any decision on a DUA first-stage appeal must be made and issued within 30 days after receipt of the appeal by the State.

(2) Notice of the decision on appeal, and the reasons therefor, shall be given to the individual by delivering the notice to such individual personally or by mailing it to the individual's last known address, whichever is most expeditious. The decision shall contain information as to the individual's right to review of the decision by the appropriate Regional Administrator, Employment and Training Administration, if requested within 15 days after the decision was mailed or delivered in person to the individual. The notice will include the manner of requesting such review, and the complete address of the Regional Administrator. Notice of the decision on appeal shall be given also to the State agency (with the same notice of right to review) and to the appropriate Regional Administrator.

(b) *Guam, American Samoa, and the Trust Territory of the Pacific Islands.* (1) In the case of an appeal by an individual from a determination or redetermination by the State agency of the Territory of Guam, American Samoa, Commonwealth of the Northern Mariana Islands, Federated States of Micronesia, Republic of the Marshall Islands, or the Trust Territory of the Pacific Islands, the individual shall be entitled to a hearing and decision in accordance with § 625.30 of this part.

(2) Notice of the referee's decision, and the reasons therefor, shall be given to the individual by delivering the notice to the individual personally or by mailing it to the individual's last known address, whichever is most expeditious. The notice of decision shall contain information as to the individual's right to review of the decision by the Regional Administrator, Employment and Training Administration, for Region IX (San Francisco), and the manner of obtaining such review, including the address of the Regional Administrator. Notice of the decision on appeal shall be given also to the State agency and to the Regional Administrator.

(c) *Review by Regional Administrator.* (1) The appropriate Regional Administrator, Employment and Training Administration, upon request for review by an applicant or the State agency shall, or upon the Regional Administrator's own motion may, review a decision on appeal issued pursuant to paragraph (a) or (b) of this section.

(2) Any request for review by an applicant or a State agency shall be filed, and any review on the Regional Administrator's own motion shall be undertaken, within 15 days after notice of the decision on appeal was delivered or mailed to the individual.

(3)(i) A request for review by an individual may be filed with the appropriate State agency, which shall forward the request to the appropriate Regional Administrator, Employment and

Training Administration, or may be filed directly with the appropriate Regional Administrator.

(ii) A request for review by a State agency shall be filed with the appropriate Regional Administrator, and a copy shall be served on the individual by delivery to the individual personally or by mail to the individual's last known address.

(iii) When a Regional Administrator undertakes a review of a decision on the Regional Administrator's own motion, notice thereof shall be served promptly on the individual and the State agency.

(iv) Whenever review by a Regional Administrator is undertaken pursuant to an appeal or on the Regional Administrator's own motion, the State agency shall promptly forward to the Regional Administrator the entire record of the case.

(v) Where service on the individual is required by paragraph (c)(3)(ii) of this section, adequate proof of service shall be furnished for the record before the Regional Administrator, and be a condition of the Regional Administrator undertaking review pursuant to this paragraph.

(4) The decision of the Regional Administrator on review shall be rendered promptly, and not later than the earlier of—

(i) 45 days after the appeal is received or is undertaken by the Regional Administrator, or

(ii) 90 days from the date the individual's appeal from the determination or redetermination was received by the State agency.

(5) Notice of the Regional Administrator's decision shall be mailed promptly to the last known address of the individual, to the State agency of the applicable State, and to the Director, Unemployment Insurance Service. The decision of the Regional Administrator shall be the final decision under the Act and this part, unless there is further review by the Assistant Secretary as provided in paragraph (d) of this section.

(d) *Further review by the Assistant Secretary.* (1) The Assistant Secretary for Employment and Training on his own motion may review any decision by a Regional Administrator issued pursuant to paragraph (c) of this section.

(2) Notice of a motion for review by the Assistant Secretary shall be given to the applicant, the State agency of the applicable State, the appropriate Regional Administrator, and the Director, Unemployment Insurance Service.

(3) When the Regional Administrator and the State agency are notified of the Assistant Secretary's motion for review, they shall forward all records in the case to the Assistant Secretary.

(4) Review by the Assistant Secretary shall be solely on the record in the case, any other written contentions or evidence requested by the Assistant Secretary, and any further evidence or arguments offered by the individual, the State agency, the Regional Administrator, or the Director, Unemployment Insurance Service, which are mailed to the Assistant Secretary within 15 days after mailing the notice of motion for review.

(5) Upon review of a case under this paragraph, the Assistant Secretary may affirm, modify, or reverse the decision of the Regional Administrator, and may remand the case for further proceedings and decision in accordance with the Assistant Secretary's decision.

(6) The decision of the Assistant Secretary shall be made promptly, and notice thereof shall be sent to the applicant, the State agency, the Regional Administrator, and the Director, Unemployment Insurance Service.

(7) The decision of the Assistant Secretary shall be final and conclusive, and binding on all interested parties, and shall be a precedent applicable throughout the States.

(e) *Procedural requirements.* (1) All decisions on first-stage appeals from determinations or redeterminations by the State agencies must be made within 30 days of the appeal; therefore, the Secretary's ''Standard for Appeals Promptness-Unemployment Compensation'' in part 650 of this chapter shall not apply to the DUA program.

(2) The provisions on right of appeal and opportunity for hearing and review with respect to applications for DUA shall be consistent with this part and with sections 303(a)(1) and 303(a)(3) of

the Social Security Act, 42 U.S.C. 503(a)(1) and 503(a)(3).

(3) Any petition or other matter required to be filed within a time limit under this section shall be deemed to be filed at the time it is delivered to an appropriate office, or at the time of the postmark if it is mailed via the United States Postal Service to an appropriate office.

(4) If any limited time period specified in this section ends on a Saturday, Sunday, or a legal holiday in the major disaster area, the time limit shall be extended to the next business day.

[42 FR 46712, Sept. 16, 1977, as amended at 55 FR 555, Jan. 5, 1990; 56 FR 22805, May 16, 1991]

§ 625.11 Provisons of State law applicable.

The terms and conditions of the State law of the applicable State for an individual, which apply to claims for, and the payment of regular compensation, shall apply to applications for, and the payment of, DUA to each such individual, only as specifically set forth in the provisions of this part.

§ 625.12 The applicable State for an individual.

(a) *Applicable State.* The applicable State for an individual shall be that State in which the individual's unemployment is the result of a major disaster.

(b) *Limitation.* DUA is payable to an individual only by an applicable State as determined pursuant to paragraph (a) of this section, and—

(1) Only pursuant to an Agreement entered into pursuant to the Act and this part, and with respect to weeks in which the Agreement is in effect; and

(2) Only with respect to weeks of unemployment that begin during a Disaster Assistance Period.

[42 FR 46712, Sept. 16, 1977, as amended at 55 FR 556, Jan. 5, 1990]

§ 625.13 Restrictions on entitlement; disqualification.

(a) *Income reductions.* The amount of DUA payable to an individual for a week of unemployment, as computed pursuant to § 625.6, shall be reduced by the amount of any of the following that an individual has received for the week or would receive for the week if the individual filed a claim or application therefor and took all procedural steps necessary under the appropriate law, contract, or policy to receive such payment:

(1) Any benefits or insurance proceed from any source not defined as ''compensation'' under § 625.2(d) for loss of wages due to illness or disability;

(2) A supplemental unemployment benefit pursuant to a collective bargaining agreement.

(3) Private income protection insurance;

(4) Any workers' compensation by virtue of the death of the head of the household as the result of the major disaster in the major disaster area, prorated by weeks, if the individual has become the head of the household and is seeking suitable work because the head of the household died as the result of the major disaster in the major disaster area; and

(5) The prorated amount of a retirement pension or annuity under a public or private retirement plan or system, prorated, where necessary, by weeks, but only if, and to the extent that, such amount would be deducted from regular compensation payable under the applicable State law.

(6) The prorated amount of primary benefits under title II of the Social Security Act, but only to the extent that such benefits would be deduced from regular compensation if payable to the individual under the applicable State law.

(b) *Disqualification.* (1) An individual shall not be entitled to DUA for any week after the week in which the individual is reemployed in a suitable position.

(2) An individual who refuses without good cause to accept a bona fide offer of reemployment in a position suitable to the individual, or to investigate or accept a referral to a position which is suitable to and available to the individual, shall not be entitled to DUA with respect to the week in which such refusal occurs or in any subsequent week in the Disaster Assistance Period. For the purposes of this paragraph, a position shall not be deemed to be suitable for an individual if the circumstances present any unusual risk to the health, safety, or morals of the

individual, if it is impracticable for the individual to accept the position, or if acceptance for the position would, as to the individual, be inconsistent with any labor standard in section 3304(a)(5) of the Federal Unemployment Tax Act, 26 U.S.C. 3304(a)(5), or the comparable provisions of the applicable State law.

[42 FR 46712, Sept. 16, 1977, as amended at 55 FR 556, Jan. 5, 1990]

§ 625.14 Overpayments; disqualification for fraud.

(a) *Finding and repayment.* If the State agency of the applicable State finds that an individual has received a payment of DUA to which the individual was not entitled under the Act and this part, whether or not the payment was due to the individual's fault or misrepresentation, the individual shall be liable to repay to the applicable State the total sum of the payment to which the individual was not entitled, and the State agency shall take all reasonable measures authorized under any State law or Federal law to recover for the account of the United States the total sum of the payment to which the individual was not entitled.

(b) *Recovery by offset.* (1) The State agency shall recover, insofar as is possible, the amount of any outstanding overpayment of DUA made to the individual by the State, by deductions from any DUA payable to the individual under the Act and this part, or from any compensation payable to the individual under any Federal unemployment compensation law administered by the State agency, or from any assistance or allowance payable to the individual with respect to unemployment under any other Federal law administered by the State agency.

(2) The State agency shall also recover, insofar as possible, the amount of any outstanding overpayment of DUA made to the individual by another State, by deductions from any DUA payable by the State agency to the individual under the Act and this part, or from any compensation payable to the individual under any Federal unemployment compensation law administered by the State agency, or from any assistance or allowance payable to the individual with respect to unemployment under any other Federal law administered by the State agency.

(3) If the State has in effect an agreement to implement the cross-program offset provisions of section 303(g)(2) of the Social Security Act (42 U.S.C. 503(g)(2)), the State shall apply the provisions of such agreement to the recovery of outstanding DUA overpayments.

(c) *Debts due the United States.* DUA payable to an individual shall be applied by the State agency for the recovery by offset of any debt due to the United States from the individual, but shall not be aplied or used by the State agency in any manner for the payment of any debt of the individual to any State or any other entity or person.

(d) *Recovered overpayments.* Overpayments recovered in any manner shall be credited or returned, as the case may be, to the appropriate account of the United States.

(e) *Application of State law.* Any provision of State law authorizing waiver of recovery of overpayments of compensation shall not be applicable to DUA.

(f) *Final decision.* Recovery of any overpayment of DUA shall not be enforced by the State agency until the determination establishing the overpayment has become final, or if appeal is taken from the determination, until the decision after opportunity for a fair hearing has become final.

(g) *Procedural requirements.* (1) The provisions of paragraphs (c), (d), and (f) of § 625.9 shall apply to determinations and redeterminations made pursuant to this section.

(2) The provisions of § 625.10 shall apply to determinations and redeterminations made pursuant to this section.

(h) *Fraud detection and prevention.* Provisions in the procedures of each State with respect to detection and prevention of fraudulent overpayments of DUA shall be, as a minimum, commensurate with the procedures adopted by the State with respect to regular compensation and consistent with the Secretary's ''Standard for Fraud and Overpayment Detection,'' *Employment Security Manual,* part V, sections 7510 *et seq.* (Appendix C of this part).

(i) *Disqualification for fraud.* Any individual who, with respect to a major disaster, makes or causes another to

make a false statement or misrepresentation of a material fact, knowing it to be false, or knowingly fails or causes another to fail to disclose a material fact, in order to obtain for the individual or any other person a payment of DUA to which the individual or any other person is not entitled, shall be disqualified as follows:

(1) If the false statement, misrepresentation, or nondisclosure pertains to an initial application for DUA—

(i) The individual making the false statement, misrepresentation, or nondisclosure shall be disqualified from the receipt of any DUA with respect to that major disaster; and

(ii) If the false statement, misrepresentation, or nondisclosure was made on behalf of another individual, and was known to such other individual to be a false statement, misrepresentation, or nondisclosure, such other individual shall be disqualified from the receipt of any DUA with respect to that major disaster; and

(2) If the false statement, misrepresentation, or nondisclosure pertains to a week for which application for a payment of DUA is made—

(i) The individual making the false statement, misrepresentation, or nondisclosure shall be disqualified from the receipt of DUA for that week and the first two compensable weeks in the Disaster Assistance Period that immediately follow that week, with respect to which the individual is otherwise entitled to a payment of DUA; and

(ii) If the false statement, misrepresentation, or nondisclosure was made on behalf of another individual, and was known to such other individual to be a false statement, misrepresentation, or nondisclosure, such other individual shall be disqualified from the receipt of DUA for that week and the first two compensable weeks in the Disaster Assistance Period that immediately follow that week, with respect to which the individual is otherwise entitled to a payment of DUA.

(j) *Criminal penalties.* The provisions of this section on recovery of overpayments and disqualification for fraudulently claiming or receiving any DUA to which an individual was not entitled under the Act and this part shall be in addition to and shall not preclude any applicable criminal prosecution and penalties under State or Federal law.

[42 FR 46712, Sept. 16, 1977, as amended at 55 FR 556, Jan. 5, 1990]

§ 625.15 Inviolate rights to DUA.

Except as specifically provided in this part, the right of individuals to DUA shall be protected in the same manner and to the same extent as the rights of persons to regular unemployment compensation are protected under the applicable State law. Such measures shall include protection of applicants for DUA from waiver, release, assignment, pledge, encumbrance, levy, execution, attachment, and garnishment, of their rights to DUA. In the same manner and to the same extent, individuals shall be protected from discrimination and obstruction in regard to seeking, applying for and receiving any right to DUA.

§ 625.16 Recordkeeping; disclosure of information.

(a) *Recordkeeping.* Each State agency will make and maintain records pertaining to the administration of the Act as the Secretary requires, and will make all such records available for inspection, examination, and audit by such Federal officials or employees as the Secretary may designate or as may be required by law.

(b) *Disclosure of information.* Information in records made and maintained by a State agency in administering the Act shall be kept confidential, and information in such records may be disclosed only in the same manner and to the same extent as information with respect to regular compensation and the entitlement of individuals thereto may be disclosed under the applicable State law, and consistently with section 303(a)(1) of the Social Security Act, 42 U.S.C. 503(a)(1). This provision on the confidentiality of information obtained in the administration of the Act shall not apply, however, to the United States Department of Labor, or in the case of information, reports and studies requested pursuant to §625.19, or where the result would be inconsistent with the Freedom of Information Act (5 U.S.C. 552), the Privacy Act of 1974 (5 U.S.C. 552a), or regulations of

the United States Department of Labor promulgated thereunder.

§ 625.17 Announcement of the beginning of a Disaster Assistance Period.

Whenever a major disaster is declared in a State, the State agency shall promptly announce throughout the major disaster area by all appropriate news media that individuals who are unemployed as the result of the major disaster may be entitled to DUA; that they should file initial applications for DUA as soon as possible, but not later than the 30th day after the announcement date; the beginning date of the Disaster Assistance Period; and where individuals may obtain further information and file applications for DUA.

§ 625.18 Public access to Agreements.

The State agency of a State will make available to any individual or organization a true copy of the Agreement with the State for inspection and copying. Copies of an Agreement may be furnished on request to any individual or organization upon payment of the same charges, if any, as apply to the furnishing of copies of other records of the State agency.

§ 625.19 Information, reports and studies.

(a) *Routine responses.* State agencies shall furnish to the Secretary such information and reports and make such studies as the Secretary decides are necessary or appropriate for carrying out the purposes of the Act and this part.

(b) *Final Report.* In addition to such other reports as may be required by the Secretary, within 60 days after all payments of Disaster Unemployment Assistance as the result of a major disaster in the State have been made, the State agency shall submit a final report to the Secretary. A final report shall contain a narrative summary, a chronological list of significant events, pertinent statistics about the Disaster Unemployment Assistance provided to disaster victims, brief statements of major problems encountered, discussion of lessons learned, and suggestions for improvement of the program during future major disasters.

(Approved by the Office of Management and Budget under control number 1205–0051)

(Pub. L. No. 96–511)

[15 FR 5886, Aug. 31, 1950; 23 FR 1267, Mar. 1, 1958, as amended at 49 FR 18295, Apr. 30, 1984]

§ 625.20 Saving clause.

The regulations in this part do not apply to applications, determinations, hearings, or other administrative or judicial proceedings, with respect to any major disaster declared prior to November 23, 1988, and such applications, determinations, hearings, or other administrative or judicial proceeding shall remain subject to the Act and the Regulations in this part issued thereunder which were in effect prior to that date.

[42 FR 46712, Sept. 16, 1977, as amended at 55 FR 557, Jan. 5, 1990]

§ 625.30 Appeal Procedures for Guam, American Samoa, Commonwealth of the Northern Mariana Islands, Federated States of Micronesia, Republic of the Marshall Islands, and the Trust Territory of the Pacific Islands.

(a) *Designation of referee.* The Director of the Unemployment Insurance Service shall designate a referee of a State agency to hear and decide appeals under this section from determinations and redeterminations by the State agencies of the Territory of Guam, American Samoa, Commonwealth of the Northern Mariana Islands, Federated States of Micronesia, Republic of the Marshall Islands, and the Trust Territory of the Pacific Islands.

(b) *Appeals to referee.* (1) A DUA applicant may appeal from a determination or redetermination issued by the State agency of the Territory of Guam, American Samoa, Commonwealth of the Northern Mariana Islands, Federated States of Micronesia, Republic of the Marshall Islands, or the Trust Territory of the Pacific Islands within 60 days after the mailing of notice and a copy of such determination or redetermination to such applicant's last known address, or in the absence of mailing within 60 days after delivery in

person thereof to such applicant. The appeal shall be in writing and may be filed with any office of the State agency.

(2) Notice that an appeal has been filed may be given or mailed, in the discretion of the referee, to any person who has offered or is believed to have evidence with respect to the claim.

(3) An appeal shall be promptly scheduled and heard, in order that a decision on the appeal can be issued within 30 days after receipt of the appeal by the State agency. Written notice of hearing, specifying the time and place thereof and those questions known to be in dispute, shall be given or mailed to the applicant, the State agency, and any person who has offered or is believed to have evidence with respect to the claim 7 days or more before the hearing, except that a shorter notice period may be used with the consent of the applicant.

(c) *Conduct of hearings.* Hearings before the referee shall be informal, fair, and impartial, and shall be conducted in such manner as may be best suited to determine the DUA applicants' right to compensation. Hearings shall be open to the public unless sufficient cause for a closed hearing is shown. The referee shall open a hearing by ascertaining and summarizing the issue or issues involved in the appeal. The applicant may examine and cross-examine witnesses, inspect documents, and explain or rebut any evidence. An opportunity to present argument shall be afforded such applicant, and such argument shall be made part of the record. The referee shall give such applicant, if not represented by counsel or other representative, every assistance that does not interfere with the impartial discharge of the referee's duties. The referee may examine such applicant and other witnesses to such extent as the referee deems necessary. Any issue involved in the claim shall be considered and passed upon even though such issue was not set forth as a ground of appeal.

(d) *Evidence.* Oral or written evidence of any nature, whether or not conforming to the legal rules of evidence, may be accepted. Any official record of the State agency, including reports submitted in connection with administration of the DUA program, may be included in the record if the applicant is given an opportunity to examine and rebut the same. A written statement under oath or affirmation may be accepted when it appears impossible or unduly burdensome to require the attendance of a witness, but a DUA applicant adversely affected by such a statement must be given the opportunity to examine such statement, to comment on or rebut any or all portions thereof, and whenever possible to cross-examine a witness whose testimony has been introduced in written form by submitting written questions to be answered in writing.

(e) *Record.* All oral testimony before the referee shall be taken under oath or affirmation and a transcript thereof shall be made and kept. Such transcript together with all exhibits, papers, and requests filed in the proceeding shall constitute the record for decision.

(f) *Withdrawal of appeal.* A DUA applicant who has filed an appeal may withdraw such appeal with the approval of the referee.

(g) *Nonappearance of DUA applicant.* Failure of a DUA applicant to appear at a hearing shall not result in a decision being automatically rendered against such applicant. The referee shall render a decision on the basis of whatever evidence is properly before him/her unless there appears to be a good reason for continuing the hearing. An applicant who fails to appear at a hearing with respect to his/her appeal may within seven days thereafter petition for a reopening of the hearing. Such petition shall be granted if it appears to the referee that such applicant has shown good cause for his/her failure to attend.

(h) *Notice of referee's decision and further review*—(1) *Decision.* A copy of the referee's decision, which shall include findings and conclusions, shall promptly be given or mailed to the applicant, the State agency, and to the Regional Administrator, Employment and Training Administration, for Region IX (San Francisco). The decision of the referee shall be accompanied by an explanation of the right of such applicant or State agency to request review by the Regional Administrator and the

time and manner in which such review may be instituted, as provided in paragraph (a)(2) of §625.10.

(2) *Time limit for decision.* A decision on an appeal to a referee under this section shall be made and issued by the referee not later than 30 days after receipt of the appeal by the State agency.

(3) *Further review.* Further review by the Regional Administrator or the Assistant Secretary with respect to an appeal under this section shall be in accordance with paragraphs (c) and (d) of §625.10.

(i) *Consolidation of appeals.* The referee may consolidate appeals and conduct joint hearings thereon where the same or substantially similar evidence is relevant and material to the matters in issue. Reasonable notice of consolidation and the time and place of hearing shall be given or mailed to the applicants or their representatives, the State agency, and to persons who have offered or are believed to have evidence with respect to the DUA claims.

(j) *Representation.* A DUA applicant may be represented by counsel or other representative in any proceedings before the referee or the Regional Administrator. Any such representative may appear at any hearing or take any other action which such applicant may take under this part. The referee, for cause, may bar any person from representing an applicant, in which event such action shall be set forth in the record. No representative shall charge an applicant more than an amount fixed by the referee for representing the applicant in any proceeding under this section.

(k) *Postponement, continuance, and adjournment of hearings.* A hearing before the referee shall be postponed, continued, or adjourned when such action is necessary to afford a DUA applicant reasonable opportunity for a fair hearing. In such case notice of the subsequent hearing shall be given to any person who received notice of the prior hearing.

(l) *Information from agency records.* Information shall be available to a DUA applicant, either from the records of the State agency or as obtained in any proceeding herein provided for, to the extent necessary for proper presentation of his/her case. All requests for information shall state the nature of the information desired as clearly as possible and shall be in writing unless made at a hearing.

(m) *Filing of decisions.* Copies of all decisions of the referee shall be kept on file at his/her office or agency for at least 3 years.

[55 FR 557, Jan. 5, 1990, as amended at 56 FR 22805, May 16, 1991]

APPENDIX A TO PART 625—STANDARD FOR CLAIM FILING, CLAIMANT REPORTING, JOB FINDING, AND EMPLOYMENT SERVICES

Employment Security Manual (Part V, Sections 5000–5004)

5000 *Standard for Claim Filing, Claimant Reporting, Job Finding, and Employment Services*

A. *Federal law requirements.* Section 3304(a)(1) of the Federal Unemployment Tax Act and section 303(a)(2) of the Social Security Act require that a State law provide for: ''Payment of unemployment compensation solely through public employment offices or such other agencies as the Secretary may approve.''

Section 3304(a)(4) of the Federal Unemployment Tax Act and section 303(a)(5) of the Social Security Act require that a State law provide for: ''Expenditure of all money withdrawn from an unemployment fund of such State, in the payment of unemployment compensation * * *''

Section 303(a)(1) of the Social Security Act requires that the State law provide for: ''Such methods of administration . . . as are found by the Secretary to be reasonably calculated to insure full payment of unemployment compensation when due.''

B. *Secretary's interpretation of federal law requirements:* 1. The Secretary interprets section 3304(a)(1) of the Federal Unemployment Tax Act and section 303(a)(2) of the Social Security Act to require that a State law provide for payment of unemployment compensation solely through public employment offices or claims offices administered by the State employment security agency if such agency provides for such coordination in the operations of its public employment offices and claims offices as will insure (a) the payment of benefits only to individuals who are unemployed and who are able to work and available for work, and (b) that individuals claiming unemployment compensation (claimants) are afforded such placement and other employment services as are necessary and appropriate to return them to suitable work as soon as possible.

2. The Secretary interprets all the above sections to require that a State law provide for: a. Such contact by claimants with public employment offices or claims offices or both, (1) as will reasonably insure the payment of unemployment compensation only to individuals who are unemployed and who are able to work and available for work, and (2) that claimants are afforded such placement and other employment services as are necessary and appropriate to facilitate their return to suitable work as soon as possible; and b. Methods of administration which do not unreasonably limit the opportunity of individuals to establish their right to unemployment compensation due under such State law.

5001 *Claim Filing and Claimant Reporting Requirements Designed to Satisfy Secretary's Interpretation*

A. *Claim filing—total or part-total unemployment:* 1. Individuals claiming unemployment compensation for total or part-total unemployment are required to file a claim weekly or biweekly, in person or by mail, at a public employment office or a claims office (these terms include offices at itinerant points) as set forth below.

2. Except as provided in paragraph 3, a claimant is required to file in person: a. His new claim with respect to a benefit year, or his continued claim for a waiting week or for his first compensable week of unemployment in such year; and b. Any other claim, when requested to do so by the claims personnel at the office at which he files his claim(s) because questions about his right to benefits are raised by circumstances such as the following:

(1) The conditions or circumstances of his separation from employment;

(2) The claimant's answers to questions on mail claim(s) indicate that he may be unable to work or that there may be undue restrictions on his availability for work or that his search for work may be inadequate or that he may be disqualified;

(3) The claimant's answers to questions on mail claims create uncertainty about his credibility or indicate a lack of understanding of the applicable requirements; or

(4) The claimant's record shows that he has previously filed a fraudulent claim.

In such circumstances, the claimant is required to continue to file claims in person each week (or biweekly) until the State agency determines that filing claims in person is no longer required for the resolution of such questions.

3. A claimant must be permitted to file a claim by mail in any of the following circumstances: a. He is located in an area requiring the expenditure of an unreasonable amount of time or money in traveling to the nearest facility established by the State agency for filing claims in person; b. Conditions make it impracticable for the agency to take claims in person; c. He has returned to full-time work on or before the scheduled date for his filing a claim, unless the agency makes provision for in-person filing at a time and place that does not interfere with his employment; d. The agency finds that he has good cause for failing to file a claim in person.

4. A claimant who has been receiving benefits for partial unemployment may continue to file claims as if he were a partially unemployed worker for the first four consecutive weeks of total or part-total unemployment immediately following his period of partial unemployment so long as he remains attached to his regular employer.

B. *Claim filing—partial unemployment.* Each individual claiming unemployment compensation for a week (or other claim period) during which, because of lack of work, he is working less than his normal customary full-time hours for his regular employer and is earning less than the earnings limit provided in the State law, shall not be required to file a claim for such week or other claim period earlier than 2 weeks from the date that wages are paid for such claim period or, if a low earnings report is required by the State law, from the date the employer furnished such report to the individual. State agencies may permit claims for partial unemployment to be filed either in person or by mail, except that in the circumstances set forth in section A 3, filing by mail must be permitted, and in the circumstances set forth in section A 2 b, filing in person may be required.

5002 *Requirement for Job Finding, Placement, and other Employment Services Designed to Satisfy Secretary's Interpretation*

A. Claims personnel are required to assure that each claimant is doing what a reasonable individual in his circumstances would do to obtain suitable work.

B. In the discretion of the State agency: 1. The claims personnel are required to give each claimant such necessary and appropriate assistance as they reasonably can in finding suitable work and at their discretion determine when more complete placement and employment services are necessary and appropriate for a claimant; and if they determine more complete services are necessary and appropriate, the claims personnel are to refer him to employment service personnel in the public employment office in which he has been filing claim(s), or, if he has been filing in a claims office, in the public employment office most accessible to him; *or*

2. All placement and employment services are required to be afforded to each claimant by employment service personnel in the public employment office most accessible to him in which case the claims personnel in the office in which the claimant files his claim are

to refer him to the employment service personnel when placement or other employment services are necessary and appropriate for him.

C. The personnel to whom the State agency assigns the responsibilities outlined in paragraph B above are required to give claimants such job-finding assistance, placement, and other employment services as are necessary and appropriate to facilitate their return to suitable work as soon as possible.

In some circumstances, no such services or only limited services may be required. For example, if a claimant is on a short-term temporary layoff with a fixed return date, the only service necessary and appropriate to be given to him during the period of the layoff is a referral to suitable temporary work if such work is being performed in the labor market area.

Similarly, claimants whose unemployment is caused by a labor dispute presumably will return to work with their employer as soon as the labor dispute is settled. They generally do not need services, nor do individuals in occupations where placement customarily is made by other nonfee charging placement facilities such as unions and professional associations.

Claimants who fall within the classes which ordinarily would require limited services or no services shall, if they request placement and employment services, be afforded such services as are necessary and appropriate for them to obtain suitable work or to achieve their reasonable employment goals.

On the other hand, a claimant who is permanently separated from his job is likely to require some services. He may need only some direction in how to get a job; he may need placement services if he is in an occupation for which there is some demand in the labor market area; if his occupation is outdated, he may require counseling and referral to a suitable training course. The extent and character of the services to be given any particular claimant may change with the length of his unemployment and depend not only on his own circumstances and conditions, but also on the condition of the labor market in the area.

D. Claimants are required to report to employment service personnel, as directed, but such personnel and the claims personnel are required to so arrange and coordinate the contracts required of a claimant as not to place an unreasonable burden on him or unreasonably limit his opportunity to establish his rights to compensation. As a general rule, a claimant is not required to contact in person claims personnel or employment service personnel more frequently than once a week, unless he is directed to report more frequently for a specific service such as referral to a job or a training course or counseling which cannot be completed in one visit.

E. Employment service personnel are required to report promptly to claims personnel in the office in which the claimant files his claim(s): (1) his failure to apply for or accept work to which he was referred by such personnel or when known, by any other nonfee-charging placement facility such as a union or a professional association; and (2) any information which becomes available to it that may have a bearing on the claimant's ability to work or availability for work, or on the suitability of work to which he was referred or which was offered to him.

5004 *Evaluation of Alternative State Provisions*

If the State law provisions do not conform to the ''suggested State law requirements'' set forth in sections 5001 and 5002, but the State law contains alternative provisions, the Manpower Administrator, in collaboration with the State agency, will study the actual or anticipated affect of the alternative provisions. If the Manpower Administrator concludes that the alternative provisions satisfy the requirements of the Federal law as construed by the Secretary (see section 5000 B) he will so notify the State agency. If he does not so conclude, he will submit the matter to the Secretary. If the Secretary concludes that the alternative provisions satisfy such requirements, the State agency will be so notified. If the Secretary concludes that there is a question as to whether the alternative provisions satisfy such requirements, the State agency will be advised that unless the State law provisions are appropriately revised, a notice of hearing will be issued as required by the Code of Federal Regulations, title 20, section 601.5.

[55 FR 558, Jan. 5, 1990]

APPENDIX B TO PART 625—STANDARD FOR CLAIM DETERMINATIONS—SEPARATION INFORMATION

Employment Security Manual (Part V, Sections 6010–6015)

6010–6019 *Standard for Claim Determinations—Separation Information*

6010 *Federal Law Requirements.* Section 303(a)(1) of the Social Security Act requires that a State law include provision for: ''Such methods of administration . . . as are found by the Secretary to be reasonably calculated to insure full payment of unemployment compensation when due.''

Section 303(a)(3) of the Social Security Act requires that a State law include provision for: ''Opportunity for a fair hearing before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied.''

Section 3304(a)(4) of the Federal Unemployment Tax Act and section 303(a)(5) of the Social Security Act require that a State law include provision for: ''Expenditure of all money withdrawn from an unemployment fund of such State, in the payment of unemployment compensation . . . .''

Section 3306(h) of the Federal Unemployment Tax Act defines ''compensation'' as ''cash benefits payable to individuals with respect to their unemployment.''

6011 *Secretary's Interpretation of Federal Law Requirements.* The Secretary interprets the above sections to require that a State law include provisions which will insure that: A. Individuals who may be entitled to unemployment compensation are furnished such information as will reasonably afford them an opportunity to know, establish, and protect their rights under the unemployment compensation law of such State, and

B. The State agency obtains and records in time for the prompt determination and review of benefit claims such information as will reasonably insure the payment of benefits to individuals to whom benefits are due.

6012 *Criteria for Review of State Law Conformity with Federal Requirements.* In determining the conformity of a State law with the above requirements of the Federal Unemployment Tax Act and the Social Security Act as interpreted by the Secretary, the following criteria will be applied:

A. Is it required that individuals who may be entitled to unemployment compensation be furnished such information of their potential rights to benefits, including the manner and places of filing claims, the reasons for determinations, and their rights of appeal, as will insure them a reasonable opportunity to know, establish, and protect their rights under the law of the State?

B. Is the State agency required to obtain, in time for prompt determination of rights to benefits such information as will reasonably insure the payment of benefits to individuals to whom benefits are due?

C. Is the State agency required to keep records of the facts considered in reaching determinations of rights to benefits?

6013 *Claim Determinations Requirements Designed To Meet Department of Labor Criteria.*

A. *Investigation of claims.* The State agency is required to obtain promptly and prior to a determination of an individual's right to benefits, such facts pertaining thereto as will be sufficient reasonably to insure the payment of benefits when due.

This requirement embraces five separate elements:

1. It is the responsibility of the agency to take the initiative in the discovery of information. This responsibility may not be passed on to the claimant or the employer. In addition to the agency's own records, this information may be obtained from the worker, the employer, or other sources. If the information obtained in the first instance discloses no essential disagreement and provides a sufficient basis for a fair determination, no further investigation is necessary. If the information obtained from other sources differs essentially from that furnished by the claimant, the agency, in order to meet its responsibility, is required to inform the claimant of such information from other sources and to afford the claimant an opportunity to furnish any further facts he may have.

2. Evidentiary facts must be obtained as distinguished from ultimate facts or conclusions. That a worker was discharged for misconduct is an ultimate fact or conclusion; that he destroyed a machine upon which he was working is a primary or evidentiary fact, and the sort of fact that the requirement refers to.

3. The information obtained must be sufficient reasonably to insure the payment of benefits when due. In general, the investigation made by the agency must be complete enough to provide information upon which the agency may act with reasonable assurance that its decision is consistent with the unemployment compensation law. On the other hand, the investigation should not be so exhaustive and time-consuming as unduly to delay the payment of benefits and to result in excessive costs.

4. Information must be obtained promptly so that the payment of benefits is not unduly delayed.

5. If the State agency requires any particular evidence from the worker, it must give him a reasonable opportunity to obtain such evidence.

B. *Recording of facts.* The agency must keep a written record of the facts considered in reaching its determinations.

C. *Determination notices*

1. The agency must give each claimant a written notice of:

a. Any monetary determination with respect to his benefit year;

b. Any determination with respect to purging a disqualification if, under the State law, a condition or qualification must be satisfied with respect to each week of disqualification; but in lieu of giving written notice of each determination for each week in which it is determined that the claimant has met the requirements for purging, the agency may inform the claimant that he has purged the disqualification for a week by notation on his application identification card or otherwise in writing.

c. Any other determination which adversely affects[1] his rights to benefits, except

[1] A determination ''adversely affects'' claimant's right to benefits if it (1) results in a denial to him of benefits (including a cancellation of benefits or wage credits or any reduction in whole or in part below the

that written notice of determination need not be given with respect to:

(1) A week in a benefit year for which the claimant's weekly benefit amount is reduced in whole or in part by earnings if, the first time in the benefit year that there is such a reduction, he is required to be furnished a booklet or leaflet containing the information set forth below in paragraph 2 f (1). However, a written notice of determination is required if: (a) there is a dispute concerning the reduction with respect to any week (e.g., as to the amount computed as the appropriate reduction, etc.); or (b) there is a change in the State law (or in the application thereof) affecting the reduction; or

(2) Any week in a benefit year subsequent to the first week in such benefit year in which benefits were denied, or reduced in whole or in part for reasons other than earnings, if denial or reduction for such subsequent week is based on the same reason and the same facts as for the first week, and if written notice of determination is required to be given to the claimant with respect to such first week, and with such notice of determination, he is required to be given a booklet or pamphlet containing the information set forth below in paragraphs 2 f (2) and 2 h. However, a written notice of determination is required if: (a) there is a dispute concerning the denial or reduction of benefits with respect to such week; or (b) there is a change in the State law (or in the application thereof) affecting the denial or reduction; or (c) there is a change in the amount of the reduction except as to the balance covered by the last reduction in a series of reductions.

Note: This procedure may be applied to determinations made with respect to any subsequent weeks for the same reason and on the basis of the same facts: (a) that claimant is unable to work, unavailable for work, or is disqualified under the labor dispute provision; and (b) reducing claimant's weekly benefit amount because of income other than earnings or offset by reason of overpayment.

2. The agency must include in written notices of determinations furnished to claimants sufficient information to enable them to understand the determinations, the reasons therefor, and their rights to protest, request reconsideration, or appeal.

The written notice of monetary determination must contain the information specified in the following items (except h) unless an item is specifically not applicable. A written notice of any other determination must contain the information specified in as many of the following items as are necessary to enable the claimant to understand the determination and to inform him of his appeal rights. Information specifically applicable to the individual claimant must be contained in the written notice of determination. Information of general application such as (but not limited to) the explanation of benefits for partial unemployment, information as to deductions, seasonality factors, and information as to the manner and place of taking an appeal, extension of the appeal period, and where to obtain information and assistance may be contained in a booklet or leaflet which is given the claimant with his monetary determination.

a. *Base period wages.* The statement concerning base-period wages must be in sufficient detail to show the basis of computation of eligibility and weekly and maximum benefit amounts. (If maximum benefits are allowed, it may not be necessay to show details of earnings.)

b. *Employer name.* The name of the employer who reported the wages is necessary so that the worker may check the wage transcript and know whether it is correct. If the worker is given only the employer number, he may not be able to check the accuracy of the wage transcript.

c. *Explanation of benefit formula—weekly and maximum benefit amounts.* Sufficient information must be given the worker so that he will understand how his weekly benefit amount, including allowances for dependents, and his maximum benefit amount were figured. If benefits are computed by means of a table contained in the law, the table must be furnished with the notice of determination whether benefits are granted or denied.

The written notice of determination must show clearly the weekly benefit amount and the maximum potential benefits to which the claimant is entitled.

The notice to a claimant found ineligible by reason of insufficient earnings in the base period must inform him clearly of the reason for ineligibility. An explanation of the benefit formula contained in a booklet or pamphlet should be given to each claimant at or prior to the time he receives written notice of a monetary determination.

d. *Benefit year.* An explanation of what is meant by the benefit year and identification of the claimant's benefit year must be included in the notice of determination.

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weekly or maximum amount established by his monetary determination) for any week or other period; or (2) denies credit for a waiting week; or (3) applies any disqualification or penalty; or (4) determines that he has not satisfied a condition of eligibility, requalification for benefits, or purging a disqualification; or (5) determines that an overpayment has been made or orders repayment or recoupment of any sum paid to him; or (6) applies a previously determined overpayment, penalty, or order for repayment or recoupment; or (7) in any other way denies claimant a right to benefits under the State law.

e. *Information as to benefits for partial unemployment.* There must be included either in the written notice of determination or in a booklet or pamphlet accompanying the notice an explanation of the claimant's rights to partial benefits for any week with respect to which he is working less than his normal customary full-time workweek because of lack of work and for which he earns less than his weekly benefit amount or weekly benefit amount plus earnings, whichever is provided by the State law. If the explanation is contained in the notice of determination, reference to the item in the notice in which his weekly benefit amount is entered should be made.

f. *Deductions from weekly benefits*

(1) *Earnings.* Although written notice of determinations deducting earnings from a claimant's weekly benefit amount is generally not required (see paragraph 1 c(1) above), where written notice of determination is required (or given) it shall set forth the amount of earnings, the method of computing the deduction in sufficient detail to enable the claimant to verify the accuracy of the deduction, and his right to protest, request redetermination, and appeal. Where a written notice of determination is given to the claimant because there has been a change in the State law or in the application of the law, an explanation of the change shall be included.

Where claimant is not required to receive a written notice of determination, he must be given a booklet or pamphlet the first time in his benefit year that there is a deduction for earnings which shall include the following information:

(a) The method of computing deductions for earnings in sufficient detail to enable the claimant to verify the accuracy of the deduction;

(b) That he will not automatically be given a written notice of determination for a week with respect to which there is a deduction for earnings (unless there is a dispute concerning the reduction with respect to a week or there has been a change in the State law or in the application of the law affecting the deduction) but that he may obtain such a written notice upon request; and

(c) A clear statement of his right to protest, request a redetermination, and appeal from any determination deducting earnings from his weekly benefit amount even though he does not automatically receive a written notice of determination; and if the State law requires written notice of determination in order to effectuate a protest, redetermination, or appeal, he must be so advised and advised also that he must request a written notice of determination before he takes any such action.

(2) *Other deductions*

(a) A written notice of determination is required with respect to the first week in claimant's benefit year in which there is a reduction from his benefits for a reason other than earnings. This notice must describe the deduction made from claimaint's weekly benefit amount, the reason for the deduction, the method of computing it in sufficient detail to enable him to verify the accuracy of such deduction, and his right to protest, request redetermination, or appeal.

(b) A written notice of determination is not required for subsequent weeks that a deduction is made for the same reason and on the basis of the same facts, if the notice of determination pursuant to (2)(a), or a booklet or pamphlet given him with such notice explains (i) the several kinds of deductions which may be made under the State law (e.g., retirement pensions, vacation pay, and overpayments); (ii) the method of computing each kind of deduction in sufficient detail that claimant will be able to verify the accuracy of deductions made from his weekly benefit payments; (iii) any limitation on the amount of any deduction or the time in which any deduction may be made; (iv) that he will not automatically be given a written notice of determination for subsequent weeks with respect to which there is a deduction for the same reason and on the basis of the same facts, but that he may obtain a written notice of determination upon request; (v) his right to protest, request redetermination, or appeal with respect to subsequent weeks for which there is a reduction from his benefits for the same reason, and on the basis of the same facts even though he does not automatically receive a written notice of determination; and (vi) that if the State law requires written notice of determination in order to effectuate a protest, redetermination, or appeal, he must be so advised and advised also that he must request a written notice of determination before he takes any such action.

g. *Seasonality factors.* If the individual's determination is affected by seasonality factors under the State law, an adequate explanation must be made. General explanations of seasonality factors which may affect determinations for subsequent weeks may be included in a booklet or pamphlet given claimant with his notice of monetary determination.

h. *Disqualification or ineligibility*. If a disqualification is imposed, or if the claimant is declared ineligible for one or more weeks, he must be given not only a statement of the period of disqualification or ineligibility and the amount of wage-credit reductions, if any, but also an explanation of the reason for the ineligibility or disqualification. This explanation must be sufficiently detailed so that he will understand why he is ineligibile or why he has been disqualified, and what he must do in order to requalify for benefits or purge the disqualification. The statement must be individualized to indicate the facts

upon which the determination was based, e.g., state, ''It is found that you left your work with Blank Company because you were tired of working; the separation was voluntary, and the reason does not constitute good cause,'' rather than merely the phrase ''voluntary quit.'' Checking a box as to the reason for the disqualification is not a sufficiently detailed explanation. However, this statement of the reason for the disqualification need not be a restatement of all facts considered in arriving at the determination.

1. *Appeal rights.* The claimant must be given information with respect to his appeal rights.

(1) The following information shall be included in the notice of determination:

(a) A statement that he may appeal or, if the State law requires or permits a protest or redetermination before an appeal, that he may protest or request a redetermination.

(b) The period within which an appeal, protest, or request for redetermination must be filed. The number of days provided by statute must be shown as well as either the beginning date or ending date of the period. (It is recommended that the ending date of the appeal period be shown, as this is the more understandable of the alternatives.)

(2) The following information must be included either in the notice of determination or in separate informational material referred to in the notice:

(a) The manner in which the appeal, protest, or request for redetermination must be filed, e.g., by signed letter, written statement, or on a prescribed form, and the place or places to which the appeal, protest, or request for redetermination may be mailed or hand-delivered.

(b) An explanation of any circumstances (such as nonworkdays, good cause, etc.) which will extend the period for the appeal, protest, or request for redetermination beyond the date stated or identified in the notice of determination.

(c) That any further information claimant may need or desire can be obtained together with assistance in filing his appeal, protest, or request for redetermination from the local office.

If the information is given in separate material, the notice of determination would adequately refer to such material if it said, for example, ''For other information about your (appeal), (protest), (redetermination) rights, see pages ___ to ___ of the _____ (name of pamphlet or booklet) heretofore furnished to you.''

6014 *Separation Information Requirements Designed To Meet Department of Labor Criteria*

A. *Information to agency.* Where workers are separated, employers are required to furnish the agency promptly, either upon agency request or upon such separation, a notice describing the reasons for and the circumstances of the separation and any additional information which might affect a claimant's right to benefits. Where workers are working less than full time, employers are required to furnish the agency promptly, upon agency request, information concerning a claimant's hours of work and his wages during the claim periods involved, and other facts which might affect a claimant's eligibility for benefits during such periods.

When workers are separated and the notices are obtained on a request basis, or when workers are working less than full time and the agency requests information, it is essential to the prompt processing of claims that the request be sent out promptly after the claim is filed and the employer be given a specific period within which to return the notice, preferably within 2 working days.

When workers are separated and notices are obtained upon separation, it is essential that the employer be required to send the notice to the agency with sufficient promptness to insure that, if a claim is filed, it may be processed promptly. Normally, it is desirable that such a notice be sent to the central office of the agency, since the employer may not know in which local office the worker will file his claim. The usual procedure is for the employer to give the worker a copy of the notice sent by the employer to the agency.

B. *Information of worker.* 1. *Information required to be given.* Employers are required to give their employees information and instructions concerning the employees' potential rights to benefits and concerning registration for work and filing claims for benefits.

The information furnished to employees under such a requirement need not be elaborate; it need only be adequate to insure that the worker who is separated or who is working less than full time knows he is potentially eligible for benefits and is informed as to what he is to do or where he is to go to file his claim and register for work. When he files his claim, he can obtain more detailed information.

In States that do not require employers to furnish periodically to the State agency detailed reports of the wages paid to their employees, each employer is required to furnish to his employees information as to (a) the name under which he is registered by the State agency, (b) the address where he maintains his payroll records, and (c) the workers' need for this information if and when they file claims for benefits.

2. *Methods for giving information.* The information and instructions required above may be given in any of the following ways:

a. *Posters prominently displayed in the employer's establishment.* The State agency should supply employers with a sufficient

number of posters for distribution throughout their places of business and should see that the posters are conspicuously displayed at all times.

b. *Leaflets.* Leaflets distributed either periodically or at the time of separation or reduction of hours. The State agency should supply employers with a sufficient number of leaflets.

c. *Individual notices.* Individual notices given to each employee at the time of separation or reduction in hours.

It is recommended that the State agency's publicity program be used to supplement the employer-information requirements. Such a program should stress the availability and location of claim-filing offices and the importance of visiting those offices whenever the worker is unemployed, wishes to apply for benefits, and to seek a job.

6015 *Evaluation of Alternative State Provisions with Respect to Claim Determinations and Separation Information.* If the State law provisions do not conform to the suggested requirements set forth in sections 6013 and 6014, but the State law contains alternative provisions, the Bureau of Employment Security, in collaboration with the State agency, will study the actual or anticipated effects of the alternative provisions. If the Administrator of the Bureau concludes that the alternative provisions satisfy the criteria in section 6012, he will so notify the State agency. If the Administrator of the Bureau does not so conclude, he will submit the matter to the Secretary. If the Secretary concludes that the alternative provisions satisfy the criteria in section 6012, the State agency will be so notified. If the Secretary concludes that there is a question as to whether the alternative provisions satisfy the criteria, the State agency will be advised that unless the State law provisions are appropriately revised, a notice of hearing will be issued as required by the Code of Federal Regulations, title 20, section 601.5.

[55 FR 559, Jan. 5, 1990]

APPENDIX C TO PART 625—STANDARD FOR FRAUD AND OVERPAYMENT DETECTION

Employment Security Manual (Part V, Sections 7510–7515)

7510–7519 *Standard for Fraud and Overpayment Detection*

7510 *Federal Law Requirements.* Section 303(a)(1) of the Social Security Act requires that a State law include provision for:

''Such methods of administration * * * as are found by the Secretary to be reasonably calculated to insure full payment of unemployment compensation when due.''

Section 1603(a)(4) of the Internal Revenue Code and section 3030(a)(5) of the Social Security Act require that a State law include provision for:

''Expenditure of all money withdrawn from an unemployment fund of such State, in the payment of unemployment compensation * * *''

Section 1607(h) of the Internal Revenue Code defines ''compensation'' as ''cash benefits payable to individuals with respect to their unemployment.''

7511 *The Secretary's Interpretation of Federal Law Requirements.* THE SECRETARY OF LABOR INTERPRETS THE ABOVE SECTIONS TO REQUIRE THAT A STATE LAW INCLUDE PROVISION FOR SUCH METHODS OF ADMINISTRATION AS ARE, WITHIN REASON, CALCULATED (1) TO DETECT BENEFITS PAID THROUGH ERROR BY THE AGENCY OR THROUGH WILLFUL MISREPRESENTATION OR ERROR BY THE CLAIMANT OR OTHERS, AND (2) TO DETER CLAIMANTS FROM OBTAINING BENEFITS THROUGH WILLFUL MISREPRESENTATION.

7513 *Criteria for Review of State Conformity With Federal Requirements.* IN DETERMINING STATE CONFORMITY WITH THE ABOVE REQUIREMENTS OF THE INTERNAL REVENUE CODE AND THE SOCIAL SECURITY ACT, AS INTERPRETED BY THE SECRETARY OF LABOR, THE FOLLOWING CRITERIA WILL BE APPLIED:

A. *Are investigations required to be made after the payment of benefits, (or, in the case of interstate claims, are investigations made by the agent State after the processing of claims) as to claimants' entitlement to benefits paid to them in a sufficient proportion of cases to test the effectiveness of the agency's procedures for the prevention of payments which are not due? To carry out investigations, has the agency assigned to some individual or unit, as a basic function, the responsibility of making or functionally directing such investigations?*

Explanation: It is not feasible to prescribe the extent to which the above activities are required; however, they should always be carried on to such an extent that they will show whether or not error or willful misrepresentation is increasing or decreasing, and will reveal problem areas. The extent and nature of the above activities should be varied according to the seriousness of the problem in the State. The responsible individual or unit should:

1. Check paid claims for overpayment and investigate for willful misrepresentation or, alternatively, advise and assist the operating units in the performance of such functions, or both;

2. Perform consultative services with respect to methods and procedures for the prevention and detection of fraud; and

3. Perform other services which are closely related to the above.

Although a State agency is expected to make a full-time assignment of responsibility to a unit or individual to carry on the functions described above, a small State agency might make these functions a part-time responsibility of one individual. In connection with the detection of overpayments, such a unit or individual might, for example:

(a) Investigate information on suspected benefit fraud received from any agency personnel, and from sources outside the agency, including anonymous complaints;

(b) Investigate information secured from comparisons of benefit payments with employment records to detect cases of concurrent working (whether in covered or noncovered work) and claiming of benefits (including benefit payments in which the agency acted as agency for another State).

The benefit fraud referred to herein may involve employers, agency employees, and witnesses, as well as claimants.

Comparisons of benefit payments with employment records are commonly made either by post-audit or by industry surveys. The so-called ''post-audit'' is a matching of central office wage-record files against benefit payments for the same period. ''Industry surveys'' or ''mass audits'' are done in some States by going directly to employers for pay-roll information to be checked against concurrent benefit lists. A plan

A. of investigation based on a sample post-audit will be considered as partial fulfillment of the investigation program; it would need to be supplemented by other methods capable of detecting overpayments to persons who have moved into noncovered occupations or are claiming interstate benefits.

B. *Are adequate records maintained by which the results of investigations may be evaluated?*

Explanation: To meet this criterion, the State agency will be expected to maintain records of all its activities in the detection of overpayments, showing whether attributable to error or willful misrepresentation, measuring the results obtained through various methods, and noting the remedial action taken in each case. The adequacy and effectiveness of various methods of checking for willful misrepresentation can be evaluated only if records are kept of the results obtained. Internal reports on fraudulent and erroneous overpayments are needed by State agencies for self-evaluation. Detailed records should be maintained in order that the State agency may determine, for example, which of several methods of checking currently used are the most productive. Such records also will provide the basis for drawing a clear distinction between fraud and error.

C. *Does the agency take adequate action with respect to publicity concerning willful misrepresentation and its legal consequences to deter fraud by claimants?*

Explanation: To meet this criterion, the State agency must issue adequate material on claimant eligibility requirements and must take necessary action to obtain publicity on the legal consequences of willful misrepresentation or willful nondisclosure of facts.

Public announcements on convictions and resulting penalties for fraud are generally considered necessary as a deterrent to other persons, and to inform the public that the agency is carrying on an effective program to prevent fraud. This alone is not considered adequate publicity. It is important that information be circulated which will explain clearly and understandably the claimant's rights, and the obligations which he must fulfill to be eligible for benefits. Leaflets for distribution and posters placed in local offices are appropriate media for such information.

7515 *Evaluation of Alternative State Provisions with Respect to Erroneous and Illegal Payments.* If the methods of administration provided for by the State law do not conform to the suggested methods of meeting the requirements set forth in section 7511, but a State law does provide for alternative methods of administration designed to accomplish the same results, the Bureau of Employment Security, in collaboration with the State agency, will study the actual or anticipated effect of the alternative methods of administration. If the Bureau concludes that the alternative methods satisfy the criteria in section 7513, it will so notify the State agency. If the Bureau does not so conclude, it will submit to the Secretary the results of the study for his determination of whether the State's alternative methods of administration meet the criteria.

[55 FR 562, Jan. 5, 1990]

PART 626—INTRODUCTION TO THE REGULATIONS UNDER THE JOB TRAINING PARTNERSHIP ACT

Sec.

626.1 Scope and purpose of the Job Training Partnership Act.
626.2 Format of the Job Training Partnership Act regulations.
626.3 Purpose, scope, and applicability of the Job Training Partnership Act regulations.
626.4 Table of contents for the Job Training Partnership Act regulations.
626.5 Definitions.

AUTHORITY: 29 U.S.C. 1579(a).

SOURCE: 59 FR 45815, Sept. 2, 1994, unless otherwise noted.

§ 626.1 Scope and purpose of the Job Training Partnership Act.

It is the purpose of the Job Training Partnership Act (JTPA or the Act) to establish programs to prepare youth and adults facing serious barriers to employment for participation in the labor force by providing job training and other services that will result in increased employment and earnings, increased educational and occupational skills, and decreased welfare dependency, thereby improving the quality of the work force and enhancing the productivity and competitiveness of the Nation (section 2).

§ 626.2 Format of the Job Training Partnership Act regulations.

(a) Regulations promulgated by the Department of Labor to implement the provisions of the Act are set forth in parts 626 through 638 of title 20, chapter V, of the Code of Federal Regulations, with the exception of the veterans' employment program's chapter IX regulations of the Office of the Assistant Secretary for Veterans' Employment and Training, which are set forth at part 1005 of title 20.

(b) Nondiscrimination and equal opportunity requirements and procedures, including complaint processing and compliance reviews, will be governed by the provisions of 29 CFR part 34 and will be administered by the Department of Labor (Department or DOL) Directorate of Civil Rights.

(c) General authority for the JTPA regulations is found at section 169 of the Act. Specific statutory authorities other than section 169 are noted throughout the JTPA regulations.

§ 626.3 Purpose, scope, and applicability of the Job Training Partnership Act regulations.

(a) Parts 626 through 638 of this chapter and part 1005 of chapter IX (Veterans' employment programs under title IV, part C of the Job Training Partnership Act) establish the Federal programmatic and administrative requirements for JTPA grants awarded by the Department of Labor to eligible grant recipients.

(b) Parts 626 through 638 of this chapter and part 1005 of chapter IX apply to recipients and subrecipients of JTPA funds.

§ 626.4 Table of contents for the Job Training Partnership Act regulations.

The table of contents for the regulations under the Job Training Partnership Act, 20 CFR parts 626–638 and 1005,[1] is as follows:

PART 626—INTRODUCTION TO THE REGULATIONS UNDER THE JOB TRAINING PARTNERSHIP ACT

Sec.
626.1 Scope and purpose of the Job Training Partnership Act.
626.2 Format of the Job Training Partnership Act regulations.
626.3 Purpose, scope and applicability of the Job Training Partnership Act regulations.
626.4 Table of contents for the Job Training Partnership Act regulations.
626.5 Definitions.

PART 627—GENERAL PROVISIONS GOVERNING PROGRAMS UNDER THE ACT

Subpart A—Scope and Purpose

627.100 Scope and Purpose of Part 627.

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627.200 Governor/Secretary agreement.
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627.210 Nondiscrimination and nonsectarian activities.
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627.225 Employment generating activities.
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627.250 Interstate agreements.

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627.300 Scope and purpose.
627.305 Payments.
627.310 Supportive Services.
627.315 Benefits and working conditions.

[1] Part 1005 was removed at 59 FR 26601, May 23, 1994.

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627.425 Standards for financial management and participant data systems.
627.430 Grant payments.
627.435 Cost principles and allowable costs.
627.440 Classification of costs.
627.445 Limitations on certain costs.
627.450 Program income.
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627.463 Public access to records.
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627.500 Scope and purpose.
627.501 State grievance and hearing procedures for noncriminal complaints at the recipient level.
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627.600 Scope and purpose.
627.601 Complaints and allegations at the Federal level.
627.602 Resolution of investigative findings.
627.603 Special handling of labor standards violations under section 143 of the Act.
627.604 Alternative procedure for handling labor standards violations under section 143—Binding arbitration.
627.605 Special Federal review of SDA and SSG–level complaints without decision.
627.606 Grant officer resolution.
627.607 Grant Officer resolution of Governor's failure to promptly take action.

Subpart G—Sanctions for Violations of the Act

627.700 Scope and purpose.
627.702 Sanctions and corrective actions.
627.703 Failure to comply with procurement provisions.
627.704 Process for waiver of State liability.
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Subpart H—Hearings by the Office of Administrative Law Judges

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Subpart I—Transition Provisions

627.900 Scope and purpose.
627.901 Transition period.
627.902 Governor's actions.
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627.904 Transition and implementation.
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PART 628—PROGRAMS UNDER TITLE II OF THE JOB TRAINING PARTNERSHIP ACT

Subpart A—Scope and Purpose

628.100 Scope and purpose of part 628.

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[59 FR 45815, Sept. 2, 1994, as amended at 60 FR 58229, Nov. 27, 1995]

§ 626.5 Definitions.

In addition to the definitions contained in section 4 of the Act, the following definitions of terms used in the Act or parts 626–631 of this chapter apply as appropriate to programs under titles I, II, and III of the Act:

Accrued expenditures means charges made to the JTPA program. Expenditures are the sum of actual cash disbursements, the amount of indirect expense incurred, and the net increase (or decrease) in the amounts owed by the recipient for the goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

Act means the Job Training Partnership Act.

ALJ means an administrative law judge in the Office of Administrative Law Judges of the U.S. Department of Labor.

Awarding agency means: (1) With respect to a grant, the Department of Labor; and (2) with respect to a subgrant or contract, the party that awarded the subgrant or contract.

Capacity building means the systematic improvement of job functions, skills, knowledge, and expertise of the personnel who staff and administer employment and training and other closely related human service systems. Capacity building is designed to enhance the effectiveness, to strengthen the caliber of customer services provided under the Act and other Federal, State, and local employment and training programs, and improve coordination among them. Capacity building includes curriculum development, appropriate training, technical assistance, staff development, and other related activities.

Chief elected official (CEO) means the official or officials, or their representatives, of the jurisdiction or jurisdictions which requested designation by the Governor as a service delivery area.

Commercial organizations means private for-profit entities.

Commercially available off-the-shelf training package means a training package sold or traded to the general public in the course of normal business operations, at prices based on established catalog or market prices. To be considered as ''sold to the general public,'' the package must be regularly sold in sufficient quantities to constitute a real commercial market to buyers that must include other than JTPA programs. The package must include performance criteria pertaining to the delivery of the package which may include participant attainment of knowledge, skills or a job.

Contractor means the organization, entity, or individual that is awarded a procurement contract under the recipient's or subrecipient's procurement standards and procedures.

Cost means accrued expenditure.

Department means the U.S. Department of Labor.

DOL means the U.S. Department of Labor.

ETA means the Employment and Training Administration of the U.S. Department of Labor.

Family is defined at section 4(34) of the Act. An ''individual with a disability'' shall, for the purposes of income eligibility determination, be considered to be an unrelated individual who is a family unit of one, consistent with the definition of ''economically disadvantaged'' at section 4(8) of the Act. The Governor may provide interpretations of the term ''family'' related

to how ''dependent children'' are defined for programs within a State, consistent with the Act, and all applicable rules and regulations, and State or local law. Such interpretations by the Governor may address the treatment of certain individuals who may need to be viewed discretely in the income eligibility determination process, such as runaways, emancipated youth, and court adjudicated youth separated from the family.

The phrase ''living in a single residence'' with other family members includes temporary, voluntary residence elsewhere (*e.g.*, attending school or college, or visiting relatives). It does not include involuntary temporary residence elsewhere (*e.g.*, incarceration, or placement as a result of a court order).

Family income means ''income'' as defined by the Department of Health and Human Services in connection with the annual poverty guidelines. Such income shall not include unemployment compensation, child support and public assistance (including Aid to Families with Dependent Children, Supplemental Security Income, Emergency Assistance money payments, and non-federally funded General Assistance or General Relief money payments), as provided for at section 4(8) of the Act. In addition, such income shall also exclude foster child care payments, educational financial assistance received under title IV of the Higher Education Act (20 U.S.C. 1087), as amended by section 479(B) of the Higher Education Act Amendments of 1992), needs-based scholarship assistance, and income earned while on active military duty and other benefit payments specified at 38 U.S.C. 4213, items (1) and (3). The Governor may, for the purposes of determining income eligibility for services to older individuals under section 204(d)(5) of the Act, exclude up to 25 percent of Social Security and Old Age Survivors' Insurance benefit payments under title II of the Social Security Act, (42 U.S.C., section 401, et seq.) from the definition of family income. In addition, when a Federal statute specifically provides that income or payments received under such statute shall be excluded in determining eligibility for and the level of benefits received under any other federal statute, such income or payments shall be excluded in JTPA eligibility determinations.

Funding period means the period of time when JTPA funds are available for expenditure. Unless a shorter period of time is specified in a title III discretionary award, the JTPA funding period is the 3-year period specified in JTPA section 161(b); the program year in which Federal funds are obligated to the recipient, and the two succeeding program years.

Governor means, in addition to the definition at section 4(9) of the Act, the recipient of JTPA funds awarded to the State under titles I through III.

Grant means an award of JTPA financial assistance by the U.S. Department of Labor to an eligible JTPA recipient. (Also, see §§ 627.405 and 627.430 of these regulations).

Grantee means the recipient.

Individual service strategy (ISS) is defined in § 628.520 of this chapter.

Job search assistance (also including *job search skills training* and *job club activities*) means the provision of instruction and support to a participant to give the participant skills in acquiring full time employment. The services provided may include, but are not limited to, resume writing, interviewing skills, labor market guidance, telephone techniques, information on job openings, and job acquisition strategies, as well as the provision of office space and supplies for the job search.

Job Training Partnership Act means Public Law (Pub. L.) 97–300, as amended, 29 U.S.C. 1501, et seq.

JTPA means the Job Training Partnership Act.

Nontraditional employment, as applied to women, means occupations or fields of work where women comprise less than 25 percent of the individuals employed in such occupation or field of work as provided periodically by the Department in the FEDERAL REGISTER. (Pub. L. 102–235, Nontraditional Employment for Women Act).

OALJ means the Office of Administrative Law Judges of the U.S. Department of Labor.

Obligations means the amounts of orders placed, contracts and subgrants awarded, goods and services received,

and similar transactions during a funding period that will require payment by the recipient or subrecipient during the same or a future period.

OIG means the Office of Inspector General of the U.S. Department of Labor.

PIC means a private industry council.

Participant means an individual who has been determined to be eligible to participate in and who is receiving services (except post-termination services authorized under sections 204(c)(4) and 264(d)(5) and followup services authorized under section 253(d)) under a program authorized by the JTPA. Participation shall be deemed to commence on the first day, following determination of eligibility, on which the participant began receiving subsidized employment, training, or other services provided under the JTPA. (section 4(37)).

Program year means the 12-month period beginning July 1 of the indicated year.

Recipient means the entity to which a JTPA grant is awarded directly from the Department of Labor to carry out the JTPA program. The recipient is the entire legal entity that received the award and is legally responsible for carrying out the JTPA program, even if only a particular component of the entity is designated in the grant award document. For JTPA grants under titles I, II and III, except for certain discretionary grants awarded under title III, part B, the State is the recipient.

SDA means a service delivery area designated by the Governor pursuant to section 101(a)(4) of the Act. As used in these regulations, SDA may also refer to the entity that administers the JTPA program within the designated area.

SDA grant recipient means the entity that receives JTPA funds for a service delivery area directly from the recipient.

Secretary means the Secretary of Labor, U.S. Department of Labor, or his or her designee.

Section, as used in this chapter, means a section of the Act unless the text specifically indicates otherwise.

Service provider means a public agency, private nonprofit organization, or private-for-profit entity that delivers educational, training, employment or supportive services to JTPA participants. Awards to service providers may be made by subgrant, contract, subcontract, or other legal agreement.

Stand-in costs means costs paid from non-Federal sources that a recipient proposes to substitute for Federal costs that have been disallowed as a result of an audit or other review. In order to be considered as valid substitutions, the costs (1) shall have been reported by the grantee as uncharged program costs under the same title and in the same program year in which the disallowed costs were incurred (2) shall have been incurred in compliance with laws, regulations, and contractual provisions governing JTPA, and (3) shall not result in a violation of the applicable cost limitations.

State is defined at section 4(22) of the Act. For cash payment purposes, the definition of ''State'' contained in the Department of the Treasury regulations at 31 CFR 205.3 shall apply to JTPA programs.

State council means the State Job Training Coordinating Council (SJTCC) or, in a State with a Human Resource Investment Council (HRIC) pursuant to §628.215 of this chapter, the HRIC.

Subgrant means an award of JTPA financial assistance in the form of money, or property in lieu of money, made under a grant by a recipient to an eligible subrecipient. It also means a subgrant award of JTPA financial assistance by a subrecipient to a lower tier subrecipient. The term includes financial assistance when provided by any legal agreement, even if the agreement is called a contract, but does not include procurement purchases from vendors nor does it include any form of assistance received by program participants.

Subgrantee means a subrecipient.

Subrecipient means the legal entity to which a subgrant is awarded and which is accountable to the recipient (or higher tier subrecipient) for the use of the funds provided. For JTPA purposes, distinguishing characteristics of a subrecipient include items such as determining eligibility of applicants, enrollment of participants, performance

measured against meeting the objectives of the program, responsibility for programmatic decisionmaking, responsibility for compliance with program requirements, and use of the funds awarded to carry out a JTPA program or project, as compared to providing goods or services for a JTPA program or project (vendor). Depending on local circumstances, the PIC, local elected official, or administrative entity may be a subrecipient. SDA grant recipients and JTPA title III substate grantees are particular types of subrecipients.

Substate grantee (SSG) means that agency or organization selected to administer programs pursuant to section 312(b) of the Act. The substate grantee is the entity that receives JTPA title III funds for a substate area directly from the Governor.

Technical assistance is a facet of capacity building which may include but is not limited to information sharing, dissemination and training on program models and job functions; peer-to-peer networking and problem solving; guides; and interactive communication technologies.

Title, as used in this chapter, means a title of the Act, unless the text of the regulation specifically indicates otherwise.

Vendor means an entity responsible for providing generally required goods or services to be used in the JTPA program. These goods or services may be for the recipient's or subrecipient's own use or for the use of participants in the program. Distinguishing characteristics of a vendor include items such as: Providing the goods and services within normal business operations; providing similar goods or services to many different purchasers, including purchasers outside the JTPA program; and operating in a competitive environment. A vendor is not a subrecipient and does not exhibit the distinguishing characteristics attributable to a subrecipient, as defined above. Any entity directly involved in the delivery of program services not available to the general public, with the exception of an employer providing on-the-job training, shall be considered a subrecipient rather than a vendor.

Wagner-Peyser Act means 29 U.S.C. 49, et seq.

[59 FR 45815, Sept. 2, 1994, as amended at 61 FR 19983, May 3, 1996]

PART 627—GENERAL PROVISIONS GOVERNING PROGRAMS UNDER TITLES I, II, AND III OF THE ACT

Subpart A—Scope and Purpose

627.100 Scope and purpose of this part 627.

Subpart B—Program Requirements

627.200 Governor/Secretary agreement.
627.201 Waivers.
627.205 Public service employment prohibition.
627.210 Nondiscrimination and nonsectarian activities.
627.215 Relocation.
627.220 Coordination with programs under title IV of the Higher Education Act including the Pell grant program.
627.225 Employment generating activities.
627.230 Displacement.
627.235 General program requirements.
627.240 On-the-job training.
627.245 Work experience.
627.250 Interstate agreements.

Subpart C—Payments, Supportive Services, and Benefits and Working Conditions

627.300 Scope and purpose.
627.305 Payments.
627.310 Supportive services.
627.315 Benefits and working conditions.

Subpart D—Administrative Standards

627.400 Scope and purpose.
627.405 Grant agreement and funding.
627.410 Reallotment and reallocation.
627.415 Insurance.
627.420 Procurement.
627.422 Selection of service providers.
627.423 Funding restrictions for ''high-risk'' recipients and subrecipients.
627.424 Prohibition of subawards to debarred and suspended parties.
627.425 Standards for financial management and participant data systems.
627.430 Grant payments.
627.435 Cost principles and allowable costs.
627.440 Classification of costs.
627.445 Limitations on certain costs.
627.450 Program income.
627.455 Reports required.
627.460 Requirements for records.
627.463 Public access to records.
627.465 Property management standards.
627.470 Performance standards.
627.471 Reorganization plan appeals.
627.475 Oversight and monitoring.

627.477 Governor's determination of substantial violation.
627.480 Audits.
627.481 Audit resolution.
627.485 Closeout.
627.490 Later disallowances and adjustments after closeout.
627.495 Collection of amounts due.

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627.500 Scope and purpose.
627.501 State grievance and hearing procedures for noncriminal complaints at the recipient level.
627.502 Grievance and hearing procedures for noncriminal complaints at the SDA and SSG levels.
627.503 Recipient-level review.
627.504 Noncriminal grievance procedure at employer level.

Subpart F—Federal Handling of Noncriminal Complaints and Other Allegations

627.600 Scope and purpose.
627.601 Complaints and allegations at the Federal level.
627.602 Resolution of investigative findings.
627.603 Special handling of labor standards violations under section 143 of the Act.
627.604 Alternative procedure for handling labor standards violations under section 143—binding arbitration.
627.605 Special Federal review of SDA- and SSG-level complaints without decision.
627.606 Grant Officer resolution.
627.607 Grant Officer resolution of Governor's failure to promptly take action.

Subpart G—Sanctions for Violations of the Act

627.700 Purpose and scope.
627.702 Sanctions and corrective actions.
627.703 Failure to comply with procurement provisions.
627.704 Process for waiver of State liability.
627.706 Process for advance approval of a recipient's contemplated corrective actions.
627.708 Offset process.

Subpart H—Hearings by the Office of Administrative Law Judges

627.800 Scope and purpose.
627.801 Procedures for filing request for hearing.
627.802 Rules of procedure.
627.803 Relief.
627.804 Timing of decisions.
627.805 Alternative dispute resolution.
627.806 Other authority.

Subpart I—Transition Provisions

627.900 Scope and purpose.
627.901 Transition period.
627.902 Governor's actions.
627.903 Actions which are at the discretion of the Governor.
627.904 Transition and implementation.
627.905 Guidance on contracts and other agreements.
627.906 Determinations on State and SDA implementation.

AUTHORITY: 29 U.S.C. 1579(a); Sec. 6305(f), Pub. L. 100–418, 102 Stat. 1107; 29 U.S.C. 1791i(e).

SOURCE: 59 FR 45821, Sept. 2, 1994, unless otherwise noted.

SUBPART A—SCOPE AND PURPOSE

§ 627.100 Scope and purpose of this part 627.

(a) This part sets forth requirements for implementation of programs under titles I, II, and III of the Job Training Partnership Act.

(b) Subpart B provides general program requirements that apply to all programs under the titles I, II, and III of the Act, except as provided elsewhere in the Act or this chapter. These requirements include the Governor/Secretary agreement, the nondiscrimination and nonsectarian activity provisions, coordination provisions with Higher Education Act programs, and the prohibitions on public service employment, relocation assistance, displacement, and employment generating activities. This subpart also sets forth comprehensive rules for on-the-job training for JTPA participants as well as for work experience.

(c) Subpart C sets forth requirements for allowable payments to JTPA participants.

(d) Subpart D establishes the administrative and financial standards and requirements that apply to funds received under the Act.

(e) Subpart E establishes the procedures that apply to the handling of noncriminal complaints under the Act at the Governor, the SDA, and title III SSG levels.

(f) Subpart F establishes the procedures that apply to the filing, handling, and review of complaints at the Federal level.

(g) Subpart G sets forth the provisions that apply to the sanctions and

corrective actions that may be imposed by the Secretary for violations of the Act, regulations, or grant terms and conditions.

(h) Subpart H sets forth procedures that apply to hearing by the Office of the Administrative Law Judges.

Subpart B—Program Requirements

§ 627.200 Governor/Secretary agreement.

(a)(1) To establish a continuing relationship under the Act, the Governor and the Secretary shall enter into a Governor/Secretary agreement. The agreement shall consist of a statement assuring that the State shall comply with (i) the Job Training Partnership Act and all applicable rules and regulations and (ii) the Wagner-Peyser Act and all applicable rules and regulations. The agreement shall specify that guidelines, interpretations, and definitions, adopted and issued by the Governor and identified pursuant to section 124 of the Act, shall, to the extent that they are consistent with the Act and applicable rules and regulations, be accepted by the Secretary.

(2) Either the Governor or the Secretary may seek a modification, revision, or termination of the agreement at any time, to be effective at the end of a program year.

(b) Except as provided at part B of title III of the Act and part 631, subpart G, of this chapter, the State shall be the grant recipient of JTPA funds awarded under titles I, II, and III.

§ 627.201 Waivers.

(a)(1) The Governor may request, and the Secretary may grant, a waiver of specific provisions of these regulations to the extent that such request is consistent with the provisions of the Act.

(2) In requesting a waiver under paragraph (a)(1) of this section, the Governor shall demonstrate how it will either improve the targeting of services to the hard to serve, increase the level of basic and occupational skills training provided by the JTPA program in the State, contribute to the provision of academic enrichment services to youth, promote coordination of JTPA programs with other human resource programs, or substantially improve the job placement outcomes of the JTPA program.

(3) Waivers granted by the Secretary shall be effective for no more than four years from the date the waiver is granted.

§ 627.205 Public service employment prohibition.

No funds available under titles I, II–A, II–C, or III–A of the Act may be used for public service employment (sections 141(p) and 314(d)(2)).

§ 627.210 Nondiscrimination and nonsectarian activities.

(a)(1) Recipients, SDA grant recipients, title III substate grantees, and other subrecipients shall comply with the nondiscrimination provisions of section 167 of the Act.

(2) Nondiscrimination and equal opportunity requirements and procedures, including complaint processing and compliance reviews, are governed by the provisions of 29 CFR part 34 and are administered and enforced by the DOL Directorate of Civil Rights.

(3) Funds may be used to meet a recipient's or subrecipient's obligation to provide physical and programmatic accessibility and reasonable accommodation in regard to the JTPA program as required by Section 504 of the Rehabilitation Act of 1973, as amended, and the Americans with Disabilities Act of 1990.

(b) The employment or training of participants in sectarian activities is prohibited.

§ 627.215 Relocation.

(a) No funds provided under the Act shall be used, or proposed for use, to encourage or to induce the relocation of an establishment, or part thereof, that result in the loss of employment for any employee or such establishment at the original location.

(b) For 120 days after the commencement or the expansion of commercial operations of a relocating establishment, no funds provided under this Act shall be used for customized or skill training, on-the-job training, or company-specific assessments of job applicants or employees, for any relocating establishment or part thereof at a new, or expanded location, if the relocation

of such establishment or part thereof results in a loss of employment for any employee of such establishment at the original location.

(c) For the purposes of this section, *relocating establishment* means a business entity, including a successor-in-interest, which is moving any operations from a facility in one labor market area within the United States and its territories to a new or expanding facility in another labor market area. For the purposes of this section, a labor market area is an area within which individuals can readily change employment without changing their place of residence.

(d) *Pre-award review.* To verify that an establishment which is new or expanding is not, in fact, relocating employment from another area, standardized pre-award review procedures developed by the State shall be completed and documented jointly by the service delivery area or substate grantee and the establishment as a prerequisite to JTPA assistance. The review should include names under which the establishment does business, including successors-in-interest; the name, title, and address of the company official certifying the information; the name and address of the facility in the other geographic location which is being closed or from which business is being transferred; a statement from the employer about job losses at that location; the nature of the products or business being transferred; the date the facility will commence or expand operations, and whether JTPA assistance is sought in connection with past or impending job losses at other facilities.

(e) *Violations and sanctions.* The Department will promptly review and take appropriate action with regard to alleged violations of the provisions of paragraphs (a) and (b) of this section. Procedures for the investigation and resolution of the violations are provided for under subpart F of this part. Sanctions and remedies are provided for under subpart G of this part.

§ 627.220 Coordination with programs under title IV of the Higher Education Act including the Pell grant program.

(a) *Coordination.* Financial assistance programs under title IV of the Higher Education Act of 1965, as amended (HEA) (the Pell Grant program, the Supplemental Education Opportunity Grant program, the Work-study program, and Federal loan programs such as Federal Perkins Loans. Federal Stafford Loans and Federal Direct Stafford Loans) provide student financial aid and are available to JTPA participants enrolling in postsecondary level education programs. SDA's and title III SSG's shall establish coordination procedures and contractual safeguards to ensure that JTPA funds are used in addition to funds otherwise available in the area and are coordinated with these funding sources.

(b) *Affordable programs.* (1) The SDA shall assist the participant early in the objective assessment, as appropriate, to establish eligibility for Pell Grants, student loans and other forms of financial aid.

(2) The SDA or SSA shall record in the ISS or participant record the participant's training-related financial assistance needs and the mix of JTPA and other funds, including Pell Grant funds (sections 141(b), 107(b), 205(b) and 265(b)).

(3) The SDA shall ensure, to the extent practicable, that available Federal, State, and local resources are coordinated sufficiently to meet the training and education-related costs of services, so that the participant can afford to complete the agreed-upon program successfully.

(4) Participants shall not be required to apply for or access student loans, or incur personal debt as a condition of JTPA participation.

(c) *Information sharing.* To prevent duplication of funding and to streamline the tracking of the participant's financial needs and use of funds when HEA, title IV programs are involved, contracts and agreements with educational institutions shall require the educational institution's financial aid

officer to inform the SDA's/SSG's of the amounts and disposition of any HEA, title IV awards and other types of financial aid to each JTPA participant awarded after the enrollment of the participant, as part of a continuing, regular information sharing process (section 141(b)).

§ 627.225 Employment generating activities.

(a)(1) No funds available under the Act shall be used for employment generating activities, economic development activities, investment in revolving loan funds, capitalization of businesses, investment in contract bidding resource centers, or similar activities.

(2) No funds available under titles I, II, or III of the Act shall be used for foreign travel for employment generating activities, economic development activities, or similar activities.

(b) JTPA funds may be used for normal employer outreach and job development activities including, but not limited to: contacts with potential employers for the purpose of placement of JTPA participants; participation in business associations (such as chambers of commerce); JTPA staff participation on economic development boards and commissions, and work with economic development agencies, to provide information about JTPA and to assist in making informed decisions about community job training needs; subscriptions to relevant publications; general dissemination of information on JTPA programs and activities; labor market surveys; and development of on-the-job training (OJT) opportunities, as defined in §627.240; and other allowable JTPA activities in the private sector.

§ 627.230 Displacement.

(a) No currently employed worker shall be displaced by any participant (including partial displacement such as a reduction in the hours of non-overtime work, wages, or employment benefits).

(b) No participant shall be employed or job opening filled: (1) When any other individual is on layoff from the same or any substantially equivalent job, or

(2) When the employer has terminated any regular employee without cause or otherwise reduced its workforce with the intention of filling the vacancy so created by hiring a participant whose wages are subsidized under the Act.

(c) *Violations and sanctions.* The Department will promptly review and take appropriate action with regard to alleged violations of the provisions of paragraphs (a) and (b) of this section. Procedures for the investigation and resolution of violations are provided for under subpart F of this part. Sanctions and remedies are provided for under subpart G of this part.

§ 627.235 General program requirements.

(a) The requirements set forth in sections 141, 142 and 143 of the Act apply to all programs under titles I, II, and III of the Act, except as provided elsewhere in the Act.

(b) Recipients shall ensure that an individual enrolled in a JTPA program meets the requirements of section 167(a)(5) of the Act, Section 3 of the Military Selective Service Act (50 U.S.C. App. 453) and other requirements applicable to programs funded under the specific section or title of the Act under which the participant is enrolling (section 604).

(c) Recipients shall ensure that individuals are enrolled within 45 days of the date of eligibility determination or a new eligibility determination (including new application, if necessary) shall be made, except that eligible summer program applicants under title II-B may be enrolled within 45 days into a summer youth enrollee pool, and no subsequent eligibility determination need be made prior to participation during the period of that summer program. In addition, the 45-day enrollment requirement shall not apply for individuals who have a valid certificate of continuing eligibility under the title III program, as described in §631.3 and §631.53 of this chapter.

(d) Programs operated under titles I, II, and III of the Act are not subject to the provisions of 29 CFR part 97, ''Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments,'' except

as otherwise explicitly provided in this chapter.

(e) If a recipient or SDA imposes a requirement that is in addition to the provisions of the Act and these regulations relating to the administration and operation of programs funded by the Act, the recipient or SDA shall identify the requirement as a State- or SDA-imposed requirement (section 124).

§ 627.240 On-the-job training.

(a) *General*—(1) *On-the-job training* (OJT) means training by an employer in the private or public sector given to a participant who, after objective assessment, and in accordance with the ISS, has been referred to and hired by the employer following the development of an agreement with the employer to provide occupational training in exchange for reimbursement of the employer's extraordinary costs. On-the-job training occurs while the participant is engaged in productive work which provides knowledge and skills essential to the full and adequate performance of the job.

(2) This does not preclude a participant who has been trained by one employer from ultimately being placed in a comparable training-related position with another employer.

(3) On-the-job training may be sequenced with or accompanied by other types of training such as classroom training or literacy training.

(b) *Duration of OJT.* (1) OJT authorized for a participant shall be limited to a period not in excess of that required for the participant to acquire the skills needed for the OJT position. Except as described in paragraph (b) (3) of this section, the period of reimbursement to the employer under an OJT agreement shall not exceed 6 months of training.

(2) The 6-month duration of OJT may be expressed as a number of hours, days, or weeks the participant is expected to work in a 6-month period if the participant works full-time.

(3) In the event that a participant's regular employment is less than full-time and less than 500 hours of OJT has occurred by the end of 6 months, that participant may remain in OJT until 499 hours OJT hours have occurred.

(4)(i) Recipients shall develop policies and procedures for determining the average training duration for occupations including to reflect an individual participant's need for additional training time, or reduction in training time to reflect the individual participant's partial acquisition of needed skills. (In no case should an individual who is fully skilled in an occupation be placed in OJT in that occupation.)

(ii) In determining the average training time, consideration should be given to recognized reference materials, such as the ''Dictionary of Occupational Titles'' (DOT) and employer training plans. Such materials need not be limited to the DOT, however.

(5) On-the-job training is encouraged, but not required, in all occupations with significant training content, particularly in higher-skill occupations appropriate to the participant's needs. Training plans may be developed that recognize the full duration of the OJT period necessary for the full and adequate performance of the job, but the period of reimbursement may not exceed the duration in paragraph (a)(1) or (a)(2) of this section.

(6) When the OJT period in a given occupation for a participant for whom the ISS identifies OJT as appropriate varies from the average for that occupation, the basis for the variation shall be recorded in the ISS.

(c) *On-the-job training payments to employers.* (1) On-the-job training payments to employers are deemed to be in compensation for the extraordinary costs associated with training participants and in compensation for the costs associated with the lower productivity of such participants. Employers shall not be required to document such extraordinary costs or lower productivity (section 141(g)(1)).

(2)(i) On-the-job training payments to employers shall not, during the period of such training, average more than 50 percent of the wages paid by the employer to OJT participants.

(ii) On-the-job training payments to employers may be based upon scheduled raises or regular pay increases.

(iii) On-the-job training payments may not be based on overtime, shift differential, premium pay and other

nonregular wages paid by the employer to participants.

(iv) On-the-job training payments may not be based upon periods of time such as illness, holidays, plant downtime or other events in which no training occurs.

(3) Employers which provide classroom or vestibule training to meet the specific training needs of JTPA participants to equip them with education and knowledge necessary to the OJT occupation may be separately reimbursed for training costs, such as instructors and training material.

(d) *On-the-job training agreements.* (1) Each OJT agreement shall, at a minimum, specify the occupation(s) for which training is to be provided, the duration of the training, the number of participants to be trained in each occupation, wage rates to be paid, the rate of reimbursement, the maximum amount of reimbursement, a job description or training outline that reflects what the participant will learn, and any other separate classroom training that may be provided.

(2) The agreement shall provide that the employer will maintain and make available time and attendance, payroll and other records to support amounts reimbursed under OJT contracts.

(e) *Labor standards.* OJT participants shall be compensated by the employer at the same rates, including periodic increases, as similarly situated employees, but in no event less than the higher of the minimum wage specified under the Fair Labor Standards Act of 1938, as amended or the applicable State or local minimum wage. Participants must receive the same benefits and have the same working conditions as similarly situated employees.

(f) *Suitability of participants.* (1) Only those participants who have been assessed and for whom OJT has been determined as an appropriate activity in the participant's ISS may be referred to an employer for participation in OJT.

(2) An individual referred to the JTPA program by an employer may be enrolled in an OJT program with such employer only upon completion of the objective assessment and individual service strategy in which OJT with such employer has been determined to be an appropriate activity and only if the employer has not already hired such individual.

(3) OJT with the participant's previous or current employer in the same, a similar, or an upgraded job is not permitted.

(g) *Monitoring.* (1) OJT agreements shall be monitored periodically on-site by the entity issuing the contract to assure that the validity and propriety of amounts claimed for reimbursement are substantiated by payroll and time and attendance records and that the training is being provided as specified in the agreement.

(2) Brokering contractors shall conduct on-site monitoring of the OJT employers and other subcontractors to verify compliance with subcontract terms before making payments.

(3) Nothing in this paragraph (g) shall relieve recipients and SDA's from responsibility for monitoring expenditures under the Act.

(h) *Employer eligibility.* (1) OJT agreements shall not be entered into with employers which, under previous agreements, have exhibited a pattern of failing to provide OJT participants with continued long-term employment as regular employees with wages, benefits and working conditions at the same level and to the same extent as similarly situated employees. This prohibition does not apply to OJT agreements for youth in the program under title II–B who are returning to school.

(2) Governors shall issue procedures and criteria to implement the requirement in paragraph (h)(1) of this section, which shall specify the duration of the period of loss of eligibility. The procedures and criteria shall provide that situations in which OJT participants quit voluntarily, are terminated for cause, or are released due to unforeseeable changes in business conditions will not necessarily result in termination of employer eligibility.

(i) *Brokered OJT.* Each agreement with an OJT employer that is written by a brokering contractor (not written directly by the SDA/SSA or recipient) shall specify and clearly differentiate the services to be provided by the brokering contractor (including but not limited to outreach, recruitment, training, counseling, assessment,

placement, monitoring, and followup), the employer and other agencies and subcontractors, including services provided with or without cost by other agencies or subcontractors.

(j) *Youth OJT.* OJT conducted under title II–C shall meet the requirements of subpart H of part 628 of this chapter (628.804), as well as the requirements of this section. Where OJT is provided to youth concurrently enrolled under titles II–B and II–C, the source of funding for the OJT shall govern which requirements apply.

(k) *Employment and employee leasing agencies.*

(1) *Definition.* The terms *employment agency* and *employee leasing agency* mean an employer that provides regular, on-going employment (i.e., not probationary, temporary, or intermittent employment) in a specific occupation and, for a fee, places employees at the worksite of another employer to perform work for such employer.

(2) Employment and employee leasing agencies that meet the other requirements of this section may be eligible for OJT agreements when the agreement specifies the source of training and specifies that the payments are for the extraordinary training costs of the entity providing the training.

§ 627.245 Work experience.

(a) *Definition.—Work Experience* means a short-term or part-time training assignment with a public or private nonprofit organization for a participant who needs assistance in becoming accustomed to basic work requirements. It is prohibited in the private for-profit sector.

(b) *Suitability.* Work experience should be designed to promote the development of good work habits and basic work skills.

(c) *Duration of work experience.* Participation in work experience shall be for a reasonable length of time, based on the needs of the participant. The duration of work experience shall be recorded in the participant's ISS.

(d) *Combination with other services.* Work experience under titles II–A and C shall be accompanied either concurrently or sequentially by other services designed to increase the basic education and/or occupational skills of the participant, as recorded in the ISS.

(e) Work experience is not an allowable activity under title III of the Act. (Sections 204(b) and (c), 253(a), and 264 (c) and (d).)

§ 627.250 Interstate agreements.

The Secretary hereby grants authority to the several States to enter into interstate agreements and compacts in accordance with section 127 of the Act and, as specified in § 627.420(g), Procurement.

Subpart C—Payments, Supportive Services, and Benefits and Working Conditions

§ 627.300 Scope and purpose.

This subpart sets forth requirements for allowable payments to JTPA participants under titles I and II. These include needs-based payments under title II, incentive and bonus payments under title II, work-based training payments under title II, and payments for combined activities under title II. Requirements for supportive services under titles I, II, and III, including financial assistance and needs-related payments, are also included in this subpart. This subpart also sets forth rules for benefits and working conditions for JTPA participants. These include requirements for: Compliance with applicable labor laws; workers' compensation coverage or medical and accident insurance where there is no State workers' compensation coverage; and working conditions which are not detrimental to the participant's health and safety.

§ 627.305 Payments.

(a)(1) *General.* Allowable types of payments which may be made to participants are: Needs-based payments for eligible individuals in programs under title II; incentive and bonus payments for participants in title II programs; work-based training payments for work experience, entry employment experience, internships and other work-based training activities; payments for participants in title II–B activities; and

training payments for combined activities in title II programs. These payments shall be made in accordance with paragraphs (b) through (f) of this section.

(2) A participant shall receive no payments for training activities in which the participant fails to participate without good cause (section 142(a)(1)).

(3) The SDA shall ensure to the extent possible that similarly situated participants receive similar payments.

(4) Payments to participants, broadly defined for this subsection as all funds distributed to participants except OJT wages, shall not be considered as income for the purposes of determining eligibility for and the amount of income transfer and in-kind aid furnished under any Federal or federally assisted program based on need, other than as provided under the Social Security Act (section 142(b)).

(5) The SDA is responsible for meeting any applicable Internal Revenue Service and Fair Labor Standards Act requirements (section 142(a)(3)).

(6) An SDA may set fixed levels for any non-wage payment.

(b) *Needs-based payments.* (1) Participants in programs funded under title II may receive needs-based payments when such payments are necessary to enable the individual to participate in training programs. Payments shall be made in accordance with a locally developed policy which is included in the job training plan approved by the Governor.

(2) The individual determination of participants' needs-based payments and the amount of such payments shall be based upon the results of the continuing objective assessment and determined in accordance with a locally developed policy. The provisions and amount of such payments shall be recorded in the ISS.

(c) *Incentive and bonus payments.* Participants in programs funded under title II may receive incentive and bonus payments based on their attendance and performance in accordance with a locally developed policy. The policy shall be described in the job training plan approved by the Governor and shall include a specification of the requirements for the receipt of such payments and the level of payments.

(d) *Work-based training payments.* Individuals participating in work experience, in entry employment experience programs, in limited internships for youth in the private sector, or in other work-based training activities under title II of the Act may receive work-based training payments which may be wages.

(e) Summer participants may receive training payments for participation in activities under title II–B.

(f) *Training payments for combined activities.* For title II programs, participants in one of the activities described in paragraph (d) of this section for which work-based training payments are payable for more than 50 percent of the participant's time, including classroom training, may also receive training payments for hours of participation in classroom training.

§ 627.310 Supportive services.

(a)(1) The SDA or SSG shall develop a policy on supportive services in accordance with the definition at section 4(24) of the Act. This policy shall be included in the job training plan approved by the Governor (section 4(24)). Supportive services may be provided to participants through in-kind or cash assistance, or by arrangement with another human service agency when necessary to enable an individual who is eligible for training under a JTPA assisted program, but who cannot afford to pay for such services, to participate in such JTPA-assisted program.

(2) In the event that an SDA or SSG adopts a policy of providing a fixed reimbursement for a particular supportive service to all participants, it shall, as part of its policy, state the rationale for its choice and the fixed amounts it has adopted.

(b) Limited supportive services may be provided to applicants in order to permit them to complete the application process.

(c) Necessary supportive services shall be recorded in a participant's ISS under title II or should be recorded in a participant's individual readjustment plan under title III. When supportive services are provided in accordance with paragraph (b) of this section, information on any supportive service

provided may be maintained for future inclusion in an ISS.

(d) The SDA or SSG shall ensure, to the extent possible, that similarly situated participants receive similar supportive services.

(e) For title II participants, necessary supportive services (with the exception of financial assistance) may be provided for up to one year following termination as post-termination or followup services (sections 4(24), 204(b)(2)(J), and 204(c)(4)). For title III participants, the provisions at section 314(c)(15) of the Act shall apply.

(f) An SDA or SSG may set fixed levels of benefit for any supportive service.

(g)(1) For purposes of title II, financial assistance is defined as a general supportive service payment for the purpose of retaining participants in training.

(2) Financial assistance payments may be considered to be necessary for participation in training for title II participants, *i.e.,* a separate, individual determination of need is not necessary.

(h) *Needs-related payments.* The requirements pertaining to needs-related payments provided for under section 315(b) under title III of the Act, are described in part 631 of this chapter.

§ 627.315 Benefits and working conditions.

(a) In the development and conduct of programs funded under the Act, SDA's and SSG's shall ensure that participants are not assigned to work for employers which do not comply with applicable labor laws, including wage and hour, occupational health and safety, and child labor laws (29 CFR part 570).

(b) To the extent that a State workers' compensation law is applicable, workers' compensation benefits in accordance with such law shall be available with respect to injuries suffered by participants. Where a State's workers' compensation law is not applicable, recipients and subrecipients shall secure insurance coverage for injuries suffered by such participants in all JTPA work-related activities. Income maintenance coverage (e.g., contributions for unemployment compensation), is not required for participants (section 143(a)(3)).

(c) Where a participant is engaged in activities not covered under the Occupational Safety and Health Act of 1970, as amended, the participant shall not be required or permitted to work, be trained, or receive services in buildings or surroundings or under working conditions which are unsanitary, hazardous, or dangerous to the participant's health or safety. A participant employed or trained for inherently dangerous occupations, e.g., fire or police jobs, shall be assigned to work in accordance with reasonable safety practices (section 143(a)(2)).

Subpart D—Administrative Standards

§ 627.400 Scope and purpose.

This subpart establishes the administrative and financial standards and requirements that apply to funds received under the Act.

§ 627.405 Grant agreement and funding.

(a)(1) Pursuant to § 627.200 of this part and the Governor/Secretary agreement, each program year there will be executed a grant agreement signed by the Governor or the Governor's designated representative and the Secretary or the Secretary's designated representative (Grant Officer).

(2) The grant agreement described in paragraph (a)(1) of this section shall be the basis for Federal obligation of funds for the program year for programs authorized by titles I, II, and III, including any title III discretionary projects awarded to the State, and such other funds as the Secretary may award under the grant.

(b) *Funding.* The Secretary shall allot funds to the States in accordance with sections 162, 202, 252, 262, and 302 of the Act. The Secretary shall obligate such allotments through Notices of Obligation.

(c) Pursuant to instructions issued by the Secretary, additional funds may be awarded to States for the purpose of carrying out the administrative activities described in section 202(c)(1)(A) when a State receives an amount under

such section that is less than $500,000 (section 453(d)).

(d) *Termination.* Each grant shall terminate when the period of availability for expenditure (funding period), as specified in section 161(b) of the Act, has expired and shall be closed in accordance with § 627.485, of this part, Closeout.

§ 627.410 Reallotment and reallocation.

(a)(1) The Governor shall reallocate title II–A and II–C funds among service delivery areas within the State in accordance with the provisions of section 109(a) of the Act. The amount to be reallocated, if any, shall be based on SDA obligations of the funds allocated separately to each SDA for title II–A or II–C programs.

(2) The Governor shall not establish reallocation requirements that are inconsistent with the provisions of section 109(a) of the Act.

(b) The Secretary shall reallot title II–A and II–C funds among the States in accordance with the provisions of section 109(b) of the Act. The amounts to be reallotted, if any, shall be based on State obligations of the funds allotted separately to each State for title II–A or II–C programs, excluding funds allotted under section 202(c)(1)(D) and the State's obligation of such funds.

(c) Title III funds shall be reallotted by the Secretary in accordance with section 303 of the Act.

§ 627.415 Insurance.

(a) *General.* Each recipient and subrecipient shall follow its normal insurance procedures except as otherwise indicated in this section and § 627.465, Property Management Standards.

(b) DOL assumes no liability with respect to bodily injury, illness, or any other damages or losses, or with respect to any claims arising out of any activity under a JTPA grant or agreement whether concerning persons or property in the recipient's or any subrecipient's organization or that of any third party.

§ 627.420 Procurement.

(a) *General.* (1) For purposes of this section, the term *procurement* means the process which leads to any award of JTPA funds.

(2) The Governor, in accordance with the minimum requirements established in this section, shall prescribe and implement procurement standards to ensure fiscal accountability and prevent waste, fraud, and abuse in programs administered under this Act.

(3) When procuring property and services, a State shall follow the same policies and procedures it uses for procurements from its non-Federal funds, provided that the State's procurement procedures also comply with the minimum requirements of this section.

(4) Each subrecipient shall use its own procurement procedures which reflect applicable State and local laws and regulations, provided that the subrecipient's procurement procedures also comply with the requirements of this section and the standards established by the Governor, pursuant to paragraph (a)(2) of this section.

(5) States and subrecipients shall not use funds provided under JTPA to duplicate facilities or services available in the area (with or without reimbursement) from Federal, State, or local sources, unless it is demonstrated that the JTPA-funded alternative services or facilities would be more effective or more likely to achieve performance goals (sections 107(b) and 141(h)).

(6) Awards are to be made to responsible organizations possessing the demonstrated ability to perform successfully under the terms and conditions of a proposed subgrant or contract. A determination of demonstrated ability shall be done in accordance with the requirements contained in § 627.422 (b) and (d).

(b) *Competition.* (1) Each State and subrecipient shall conduct procurements in a manner which provides full and open competition. Some of the situations considered to be restrictive of competition include, but are not limited to:

(i) Placing unreasonable requirements on firms or organizations in order for them to qualify to do business;

(ii) Requiring unnecessary experience and excessive bonding;

(iii) Noncompetitive pricing practices between firms or organizations or between affiliated companies or organizations;

(iv) Noncompetitive awards to consultants that are on retainer contracts;

(v) Organizational conflicts of interest;

(vi) Specifying only a ''brand name'' product instead of allowing ''an equal'' product to be offered and describing the performance of other relevant requirements of the procurement;

(vii) Overly restrictive specifications; and

(viii) Any arbitrary action in the procurement process.

(2) Each State and subrecipient shall have written procedures for procurement transactions. These procedures shall ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured (including quantities). Such description shall not, in competitive procurements, contain features which unduly restrict competition; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(3) Each State and subrecipient shall ensure that all prequalified lists of persons, firms, or other organizations which are used in acquiring goods and services are current and include sufficient numbers of qualified sources to ensure maximum open and free competition.

(c) *Conflict of interest.* (1) Each recipient and subrecipient shall maintain a written code of standards of conduct governing the performance of persons engaged in the award and administration of JTPA contracts and subgrants. To the extent permitted by State or local law or regulation, such standards of conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the awarding agency's officers, employees, or agents, or by awardees or their agents.

(2) *Staff conflict of interest.* Each recipient and subrecipient shall ensure that no individual in a decisionmaking capacity shall engage in any activity, including participation in the selection, award, or administration of a subgrant or contract supported by JTPA funds if a conflict of interest, real or apparent, would be involved.

(3) *PIC conflict of interest.* (i) A PIC member shall not cast a vote, nor participate in any decisionmaking capacity, on the provision of services by such member (or any organization which that member directly represents), nor on any matter which would provide any direct financial benefit to that member.

(ii) Neither membership on the PIC nor the receipt of JTPA funds to provide training and related services shall be construed, by itself, to violate provisions of section 141(f) of the Act or § 627.420.

(4) A conflict of interest under paragraphs (c) (2) and (3) of this section would arise when:

(i) The individual,

(ii) Any member of the individual's immediate family,

(iii) The individual's partner, or

(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm or organization selected for award.

(5) The officers, employees, or agents of the agency and PIC members making the award will neither solicit nor accept gratuities, favors, or anything of monetary value from awardees, potential awardees, or parties to subagreements. States and subrecipients may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value.

(d) *Methods of procurement.* (1) Each State and subrecipient shall use one of the following methods of procurement, as appropriate for each procurement action:

(i) *Small purchase procedures*—simple and informal procurement methods for securing services, supplies, or other property that do not cost more than $25,000 in the aggregate. Recipients and subrecipients shall not break down one purchase into several purchases merely to be able to use small purchase procedures. The Governor shall establish standards for small purchase procedures to ensure that price or rate quotations will be documented from an adequate number of qualified sources.

(ii) *Sealed bids (formal advertising)*—bids are publicly solicited procurements for which a firm-fixed-price award (lump sum or unit price) or other fixed-price arrangement is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The Governor shall establish standards for sealed bids which include requirements that invitations for bids be publicly advertised, and that bids be solicited from an adequate number of organizations.

(iii) *Competitive proposals*—normally conducted with more than one source submitting an offer and either a fixed-price or cost-reimbursement type award is made. The Governor shall establish standards for competitive proposals which include requirements for the establishment of a documented methodology for technical evaluations and award to the responsible offeror whose proposals are most advantageous to the program with price, technical, and other factors considered.

(iv) *Noncompetitive proposals (sole source)*—procurement through solicitation of a proposal from only one source, the funding of an unsolicited proposal, or when, after solicitation of a number of sources, competition is determined inadequate. Each State and subrecipient shall minimize the use of sole source procurements to the extent practicable, but in every case the use of sole source procurements shall be justified and documented. On-the-job training (OJT) awards (except OJT brokering awards, which shall be selected competitively) and the enrollment of individual participants in classroom training may be sole sourced. For all other awards, procurement by noncompetitive proposals may be used only when the award is infeasible under small purchase procedures, sealed bids, or competitive proposals and one of the following circumstances applies:

(A) The item or service is available only from a single source;

(B) The public exigency or emergency need for the item or service does not permit a delay resulting from competitive solicitation;

(C) For SDAs, SSGs and subrecipients, the awarding agency authorizes noncompetitive proposals; for States, the noncompetitive proposal is approved through the State's normal sole source approval process;

(D) After solicitation of a number of sources, competition is determined inadequate;

(2) *Pass Throughs*—The procurement rules do not apply to pass throughs of monies from any unit of State or local government (or SDA or SSG administrative entities) to other such units, such as a local educational agency or public housing authority. To qualify as a pass through, the receiving entity must either further pass through the monies to another such entity or procure services in accordance with the procurement rules.

(e) *Cost or price analysis.* (1) Each recipient, in accordance with the minimum requirements established in this section, shall establish standards on the performance of cost or price analysis.

(2) Each recipient and subrecipient shall perform a cost or price analysis in connection with every procurement action, including modifications (except for modifications where a determination has been made that they do not have a monetary impact). The method and degree of analysis depends on the facts surrounding the particular procurement and pricing situation. At a minimum, the awarding agency shall make independent estimates before receiving bids or proposals. A cost analysis is necessary when the offeror is required to submit the elements of the estimated cost (*e.g.*, as in the case of subrecipient relationships), when adequate price competition is lacking, and for sole source procurements, including modifications or change orders. A price analysis shall be used when price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation (including situations involving inadequate price competition and sole source procurements where a price analysis may be used in lieu of a cost analysis). When a cost analysis is necessary and there is inadequate price

competition, the offeror shall certify that to the best of its knowledge and belief, the cost data are accurate, complete, and current at the time of agreement on price. Awards or modifications negotiated in reliance on such data should provide the awarding agency a right to a price adjustment to exclude any significant sum by which the price was increased because the awardee had knowingly submitted data that were not accurate, complete, or current as certified.

(3) JTPA procurements shall not permit excess program income (for nonprofit and governmental entities) or excess profit (for private for-profit entities). If profit or program income is included in the price, the awarding agency shall negotiate profit or program income as a separate element of the price for each procurement in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit or program income, consideration shall be given to:

(i) The complexity of the work to be performed;

(ii) The risk borne by the awardee;

(iii) The offeror's investment;

(iv) The amount of subcontracting/subgranting;

(v) The quality of the offeror's record of past performance;

(vi) Industry profit rates in the surrounding geographical area for similar work; and

(vii) Market conditions in the surrounding geographical area.

(4) Each recipient and subrecipient may charge to the agreement only those costs which are consistent with the allowable cost provisions of § 627.435 of this part, including the guidelines issued by the Governor, as required at § 627.435(i) of this part.

(5) The cost plus a percentage of cost method shall not be used.

(f) *Oversight.* (1) Each recipient and subrecipient shall conduct and document oversight to ensure compliance with the procurement standards, in accordance with the requirements of § 627.475 of this part, Oversight and monitoring.

(2) Each recipient and subrecipient shall maintain an administration system which ensures that vendors and subrecipients perform in accordance with the terms, conditions, and specifications of their awards.

(g) *Transactions between units of government.* (1) Except as provided in paragraph (g)(2) of this section, procurement transactions between units of State or local governments, or any other entities organized principally as the administrative entity for service delivery areas or substate areas, shall be conducted on a cost reimbursable basis. Cost plus type awards are not allowable.

(2) In the case of procurement transactions with schools that are a part of these entities, such as State universities and secondary schools, when tuition charges or entrance fees are not more than the educational institution's catalogue price, necessary to receive specific training, charged to the general public to receive the same training, and for training of participants, the tuition and/ or entrance fee does not have to be broken out by items of cost.

(h) *Award provisions.* Each recipient and subrecipient agreement shall:

(1) Clearly specify deliverables and the basis for payment; and

(2) In the case of awards to subrecipients, contain clauses that provide for:

(i) Compliance with the JTPA regulations;

(ii) Assurance of nondiscrimination and equal opportunity as found in 29 CFR 34.20, Assurance required; duration of obligation; covenants.

(3) In the case of awards to vendors, contain clauses that provide for:

(i) Access by the recipient, the subrecipient, the Department of Labor, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records (including computer records) of the contractor or subcontractor which are directly pertinent to charges to the program, in order to conduct audits and examinations and to make excerpts, transcripts, and photocopies; this right also includes timely and reasonable access to contractor's and subcontractor's personnel for the purpose of interviews and discussions related to such documents;

(4) In the case of awards to both subrecipients and vendors, contain clauses that provide for:

(i) Administrative, contractual, or legal remedies in instances where contractors/subgrantees violate or breach agreement terms, which shall provide for such sanctions and penalties as may be appropriate;

(ii) Notice of 29 CFR 97.34 requirements pertaining to copyrights (agreements which involve the use of copyrighted materials or the development of copyrightable materials);

(iii) Notice of requirements pertaining to rights to data. Specifically, the awarding agency and the Department of Labor shall have unlimited rights to any data first produced or delivered under the agreement (agreements which involve the use/development of computer programs/ applications, or the maintenance of databases or other computer data processing program, including the inputing of data);

(iv) Termination for cause and for convenience by the awarding agency, including the manner by which the termination will be effected and the basis for settlement;

(v) Notice of awarding agency requirements and regulations pertaining to reporting;

(vi) Audit rights and requirements;

(vii) Payment conditions and delivery terms;

(viii) Process and authority for agreement changes; and

(ix) Provision against assignment;

(5) The Governor may establish additional clauses, as deemed appropriate, for State and subrecipient procurements.

(i) *Disputes.* (1) The Governor shall ensure that the recipient and each subrecipient have protest procedures to handle and resolve disputes relating to their procurements. A protester shall exhaust all administrative remedies with the subrecipient before pursuing a protest at a higher level.

(2) Violations of law will be handled in accordance with the requirements contained in § 627.500(c).

(j) Each recipient and subrecipient shall maintain records sufficient to detail the significant history of a procurement. These records shall include, but are not necessarily limited to, the following: rationale for the method of procurement, selection of agreement type, awardee selection or rejection, and the basis for the agreement price.

§ 627.422 Selection of service providers.

(a) Service providers selected under titles I, II, and III of the Act shall be selected in accordance with the provisions of section 107 of the Act, except that section 107(d) shall not apply to training under title III.

(b) Consistent with the requirements of this section, the Governor shall establish standards to be followed by recipients and subrecipients in making determinations of demonstrated performance, prior to the award of all agreements under titles I, II, and III of the Act. These standards shall comply with the requirements of this section, § 627.420, of this part, Procurement, and section 164(a)(3) of the Act. The standards shall require that determinations of demonstrated performance will be in writing, and completed prior to the award of an agreement.

(c) Each recipient and subrecipient, to the extent practicable, shall select service providers on a competitive basis, in accordance with the standards established in § 627.420(b) of this part, Procurement. When a State, SDA, SSG, or administrative entity determines that services other than intake and eligibility determination will be provided by its own staff, a determination shall be made of the demonstrated performance of the entity to provide the services. This determination: Shall be in writing; shall take into consideration the matters listed in paragraph (d) of this section; and may, if appropriate, be documented and described in the Job Training Plan, GCSSP, or EDWAA plan.

(d) Awards are to be made to organizations possessing the demonstrated ability to perform successfully under the terms and conditions of a proposed subgrant or contract. Where comparable proposals have been received from an offeror which has demonstrated performance and a high-risk recipient/subrecipient, and a determination has been made that both proposals are fundable, the award should

be made to the offeror which has demonstrated performance, unless other factors dictate a contrary result. Determinations of demonstrated performance shall be in writing, and take into consideration such matters as whether the organization has:

(1) Adequate financial resources or the ability to obtain them;

(2) The ability to meet the program design specifications at a reasonable cost, as well as the ability to meet performance goals;

(3) A satisfactory record of past performance (in job training, basic skills training, or related activities), including demonstrated quality of training; reasonable drop-out rates from past programs; where applicable, the ability to provide or arrange for appropriate supportive services as specified in the ISS, including child care; retention in employment; and earning rates of participants;

(4) For title II programs, the ability to provide services that can lead to the achievement of competency standards for participants with identified deficiencies;

(5) A satisfactory record of integrity, business ethics, and fiscal accountability;

(6) The necessary organization, experience, accounting and operational controls; and

(7) The technical skills to perform the work.

(e) In selecting service providers to deliver services in a service delivery area/substate area, proper consideration shall be given to community-based organizations (section 107(a)). These community-based organizations, including women's organizations with knowledge about or experience in nontraditional training for women, shall be organizations which are recognized in the community in which they are to provide services. Where proposals are evenly rated, and one of these proposals has been submitted by a CBO, the tie breaker may go to the CBO.

(f) Appropriate education agencies in the service delivery area/substate area shall be provided the opportunity to provide educational services, unless the administrative entity demonstrates that alternative agency(ies) or organization(s) would be more effective or would have greater potential to enhance the participants' continued educational and career growth (section 107(c)). Where proposals are evenly rated, and one of these proposals has been submitted by an educational institution, the tie breaker shall go to the educational institution.

(g) In determining demonstrated performance of institutions/organizations which provide training, such performance measures as retention in training, training completion, job placement, and rates of licensure shall be taken into consideration.

(h) Service providers under agreements to conduct projects under section 123(a)(2) shall be selected in accordance with the requirements of this section.

(i) The requirements of section 204(d)(2)(B) shall be followed in entering into agreements to provide services for older individuals funded under title II, part A.

(j) Additional requirements for selection of service providers by substate grantees are described at section 313(b)(6) of the Act and § 631.52 of this chapter.

(k) Amounts for service providers. Each SDA/SSG shall ensure that, for all services provided to participants through contracts, grants, or other agreements with a service provider, such contract, grant, or agreement shall include appropriate amounts necessary for administration and supportive services (section 108(b)(5)).

(l) When a State, SDA or SSG has a policy of awarding additional points to proposals received from such organizations as minority business enterprises and women-owned businesses, and this policy is generally applicable to its other funds, the State, SDA or SSG may apply this policy to the JTPA funds.

§ 627.423 Funding restrictions for "high-risk" recipients and subrecipients.

(a) A recipient or subrecipient may be considered ''high-risk'' if an awarding agency determines that the recipient or subrecipient is otherwise responsible, but:

(1) Has a history of unsatisfactory performance;

(2) Is not financially stable;

(3) Has a management system which does not meet the management standards set forth in this part; or

(4) Has not conformed to terms and conditions of a previously awarded grant or subgrant.

(b) If the awarding agency determines that an award will be made to a ''high-risk'' recipient or subrecipient, then special funding restrictions that address the ''high-risk'' status may be included in the award. Funding restrictions may include, but are not limited to:

(1) Payment on a reimbursement basis;

(2) Requiring additional and/or more detailed financial or performance reports;

(3) Additional monitoring;

(4) Requiring the recipient or subrecipient to obtain specific technical or management assistance; and/or

(5) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such funding restrictions, the awarding official will notify the recipient or subrecipient as early as possible, in writing, of:

(1) The nature of the funding restrictions;

(2) The reason(s) for imposing them;

(3) The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions; and

(4) The method of requesting reconsideration of the restrictions imposed.

§ 627.424 Prohibition of subawards to debarred and suspended parties.

(a) No recipient or subrecipient shall make any awards or permit any awards at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs in accordance with the Department of Labor regulations at 29 CFR part 98.

(b) Recipients and subrecipients shall comply with the applicable requirements of the Department of Labor regulations at 29 CFR part 98.

§ 627.425 Standards for financial management and participant data systems.

(a)(1) *General.* The financial management system and the participant data system of each recipient and subrecipient shall provide federally required records and reports that are uniform in definition, accessible to authorized Federal and State staff, and verifiable for monitoring, reporting, audit, program management, and evaluation purposes (sections 165(a)(1) and (2), and 182).

(2) An awarding agency may review the adequacy of the financial management system and participant data system of any recipient/subrecipient as part of a preaward review or at any time subsequent to award.

(b) *Financial systems.* Recipients and subrecipients shall ensure that their own financial systems as well as those of their subrecipients provide fiscal control and accounting procedures that are:

(1) In accordance with generally accepted accounting principles applicable in each State including:

(i) Information pertaining to subgrant and contract awards, obligations, unobligated balances, assets, liabilities, expenditures, and income;

(ii) Effective internal controls to safeguard assets and assure their proper use;

(iii) A comparison of actual expenditures with budgeted amounts for each subgrant and contract;

(iv) Source documentation to support accounting records; and

(v) Proper charging of costs and cost allocation; and

(2) Sufficient to:

(i) Permit preparation of required reports;

(ii) Permit the tracing of funds to a level of expenditure adequate to establish that funds have not been used in violation of the applicable restrictions on the use of such funds;

(iii) As required by section 165(g), permit the tracing of program income, potential stand-in costs and other funds that are allowable except for funding limitations, as defined in § 627.480(f) of this part, Audits; and

(iv) Demonstrate compliance with the matching requirement of section 123(b)(2).

(c) *Applicant and participant data systems.* Each recipient and subrecipient shall ensure that records are maintained:

(1) Of each applicant for whom an application has been completed and a formal determination of eligibility or ineligibility made;

(2) Of each participant's enrollment in a JTPA-funded program in sufficient detail to demonstrate compliance with the relevant eligibility criteria attending a particular activity and with the restrictions on the provision and duration of services and specific activities imposed by the Act; and

(3) Of such participant information as may be necessary to develop and measure the achievement of performance standards established by the Secretary.

§ 627.430 Grant payments.

(a) Except as provided in paragraph (h)(2) of this section, JTPA grant payments shall be made to the Governor in accordance with the Cash Management Improvement Act of 1990 (31 U.S.C. 6501, et seq.), Department of Treasury regulations at 31 CFR part 205, and the State Agreement entered into with the Department of the Treasury.

(b) *Basic standard.* Except as provided in paragraphs (d) and (e) of this section, each recipient and subrecipient shall be paid in advance, provided it demonstrates the willingness and ability to limit advanced funds to the actual immediate disbursement needs in carrying out the JTPA program.

(c) *Advance payments.* To the maximum extent feasible, each subrecipient shall be provided advance payments via electronic funds transfer, following the procedures of the awarding agency.

(d) *Reimbursement.* (1) Reimbursement is the preferred method when the requirements in paragraph (b) of this section are not met.

(i) Each recipient shall submit requests for reimbursement in accordance with the provisions at 31 CFR part 205.

(ii) Each subrecipient shall submit requests for reimbursement in accordance with requirements established by the awarding agency.

(2) Each subrecipient shall be paid as promptly as possible after receipt of a proper request for reimbursement.

(e) *Working capital advance payments.* If a subrecipient cannot meet the criteria for advance payments described in paragraph (b) of this section, and the awarding agency has determined that reimbursement is not feasible because the subrecipient lacks sufficient working capital, the awarding agency may provide cash on a working capital advance payment basis. Under this procedure, the awarding agency shall advance cash to the subrecipient to cover its estimated disbursement needs for an initial period, generally geared to the subrecipient's disbursing cycle. In no event may such an advance exceed 20 percent of the award amount. Thereafter, the awarding agency shall reimburse the subrecipient for its actual cash disbursements. The working capital advance method of payment shall not be used by recipients or subrecipients if the reason for using such method is the unwillingness or inability of the recipient or subrecipient to provide timely advances to the subrecipient to meet the subrecipient's actual cash disbursements.

(f) *Effect of program income, refunds, and audit recoveries on payment.* Each recipient and subrecipient shall disburse cash received as a result of program income, rebates, refunds, contract settlements, audit recoveries, and interest earned on such funds before requesting additional cash payments.

(g) *Cash depositories.* (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, each recipient and subrecipient is encouraged to use minority-owned banks (a bank which is at least 50 percent owned by minority group members). Additional information may be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A recipient or subrecipient shall not be required to maintain a separate bank account but shall separately account for Federal funds on deposit.

(h) *Interest earned on advances.* (1) An interest liability shall accrue on advance payments between Federal agencies and State governments, as provided by the Cash Management Improvement Act (31 U.S.C. 6501, et seq.) and implementing regulations at 31 CFR part 205.

(2) Each recipient and subrecipient shall account for interest earned on advances of Federal funds as program income, as provided at § 627.450 of this part, Program income.

§ 627.435 Cost principles and allowable costs.

(a) *General.* To be allowable, a cost shall be necessary and reasonable for the proper and efficient administration of the program, be allocable to the program, and, except as provided herein, not be a general expense required to carry out the overall responsibilities of the Governor or a governmental subrecipient. Costs charged to the program shall be accorded consistent treatment through application of generally accepted accounting principles appropriate to the JTPA program, as determined by the Governor.

(b) Whether a cost is charged as a direct cost or as an indirect cost shall be determined in accordance with the descriptions of direct and indirect costs contained in the OMB Circulars identified in DOL's regulations at 29 CFR 97.22(b).

(c) Costs allocable to another Federal grant, JTPA program, or cost category may not be shifted to a JTPA grant, subgrant, program, or cost category to overcome fund deficiencies, avoid restrictions imposed by law or grant agreements, or for other reasons.

(d) Applicable credits such as rebates, discounts, refunds, and overpayment adjustments, as well as interest earned on any of them, shall be credited as a reduction of costs if received during the same funding period that the cost was initially charged. Credits received after the funding period shall be returned to the Department as provided for at § 627.490(b).

(e) The following costs are not allowable charges to the JTPA program:

(1) Costs of fines and penalties resulting from violations of, or failure to comply with, Federal, State, or local laws and regulations;

(2) Back pay, unless it represents additional pay for JTPA services performed for which the individual was underpaid;

(3) Entertainment costs;

(4) Bad debts expense;

(5) Insurance policies offering protection against debts established by the Federal Government;

(6) Contributions to a contingency reserve or any similar provision for unforeseen events;

(7) Costs prohibited by 29 CFR part 93 (Lobbying Restrictions) or costs of any salaries or expenses related to any activity designed to influence legislation or appropriations pending before the Congress of the United States; and

(8) Costs of activities prohibited in § 627.205, Public service employment prohibition; § 627.210, Nondiscrimination and nonsectarian activities; § 627.215, Relocation; § 627.225, Employment generating activities; and § 627.230, Displacement, of this part.

(f)(1) The cost of legal expenses required in the administration of grant programs is allowable. Legal expenses include the expenses incurred by the JTPA system in the establishment and maintenance of a grievance system, including the costs of hearings and appeals, and related expenses such as lawyers' fees. Legal expenses does not include costs resulting from, and after, the grievance process such as fines and penalties, which are not allowable, and settlement costs, which are allowable to the extent that such costs included in the settlement would have been allowable if charged to the JTPA program at the time they were incurred.

(2) Legal services furnished by the chief legal officer of a State or local government or staff solely for the purpose of discharging general responsibilities as a legal officer are unallowable.

(3) Legal expenses for the prosecution of claims against the Federal Government, including appeals to an Administrative Law Judge, are unallowable.

(g) Costs of travel and incidental expenses incurred by volunteers are allowable provided such costs are incurred for activities that are generally consistent with section 204(c)(6) of the Act.

(h) Contributions to a reserve for a self-insurance program, to the extent that the type and extent of coverage and the rates and premiums would have been allowed had insurance been purchased to cover the risks, are allowable.

(i) The Governor shall prescribe and implement guidelines on allowable costs for SDA, SSG, and statewide programs that are consistent with the cost principles and allowable costs provisions of paragraphs (a) through (h) of this section and that include, at a minimum, provisions that specify the extent to which the following cost items are allowable or unallowable JTPA costs and, if allowable, guidelines on conditions or the extent of allowability, documentation requirements, and any prior approval requirements applicable to such cost items:

(1) Compensation for personal services of staff, including wages, salaries, supplementary compensation, and fringe benefits;

(2) Costs incurred by the SJTCC, HRIC, PIC's, and other advisory councils or committees;

(3) Advertising costs;

(4) Depreciation and/or use allowances;

(5) Printing and reproduction costs;

(6) Interest expense;

(7) Expenditures for transportation and travel;

(8) Payments to OJT employers, training institutions, and other vendors;

(9) Fees or profits;

(10) Insurance costs, including insurance coverage for injuries suffered by participants who are not covered by existing workers' compensation, and personal liability insurance for PIC members;

(11) Acquisitions of capital assets;

(12) Building space costs, including rent, repairs, and alterations;

(13) Pre-agreement costs;

(14) Fund-raising activities;

(15) Professional services, including organizational management studies conducted by outside individuals or firms; and

(16) Taxes.

§ 627.440 Classification of costs.

(a) Allowable costs for programs under title II and title III shall be charged (allocated) to a particular cost objective/category to the extent that benefits are received by such cost objective/category. Joint and similar types of costs may be charged initially to a cost pool used for the accumulation of such costs pending distribution in due course to the ultimate benefitting cost objective/category. The classification of costs for programs under title III of the Act are set forth at § 631.13 of this chapter, Classification of costs at State and substate levels.

(b) For State-administered programs under Title II, the State is required to plan, control, and charge expenditures against the following cost objectives/categories:

(1) Titles II–A and II–C (combined)—capacity building and technical assistance (sections 202(c)(1)(B) and 262(c)(1)(B) of the Act to carry out activities pursuant to sections 202(c)(3)(A) and 262(c)(3)(A) of the Act);

(2) Titles II–A and II–C (combined)—8 percent coordination (sections 202(c)(1)(C) and 262(c)(1)(C) of the Act to carry out activities pursuant to section 123(d)(2)(A) of the Act);

(3) Titles II–A and II–C (combined)—8 percent services/direct training (sections 202(c)(1)(C) and 262(c)(1)(C) of the Act to carry out activities pursuant to section 123(d)(2)(B) of the Act);

(4) Titles II–A and II–C (combined)—8 percent services/training-related and supportive services (sections 202(c)(1)(C) and 262(c)(1)(C) of the Act to carry out activities pursuant to section 123(d)(2)(B) of the Act);

(5) Titles II–A and II–C (combined)—8 percent services/administration (sections 202(c)(1)(C) and 262(c)(1)(C) of the Act to carry out activities pursuant to section 123(d)(2)(B) of the Act);

(6) Titles II–A and II–C (combined)—8 percent services to disadvantaged (section 202(c)(1)(C) and 262(c)(1)(C) of the Act to carry out activities pursuant to section 123(d)(2)(C) of the Act);

(7) Title II–A—older individuals/direct training (section 202(c)(1)(D) of the Act to carry out activities pursuant to section 204(d) of the Act);

(8) Title II–A—older individuals/training-related and supportive services (section 202(c)(1)(D) of the Act to carry out activities pursuant to section 204(d) of the Act);

(9) Title II–A—older individuals/administration (section 202(c)(1)(D) of the Act to carry out activities pursuant to section 204(d) of the Act); and

(10) Title II—administration (sections 202(c)(1)(A) and 262(c)(1)(A) of the Act to carry out activities pursuant to Title II of the Act, including Title II–B).

(c)(1) SDA grant recipients and their subrecipients shall plan, control, and charge expenditures, excluding incentive funds received pursuant to sections 202(c)(1)(B) and 262(c)(1)(B) of the Act, against the following cost objectives/categories:

(i) Title II–A—direct training services;

(ii) Title II–C—direct training services;

(iii) Title II–A—training-related and supportive services;

(iv) Title II–C—training-related and supportive services;

(v) Title II–B—training and supportive services;

(vi) Title II–A—administration;

(vii) Title II–B—administration; and

(viii) Title II–C—administration.

(2) Incentive funds received pursuant to sections 202(c)(1)(B) and 262(c)(1)(B) of the Act, may be combined and accounted for in total, without regard to cost categories or cost limitations.

(d) States and subrecipients shall use the following definitions in assigning costs to the cost categories contained in paragraphs (b) and (c) of this section:

(1) *Direct training services—title II–A.* Costs for direct training services that may be charged to the title II–A program are:

(i) The personnel and non-personnel costs directly related to providing those services to participants specified in section 204(b)(1) of the Act and which can be specifically identified with one or more of those services. Generally, such costs are limited to:

(A) Salaries, fringe benefits, equipment, supplies, space, staff training, transportation, and other related costs of personnel directly engaged in providing training; and

(B) Salaries, fringe benefits, and related non-personnel costs of program component supervisors and/or coordinators as well as clerical staff, provided such staff work exclusively on activities or functions specified in section 204(b)(1) of the Act or allocations of such costs are made based on actual time worked or other equitable cost allocation methods;

(ii) Books, instructional materials, and other teaching aids used by or for participants;

(iii) Equipment and materials used in providing training to participants;

(iv) Classroom space and utility costs;

(v) Costs of insurance coverage of participants as specified at § 627.315(b) of this part, Benefits and Working Conditions;

(vi) Payments to vendors for goods or services procured for the use or benefit of program participants for direct training services, including:

(A) Payments for commercially available training packages purchased competitively pursuant to section 141(d)(3) of the Act;

(B) Tuition charges, entrance fees, and other usual and customary fees of an educational institution when such tuition charges, entrance fees, or other fees are not more than the educational institution's catalogue price, necessary to receive specific training, charged to the general public to receive the same training, and are for training of participants; and

(C) Payments to OJT employers, but not brokering contractors. Costs incurred under brokering arrangements shall be allocated to all of the benefitting cost categories, and

(vii) Payments to JTPA participants that represent hours spent in a direct training activity (e.g., wages, work-based training payments, training payments for combined activities), including work experience, vocational exploration, limited internships, and entry employment.

(2) *Direct training services—title II–C.* Costs for direct training services that may be charged to the title II–C program are the costs identified in paragraph (d)(1) of this section as well as

costs directly related to providing those services to participants specified in section 264(c)(1) of the Act and which can be specifically identified with one or more of those services.

(3) *Training-related and supportive services—title II–A.* Costs for training-related and supportive services that may be charged to the title II–A program are:

(i) The personnel and non-personnel costs directly related to providing outreach, intake, and eligibility determination, as well as those services to participants specified in section 204(b)(2) of the Act, and which can be specifically identified with one or more of those services. Generally, such costs are limited to:

(A) Salaries, fringe benefits, equipment, supplies, space, staff training, transportation, and other related costs of personnel directly engaged in providing training-related and/or supportive services; and

(B) Salaries, fringe benefits, and related non-personnel costs of program component supervisors and/or coordinators as well as clerical staff, provided such staff work exclusively on activities or functions specified in section 204(b)(2) of the Act or allocations of such costs are made based on actual time worked or another equitable allocation method.

(ii) Needs-based payments, cash incentives and bonuses, other financial assistance and supportive services to participants and applicants, where applicable.

(4) *Training-related and supportive services—title II–C.* Costs for training-related and supportive services that may be charged to the title II–C program are the costs identified in paragraph (d)(3) of this section, as well as costs directly related to providing those services to participants specified in section 264(c)(2) of the Act and which can be specifically identified with one or more of those services.

(5) *Administration.* The costs of administration are those portions of necessary and allowable costs associated with the overall management and administration of the JTPA program and which are not directly related to the provision of services to participants or otherwise allocable to the program cost objectives/categories in paragraphs (b)(1)–(8) or (c)(1) (i)–(v) of this section. These costs can be both personnel and non-personnel and both direct and indirect. Costs of administration shall include:

(i) Except as provided in paragraph (e)(1) of this section, costs of salaries, wages, and related costs of the recipient's or subrecipient's staff or PIC staff engaged in:

(A) Overall program management, program coordination, and general administrative functions, including the salaries and related costs of the executive director, JTPA director, project director, personnel officer, fiscal officer/bookkeeper, purchasing officer, secretary, payroll/insurance/property clerk and other costs associated with carrying out administrative functions;

(B) Preparing program plans, budgets, schedules, and amendments thereto;

(C) Monitoring of programs, projects, subrecipients, and related systems and processes;

(D) Procurement activities, including the award of specific subgrants, contracts, and purchase orders;

(E) Providing State or local officials and the general public with information about the program (public relations);

(F) Developing systems and procedures, including management information systems, for assuring compliance with program requirements;

(G) Preparing reports and other documents related to the program requirements;

(H) Coordinating the resolution of audit findings;

(I) Evaluating program results against stated objectives; and

(J) Performing such administrative services as general legal services, accounting services, audit services; and managing purchasing, property, payroll, and personnel;

(ii) Costs for goods and services required for administration of the program, including such goods and services as rental or purchase of equipment, utilities, office supplies, postage, and rental and maintenance of office space;

(iii) The costs of organization-wide management functions; and

(iv) Travel costs incurred for official business in carrying out program management or administrative activities, including travel costs incurred by PIC members.

(e) *Other cost classification guidance.* (1) Personnel and related non-personnel costs of the recipient's or subrecipient's staff, including project directors, who perform services or activities that benefit two or more of the cost objectives/categories identified in this section may be allocated to the benefitting cost objectives/categories based on documented distributions of actual time worked or other equitable cost allocation methods.

(2) Indirect or overhead costs normally shall be charged to administration, except that specific costs charged to an overhead or indirect cost pool that can be identified directly with a JTPA cost objective/category other than administration may be charged to the JTPA cost objective/category directly benefitted. Documentation of such charges shall be maintained.

(3) Where an award to a subrecipient is for a ''commercially available off-the-shelf training package,'' as defined at § 626.5 of this chapter, the subrecipient may charge all costs of such package to the direct training services cost category.

(4) Profits, fees, and other revenues earned by a subrecipient that are in excess of actual costs incurred, to the extent allowable and consistent with the guidelines on allowable costs prescribed by the Governor in accordance with § 627.435(i). Cost principles and allowable costs, may be allocated to all three cost categories based on the proportionate share of actual costs incurred attributable to each category.

§ 627.445 Limitations on certain costs.

(a) *State-administered programs*—(1) *Services for older individuals.* Of the funds allocated for any program year for section 202(c)(1)(D) of the Act to carry out activities pursuant to section 204(d) of the Act—

(i) Not less than 50 percent shall be expended for the cost of direct training services; and

(ii) Not more than 20 percent shall be expended for the cost of administration.

(2) *State education services.* Of the funds allocated for any program year for sections 202(c)(1)(C) and 262(c)(1)(C) of the Act to carry out activities pursuant to section 123(d)(2)(B) of the Act—

(i) Not less than 50 percent shall be expended for the cost of direct training services; and

(ii) Not more than 20 percent shall be expended for the cost of administration.

(3) The limitations specified in paragraph (a)(2) of this section shall apply to the combined total of funds allocated for sections 202(c)(1)(C) and 262(c)(1)(C) of the Act.

(b) *SDA allocations.* (1) In applying the title II–A and II–C cost limitations specified in section 108(b)(4) of the Act, the funds allocated to a service delivery area shall be net of any:

(i) Transfers made in accordance with sections 206, 256, and 266 of the Act; and

(ii) Reallocations made by the Governor in accordance with section 109(a) of the Act.

(2) The limitations specified in paragraph (b)(1) of this section shall apply separately to the funds allocated for title II–A and title II–C programs.

(3) The title II–B administrative cost limitation of 15 percent shall be 15 percent of the funds allocated for any program year to a service delivery area, excluding any funds transferred to title II–C in accordance with section 256 of the Act (section 253(a)(3)).

(c)(1) The State shall establish a system to regularly assess compliance with the cost limitations including periodic review and corrective action, as necessary.

(2) States and service delivery areas shall have the 3-year period of fund availability to comply with the cost limitations in section 108 of the Act and paragraphs (a) and (b) of this section (section 161(b)).

(d) Administrative costs incurred by a community-based organization or non-profit service provider shall not be included in the limitation described in section 108(b)(4)(A) of the Act if:

(1) Such costs are incurred under an agreement that meets the requirements of section 141(d)(3)(C) (i) and (ii) of the Act;

(2) The total administrative expenditures of the service delivery area, including the administrative expenditures of such community-based organizations or non-profit service providers, do not exceed 25 percent of the funds allocated to the service delivery area for the program year of allocation; and

(3) The total direct training expenditures of the service delivery area, including the direct training expenditures of such community-based organizations or non-profit service providers, is equal to or exceeds 50 percent of the funds allocated to the service delivery area for the program year less one-half of the percentage by which the total administrative expenditures of the service delivery area exceeds 20 percent. For example, if the total administrative expenditures of the service delivery area is 24 percent, then the total direct training expenditures of the service delivery area must be at least 48 percent.

(e) The provisions of this section do not apply to any title III programs.

(f) The provisions of this section do not apply to any designated SDA which served as a concentrated employment program grantee for a rural area under the Comprehensive Employment and Training Act (section 108(d)).

§ 627.450 Program income.

(a) *Definition of program income.* (1) Program income means income received by the recipient or subrecipient that is directly generated by a grant or subgrant supported activity, or earned only as a result of the grant or subgrant. Program income includes:

(i) Income from fees for services performed and from conferences;

(ii) Income from the use or rental of real or personal property acquired with grant or subgrant funds;

(iii) Income from the sale of commodities or items fabricated under a grant or subgrant;

(iv) Revenues earned by a governmental or non-profit service provider under either a fixed-price or reimbursable award that are in excess of the actual costs incurred in providing the services; and

(v) Interest income earned on advances of JTPA funds.

(2) Program income does not include:

(i) Rebates, credits, discounts, refunds, etc., or interest earned on any of them, which shall be credited in accordance with § 627.435(d), Cost principles and allowable costs;

(ii) Taxes, special assessments, levies, fines, and other such governmental revenues raised by a recipient or subrecipient; or

(iii) Income from royalties and license fees for copyrighted material, patents, patent applications, trademarks, and inventions developed by a recipient or subrecipient.

(3) *Property.* Proceeds from the sale of property shall be handled in accordance with the requirements of § 627.465 of this part, Property management standards.

(b) *Cost of generating program income.* Costs incidental to the generation of program income may be deducted, if not already charged to the grant, from gross income to determine program income.

(c) *Use of program income.* (1)(i) A recipient or subrecipient may retain any program income earned by the recipient or subrecipient only if such income is added to the funds committed to the particular JTPA grant or subgrant and title under which it was earned and such income is used for that title's purposes and under the terms and conditions applicable to the use of the grant funds.

(ii) A State may use interest it earns on JTPA funds, deposited by the United States to the State's account, to satisfy the requirement at 31 U.S.C. 6503(c) that the State pay interest on such deposits.

(iii) The classification of costs in §§ 627.440 and 631.13 shall apply to the use of program income.

(iv) The administrative cost limitation in §§ 627.445 and 631.14 shall apply to the use of program income, except that program income used in accordance with paragraph (c)(1)(ii) of this section shall be exempt from the administrative cost limitations.

(2) Program income generated under title II may also be used to satisfy the matching requirement of section 123(b) of the Act.

(3) Program income shall be used prior to the submission of the final report for the funding period of the program year of funds to which the earnings are attributable.

(4) If the subrecipient that earned program income cannot use such income for JTPA purposes, the recipient may permit another entity to use the program income for JTPA purposes.

(5) Program income not used in accordance with the requirements of this section shall be remitted to the Department of Labor.

(d) *Program and other income after the funding period.* Rental income and user fees on real and personal property acquired with JTPA funds shall continue to be JTPA program income in subsequent funding periods. There are no Federal requirements governing the disposition of all other income that is earned after the end of the funding period.

§ 627.455 Reports required.

(a) *General.* The Governor shall report to DOL pursuant to instructions issued by DOL. Reports shall be submitted no more frequently than quarterly, in accordance with section 165(f) of the Act, and within 45 calendar days after the end of the report period. Additional reporting requirements for title III are set forth at § 631.15 of this chapter.

(b) A recipient may impose different forms or formats, shorter due dates, and more frequent reporting requirements on subrecipients, however, the recipient is required to meet the reporting requirements imposed on it by DOL.

(c) DOL may provide computer outputs to recipients to expedite or contribute to the accuracy of reporting. DOL may accept the required information from recipients in electronically reported format or computer printouts instead of prescribed forms.

(d) *Financial reports.* (1) Financial reports for programs under titles I, II, and III shall be submitted to DOL by each State quarterly and by program year of appropriation.

(2) Each recipient shall report program outlays on an accrual basis. If the recipient's accounting records are not normally kept on the accrual basis, the recipient shall develop such accrual information through an analysis of the documentation on hand.

(3) A final financial report is required 90 days after the expiration of a funding period (see § 627.485 of this part, Closeout).

(4) Pursuant to section 104(b)(13) of the Act, the SDA shall annually report to the Governor. Among other items, this report shall include information on the extent to which the SDA has met the goals for the training and training-related placement of women in nontraditional employment.

§ 627.460 Requirements for records.

(a) Records, including the records identified in section 165(g) of the Act, shall be retained in accordance with section 165(e) of the Act. In establishing the time period of record retention requirements for records of subrecipients, the State may either:

(1) Impose the time limitation requirement of section 165(e) of the Act; or

(2) Require that subrecipient records for each funding period be retained for 3 years after the subrecipient submits to the awarding agency its final expenditure report for that funding period. Records for nonexpendable property shall be retained for a period of three years after final disposition of the property.

(b) The Governor shall ensure that the records under this section shall be retained beyond the prescribed period if any litigation or audit is begun or if a claim is instituted involving the grant or agreement covered by the records. In these instances, the Governor shall ensure that the records shall be retained until the litigation, audit, or claim has been finally resolved.

(c) In the event of the termination of the relationship with a subrecipient, the Governor or SDA or title III SSG shall be responsible for the maintenance and retention of the records of any subrecipient unable to retain them.

(d) *Record storage.* Records shall be retained and stored in a manner which will preserve their integrity and admissibility as evidence in any audit or

other proceeding. The burden of production and authentication of the records shall be on the custodian of the records.

(e) *Federal and awarding agencies' access to records*—(1) *Records of recipients and subrecipients.* The awarding agency, the Department of Labor (including the Department of Labor's Office of Inspector General), and the Comptroller General of the United States, or any of their authorized representatives, have the right of timely and reasonable access to any books, documents, papers, computer records, or other records of recipients and subrecipients that are pertinent to the grant, in order to conduct audits and examinations, and to make excerpts, transcripts, and photocopies of such documents. This right also includes timely and reasonable access to recipient and subrecipient personnel for the purpose of interview and discussion related to such documents.

(2) *Expiration of right of access.* The right of access in this section is not limited to the required retention period but shall last as long as the records are retained.

§ 627.463 Public access to records.

(a) *Public access.* Except as provided in paragraph (b) of this section, records maintained by recipients or subrecipients pursuant to § 627.460 shall be made available to the public upon request, notwithstanding the provisions of State or local law.

(b) *Exceptions.* This requirement does not apply to:

(1) Information, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; or

(2) Trade secrets, or commercial or financial information, obtained from a person and privileged or confidential.

(c) *Fees.* For processing of a request for a record under this section, a fee may be charged to the extent sufficient to recover the cost applicable to processing such request (section 165(a)(4)).

§ 627.465 Property management standards.

(a) *States and governmental subrecipients.* Real property, equipment, supplies, and intangible property acquired or produced after July 1, 1993, by States and governmental subrecipients with JTPA funds shall be governed by the definitions and property requirements in the DOL regulations at 29 CFR part 97, except that prior approval by the Department of Labor to acquire property is waived.

(b) *Nongovernmental subrecipients.* Except as provided in paragraph (c) of this section, real and personal property, including intangible property, acquired or produced after July 1, 1993, by nongovernmental subrecipients with JTPA funds shall be governed by the definitions and property management standards of OMB Circular A–110, as codified by administrative regulations of the Department of Labor in 29 CFR Part 95, except that prior approval by the Department of Labor to acquire property is waived.

(c) *Special provisions for property acquired under subgrants to commercial organizations*—(1) *Scope.* This paragraph (c) applies to real and personal property other than supplies that are acquired or produced after July 1, 1993, under a JTPA subgrant to a commercial organization.

(2) *Property acquired by commercial subrecipients.* Title to property acquired or produced by a subrecipient that is a commercial organization shall vest in the awarding agency, provided such agency is a governmental entity or nongovernmental organization that is not a commercial organization. Property so acquired or produced shall be considered to be acquired or produced by the awarding agency and paragraph (a) or (b) of this section, as appropriate, shall apply to that property. If the awarding agency is also a commercial organization, title shall vest in the higher level, non-commercial awarding agency that made the subaward to the commercial subrecipient.

(3) *Approval for acquisition.* A subrecipient that is a commercial organization shall not acquire property subject to this section without the prior approval of the awarding agency.

(d) *Notification to the Secretary of real property acquisitions.* Recipients shall notify the Secretary immediately upon acquisition of real property with JTPA

funds, including acquisitions by subrecipients. Such notification shall include the location of the real property and the Federal share percentage.

(e) *Property procured before July 1, 1993.* (1) Personal or real property procured with JTPA funds or transferred from programs under the Comprehensive Employment and Training Act must be used for purposes authorized by the Act. Subject to the Secretary's rights to such property, the Governor shall maintain accountability for property in accordance with State procedures and the records retention requirements of § 627.460 of this part.

(2) The JTPA program must be reimbursed the fair market value of any unneeded property retained by the Governor for use in a non-JTPA program. The proceeds from the sale of any property or transfer of property to a non-JTPA program must be used for purposes authorized under the Act.

§ 627.470 Performance standards.

(a) *General.* The Secretary shall prescribe performance standards for adult programs under title II–A, for youth programs under title II–C, for dislocated worker programs under title III, and for older worker programs under section 204(d) of the Act. Any performance standards developed for employment competencies shall be based on such factors as entry level skills and other hiring requirements.

(b) Pursuant to instructions and time lines issued by the Secretary, the Governor shall:

(1) Collect the data necessary to set performance standards pursuant to section 106 of the Act; and

(2) Maintain records and submit reports required by sections 106(j)(3), 165(a)(3), (c)(1), and (d) and 121(b)(6) of the Act.

(c) *Title II performance standards.* (1) The Governor shall establish SDA performance standards for title II within the parameters set by the Secretary pursuant to sections 106(b) and (d) of the Act and apply the standards in accordance with section 202(c)(1)(B) of the Act.

(2) The Governor shall establish incentive award policies pursuant to section 106(b)(7) of the Act, except for programs operated under section 204(d) of the Act. Pursuant to section 106(b)(8) of the Act, Governors may not consider standards relating gross program expenditures to performance measures in making such incentive awards.

(3) The Governor shall provide technical assistance to SDA's failing to meet performance standards established by the Secretary for a given program year (section 106(j)(2)).

(4)(i) If an SDA fails to meet a prescribed number of the Secretary's performance standards for 2 consecutive years, the Governor shall notify the Secretary and the service delivery area of the continued failure and impose a reorganization plan (section 106(j)(4)).

(ii) The number of standards deemed to constitute failure shall be specified by the Secretary biennially and shall be based on an appropriate proportion of the total number established by the Secretary for that performance cycle. In determining failure, the specified proportion shall be applied separately to each year of the two year cycle.

(iii) A reorganization plan shall not be imposed for a failure to meet performance standards other than those established by the Secretary.

(iv) A reorganization plan shall be considered to be imposed when, at a minimum:

(A) The problem or deficiency is identified,

(B) The problem is communicated to the SDA, and

(C) The SDA is provided an initial statement of the actions or steps required and the timeframe within which they are to be initiated. A final statement of required steps and actions is to be issued within 30 days.

(d)(1) If the Governor does not impose a reorganization plan, required by paragraph (c)(4) of this section, within 90 days of notifying the Grant Officer of an SDA's continued failure to meet performance standards, the Grant Officer shall develop and impose such a plan (section 106(j)(5)).

(2) Before imposing a reorganization plan, the Grant Officer shall notify the Governor and SDA in writing of the intent to impose the plan and provide both parties the opportunity to submit comments within 30 days of receipt of the Grant Officer's notice.

(e) An SDA subject to a reorganization plan under paragraphs (c)(4) or (d) of this section may, within 30 days of receiving notice of such action, appeal to the Secretary to revise or rescind the reorganization plan under the procedures set forth at §627.471 of this subpart, Reorganization plan appeals (section 106(j)(6)(A)).

(f) *Secretarial action to recapture or withhold funds.* (1) The Grant Officer shall recapture or withhold an amount not to exceed one-fifth of the State administration set-aside allocated under sections 202(c)(1)(A) and 262(c)(1)(A) of the Act when:

(i) The Governor has failed to impose a reorganization plan under paragraph (c)(4) of this section, for the purposes of providing technical assistance under a reorganization plan imposed by the Secretary (section 106(j)(5)(B)); or

(ii) The Secretary determines in an appeal provided for at paragraph (e) of this section, and set forth at §627.471 of this subpart, that the Governor has not provided appropriate technical assistance as required at section 106(j)(2) (section 106(j)(6)(B)).

(2)(i) A Governor of a State that is subject to recapture or withholding under paragraph (f)(1) of this section may, within 30 days of receipt of such notice, appeal such recapture or withholding to the Secretary.

(ii) The Secretary may consider any comments submitted by the Governor and shall make a decision within 45 days after the appeal is received.

(g) *Title III performance standards.* (1) The Governor shall establish SSG performance standards for programs under title III within the parameters set annually by the Secretary pursuant to section 106(c) and (d) of the Act.

(2) Any performance standard for programs under title III shall make appropriate allowances for the difference in cost resulting from serving workers receiving needs-related payments authorized under §631.20 of this chapter (section 106(c)(2)).

(3) The Secretary annually shall certify compliance, if the program is in compliance, with the title III performance standards established pursuant to paragraph (a) of section 322(a)(4) of the Act.

(4) The Governor shall not establish standards for the operation of programs under title III that are inconsistent with the performance standards established by the Secretary under provisions of section 106(c) of the Act (section 311(b)(8)).

(5) When an SSG fails to meet performance standards for 2 consecutive years, the Governor may institute procedures pursuant to the Governor's bypass authority in accordance with §631.38(b) of this chapter or require redesignation of the substate grantee in accordance with §631.35 of this chapter, as appropriate.

§ 627.471 Reorganization plan appeals.

(a) A reorganization plan imposed by the Governor, as provided for at §§627.470(c)(4) or 627.477(b)(2) of this part, or by the Secretary, as provided for at §627.470(d) of this part, may be appealed directly to the Secretary without prior exhaustion of local remedies.

(b)(1) Appeals shall be submitted to the Secretary, U.S. Department of Labor, Washington, DC 20210, ATTENTION: ASET. A copy of the appeal shall be provided simultaneously to the Governor.

(2) The Secretary shall not accept an appeal dated later than 30 days after receipt of written notification from the Governor or the Secretary.

(3) The appealing party shall explain why it believes the decision to impose the reorganization plan is contrary to the provisions of section 106 of the Act.

(4) The Secretary shall accept the appeal and make a decision only with regard to determining whether or not the decision to impose the reorganization plan is inconsistent with section 106 of the Act. The Secretary may consider any comments submitted by the Governor or the SDA, as appropriate. The Secretary shall make a final decision within 60 days after this appeal is received (section 106(j)).

§ 627.475 Oversight and monitoring.

(a) The Secretary may monitor all recipients and subrecipients of financial assistance pursuant to section 163 of the Act.

(b) The Governor is responsible for oversight of all SDA and SSG activities

and State-supported programs. The Governor shall develop and make available for review a State monitoring plan. The plan shall specify the mechanism which:

(1) Ensures that established policies to achieve program quality and outcomes meet the objectives of the Act and regulations promulgated thereunder;

(2) Enables the Governor to determine if SDA's and SSG's have demonstrated substantial compliance with the requirements for oversight;

(3) Determines whether the Job Training Plan shall be disapproved consistent with the criteria contained in section 105(b)(1) of the Act;

(4) Regularly examines expenditures against the cost categories and cost limitations specified in the Act and these regulations;

(5) Ensures that all areas of SDA and SSG operations are monitored onsite regularly, but not less than once annually; and

(6) Provides for corrective action to be imposed if conditions in paragraphs (b)(1)–(4) of this section are not met.

(c) The Governor shall issue instructions to SDA's and title III SSG's on the development of a substate monitoring plan. The instructions for development of the monitoring plan, at a minimum, shall address the monitoring scope and frequency, and the Secretary's emphasis and direction. The substate monitoring plan shall be part of the job training plan.

(d) The Governor shall establish general standards for PIC oversight responsibilities. The required PIC standards shall be included in the Governor's Coordination and Special Services Plan (GCSSP).

(e)(1) The PIC, pursuant to standards established by the Governor, shall establish specific policies for monitoring and oversight of SDA performance which shall be described in the job training plan.

(2) The PIC shall exercise independent oversight over activities under the job training plan which shall not be circumscribed by agreements with the appropriate chief elected official(s) of the SDA.

(f) The PIC and chief elected official(s) may conduct such oversight as they, individually or jointly, deem necessary or delegate oversight responsibilities to an appropriate entity pursuant to their mutual agreement.

§ 627.477 Governor's determination of substantial violation.

(a) Except as provided at paragraph (d) of this section, if, as a result of financial and compliance audits or otherwise, the Governor determines that there is a substantial violation of a specific provision of this Act or the regulations under this Act, and corrective action has not been taken, the Governor shall

(1) Issue a notice of intent to revoke approval of all or part of the plan affected; or

(2) Impose a reorganization plan, which may include

(i) Restructuring the private industry council involved;

(ii) Prohibiting the use of designated service providers;

(iii) Selecting an alternative entity to administer the program for the service delivery area involved;

(iv) Merging the service delivery area into 1 or more other existing service delivery areas; or

(v) Other such changes as the Secretary or Governor determines necessary to secure compliance (section 164(b)(1)).

(b)(1) The actions taken by the Governor pursuant to paragraph (a)(1) of this section may be appealed to the Secretary as provided at § 628.426 of this chapter (section 164(b)(2)(A)).

(2) The actions taken by the Governor pursuant to paragraph (a)(2) of this section may be appealed to the Secretary, as provided at § 627.471 of this part (section 164(b)(2)(B)).

(c) Allegations that the Governor failed to promptly take the actions required under paragraph (a) of this section shall be handled under § 627.607 of this part (section 164(b)(3)).

(d) This section does not apply to remedial actions for SDA failures to meet performance standards, which are provided for at § 627.470 of this part, and do not apply to remedial actions for the failure to comply with procurement standards, which are provided for at § 627.703 of this part.

§ 627.480 Audits.

(a) *Non-Federal Audits*—(1) *Governments.* Each recipient and governmental subrecipient is responsible for complying with the Single Audit Act of 1984 (31 U.S.C. 7501–7) and 29 CFR part 96, the Department of Labor regulations which implement Office of Management and Budget (OMB) Circular A–128, ''Audits of State and Local Governments''.

(2) *Non-governmental organizations.* Each non-governmental recipient or subrecipient shall comply with OMB Circular A–133, ''Audits of Institutions of Higher Education and Other Nonprofit Institutions'', as implemented by the Department of Labor regulations at 29 CFR part 96. The provisions of this paragraph (a)(2) do not apply to any non-governmental organization that is:

(i) A commercial organization; or

(ii) A hospital or an institution of higher education for which State or local governments choose to apply OMB Circular A–128.

(3) *Commercial organizations.* A commercial organization which is a recipient or subrecipient and which receives $25,000 or more a year in Federal financial assistance to operate a JTPA program shall have an audit that:

(i) Is usually performed annually, but not less frequently than every two years;

(ii) Is completed within one year after the end of the period covered by the audit and submitted to the awarding agency within one month after completion;

(iii) Is either:

(A) An independent financial and compliance audit of Federal funds that includes coverage of the JTPA program within its scope, and is conducted and prepared in accordance with generally accepted government auditing standards; or

(B) An organization-wide audit that includes financial and compliance coverage of the JTPA program within its scope.

(b) *Federal audits.* The notice of audits conducted or arranged by the Office of Inspector General or the Comptroller General shall be provided in advance, as required by section 165(b) of the Act.

(c) *Audit reports.* (1) Audit reports of recipient-level entities and other organizations which receive JTPA funds directly from the U.S. Department of Labor shall be submitted to the Office of Inspector General.

(2) Audit reports of organizations other than those described in paragraph (c)(1) of this section shall be submitted to the entity which provided the JTPA funds.

(d) Each entity that receives JTPA program funds and awards a portion of those funds to one or more subrecipients shall:

(1) Ensure that each subrecipient complies with the applicable audit requirements;

(2) Resolve all audit findings that impact the JTPA program with its subrecipient and ensure that corrective action for all such findings is instituted within 6 months after receipt of the audit report (where appropriate, corrective action shall include debt collection action for all disallowed costs); and

(3) Maintain an audit resolution file documenting the disposition of reported questioned costs and corrective actions taken for all findings. The ETA Grant Officer may request that an audit resolution report, as specified in paragraph (e)(2) of this section, be submitted for such audits or may have the audit resolution reviewed through the compliance review process.

(e)(1) Audits of recipient-level entities and other organizations which receive JTPA funds directly from DOL and all audits conducted by or under contract for the Office of Inspector General shall be issued by the OIG to the Employment and Training Administration after acceptance by OIG.

(2) After receipt of the audit report, the ETA Grant Officer shall request that the State submit an audit resolution report documenting the disposition of the reported questioned costs, *i.e.*, whether allowed or disallowed, the basis for allowing questioned costs, the method of repayment planned or required, and corrective actions, including debt collection efforts, taken or planned.

(f) If the recipient intends to propose the use of ''stand-in'' costs as substitutes for otherwise unallowable

costs, the proposal shall be included with the audit resolution report. To be considered, the proposed ''stand-in'' costs shall have been reported as uncharged JTPA program costs, included within the scope of the audit, and accounted for in the auditee's financial system, as required by § 627.425 of this part, Standards for financial management and participant data systems. To be accepted, stand-in costs shall be from the same title, and program year as the costs which they are proposed to replace, and shall not result in a violation of the applicable cost limitations.

(g) After receiving the audit resolution report, the ETA Grant Officer shall review the report, the recipient's disposition, and any liability waiver request submitted in accordance with § 627.704 of this part. If the Grant Officer agrees with all aspects of the recipient's disposition of the audit, the Grant Officer shall so notify the recipient. If the Grant Officer disagrees with the recipient's conclusion on specific points in the audit, the Grant Officer shall resolve the audit through the initial and final determination process described in § 627.606 of this part.

§ 627.481 Audit resolution.

(a) *Federal audit resolution.* When the OIG issues an audit report to the Employment and Training Administration for resolution, the ETA Grant Officer shall provide a copy of the report to the recipient (if it does not already have the report), along with a request that the recipient submit its audit resolution report as specified in § 627.480(e)(2) of this part, unless the Grant Officer chooses to proceed directly against the recipient pursuant to § 627.601 of this part.

(1) For audits of recipient-level entities and other organizations which receive JTPA funds directly from DOL, the Grant Officer shall request that the audit resolution report be submitted within 60 days from the date that the audit report is issued by the OIG.

(2) For audits of subrecipient organizations, the Grant Officer shall provide the recipient with a 180-day period within which to resolve the audit with its subrecipient(s), and shall request that the audit resolution report be submitted at the end of that 180-day period.

(b) After receiving the audit resolution report, the ETA Grant Officer shall review the report, the recipient's disposition, any liability waiver request, and any proposed ''stand-in'' costs. If the Grant Officer agrees with all aspects of the recipient's disposition of the audit, the Grant Officer shall so notify the recipient, constituting final agency action on the audit. If the Grant Officer disagrees with the recipient's conclusion on specific points in the audit, or if the recipient fails to submit its audit resolution report, the Grant Officer shall resolve the audit through the initial and final determination process described in § 627.606 of this part. Normally, the Grant Officer's notification of agreement (a concurrence letter) or disagreement (an initial determination) with the recipient's audit resolution report will be provided within 180 days of the Grant Officer's receipt of the report.

(c) *Non-Federal audit resolution.* (1) To ensure timely and appropriate resolution for audits of all subrecipients, including SDA grant recipients and title III SSG's, and to ensure recipient-wide consistency, the Governor shall prescribe standards for audit resolution and debt collection policies and procedures that shall be included in each job training plan in accordance with section 104(b)(12) of the Act.

(2) The Governor shall prescribe an appeals procedure for audit resolution disputes which, at a minimum, provides for:

(i) The period of time, not less than 15 days nor more than 30 days, after the issuance of the final determination in which an appeal may be filed;

(ii) The rules of procedure;

(iii) Timely submission of evidence;

(iv) The timing of decisions; and

(v) Further appeal rights, if any.

§ 627.485 Closeout.

(a) *General.* The Grant Officer shall close out each annual JTPA grant agreement within a timely period after the funding period covered by the award has expired.

(b) Revisions to the reported expenditures for a program year of funds may

be made until 90 days after the time limitation for expenditure of JTPA funds, as set forth in section 161(b) of the Act, has expired. The Grant Officer may extend this deadline if the recipient submits a written request with justification. After that time, the Grant Officer shall consider all reports received as final and no additional revisions may be made.

(c) When closing out a JTPA grant, the Grant Officer shall notify the recipient, by certified mail, that, since the time limitation for expenditure of funds covered by the grant award has expired, it is the Department of Labor's intent to close the annual grant as follows:

(1) *Cost adjustment.* Based on receipt of reports in paragraph (b) of this section, the Grant Officer shall make upward or downward adjustments to the allowable costs; and

(2) *Cash adjustment.* DOL shall make prompt payment to the recipient for allowable reimbursable costs; the recipient shall promptly refund to DOL any balance of cash advanced that is in excess of allowable costs for the grant award being closed.

(d) The recipient shall have an additional 60 days after the date of the notice described in paragraph (c) of this section in which to provide the Grant Officer with information as to the reason(s) why closeout should not occur.

(e) At the end of the 60-day period described in paragraph (d) of this section, the Grant Officer shall notify the recipient that closeout has occurred, unless information provided by the recipient, pursuant to paragraph (d) of this section, indicates otherwise.

§ 627.490 Later disallowances and adjustments after closeout.

The closeout of a grant does not affect:

(a) The Grant Officer's right to disallow costs and recover funds on the basis of a later audit or other review;

(b) The recipient's obligation to return any funds due as a result of later refunds, corrections, subrecipient audit disallowances, or other transactions;

(c) Records retention requirements in § 627.460 of this part, Requirements for records, and § 627.463 of this part, Public access to records;

(d) Property management requirements in § 627.465 of this part, Property management standards; and

(e) Audit and audit resolution requirements in § 627.480 of this part, Audits and § 627.481 of this part, Audit resolution.

§ 627.495 Collection of amounts due.

(a) Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms of the grant constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Secretary may take any actions permitted by law to recover the funds.

(b) The Secretary shall charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR ch. II).

Subpart E—Grievances Procedures at the State and Local Level

§ 627.500 Scope and purpose.

(a) *General.* This subpart establishes the procedures which apply to the handling of noncriminal complaints under the Act at the Governor, the SDA, and the SSG levels. Nothing contained in this subpart shall be deemed to prejudice the separate exercise of other legal rights in pursuit of remedies and sanctions available outside the Act.

(b) *Handling of discrimination complaints.* Complaints of discrimination pursuant to section 167(a) of the Act shall be handled under 29 CFR part 34.

(c) *Complaints and reports of criminal fraud, waste, and abuse.* Information and complaints involving criminal fraud, waste, abuse or other criminal activity shall be reported through the Department's Incident Reporting System, directly and immediately to the DOL Office of Inspector General, Office of Investigations, 200 Constitution Avenue NW., Room S5514, Washington, DC 20210, or to the corresponding Regional Inspector General for Investigations, with a copy simultaneously provided to the Employment and Training Administration. The Hotline number is 1–800–347–3756. Other complaints of a noncriminal nature will continue to be handled under the procedures set forth

in this part, subparts E and F, and through the Department's Incident Reporting System.

(d) *Non-JTPA remedies.* Whenever any person, organization, or agency believes that a recipient, an SDA, an SSG, or other subrecipient has engaged in conduct that violates the Act and that such conduct also violates a Federal statute other than JTPA, or a State or local law, that person, organization, or agency may, with respect to the non-JTPA cause of action, institute a civil action or pursue other remedies authorized under such other Federal, State, or local law against the recipient, the SDA, the SSG, or other subrecipient, without first exhausting the remedies in this subpart. Nothing in the Act or this chapter shall:

(1) Allow any person or organization to file a suit which alleges a violation of JTPA or regulations promulgated thereunder without first exhausting the administrative remedies described in this subpart; or

(2) Be construed to create a private right of action with respect to alleged violations of JTPA or the regulations promulgated thereunder.

§ 627.501 State grievance and hearing procedures for noncriminal complaints at the recipient level.

(a)(1) Each recipient shall maintain a recipient-level grievance procedure and shall ensure the establishment of procedures at the SDA level and the SSG level for resolving any complaint alleging a violation of the Act, regulations promulgated thereunder, grants, or other agreements under the Act. The procedures shall include procedures for handling complaints and grievances arising in connection with JTPA programs operated by each SDA, SSG, and subrecipient under the Act (section 144(a)).

(2) The procedures described in paragraph (a)(1) of this section shall also provide for resolution of complaints arising from actions taken by the recipient with respect to investigations or monitoring reports.

(b) The recipient's grievance hearing procedure shall require written notice to interested parties of the date, time, and place of the hearing; an opportunity to present evidence; and a written decision. For matters under paragraph (a)(2) of this section, the notice of hearing shall indicate the nature of the violation(s) which the hearing covers.

§ 627.502 Grievance and hearing procedures for noncriminal complaints at the SDA and SSG levels.

(a) Each SDA and SSG, pursuant to guidelines established by the recipient, shall establish procedures for resolving complaints and grievances arising in connection with JTPA programs operated by the SDA, the SSG, and other subrecipients under the Act. The procedures also shall provide for resolution of complaints arising from actions taken by the SDA or the SSG with respect to investigations or monitoring reports of their subgrantees, contractors, and other subrecipients (section 144(a)).

(b) Each SDA and SSG grievance hearing procedure shall include written notice of the date, time, and place of the hearing; an opportunity to present evidence; a written decision; and a notice of appeal rights.

(c) The SDA and SSG procedures shall provide for a decision within 60 days of the filing of the complaint.

§ 627.503 Recipient-level review.

(a) If a complainant does not receive a decision at the SDA or the SSG level within 60 days of filing the complaint or receives a decision unsatisfactory to the complainant, the complainant shall have the right to request a review of the complaint by the recipient. The recipient shall issue a decision within 30 days of receipt of the complaint.

(b) The recipient shall also provide for an independent review, by a reviewer who is independent of the JTPA program, of a complaint initially filed at the recipient level on which a decision was not issued within 60 days of receipt of a complaint or on which the complainant has received an adverse decision. A decision shall be made within 30 days of receipt by the recipient.

(c) A request for review under the provisions of paragraphs (a) or (b) of this section shall be filed within 10 days of receipt of the adverse decision or, if no timely decision is rendered,

within 15 days from the date on which the complainant should have received a timely decision.

(d) With the exception of complaints alleging violations of the labor standards under section 143 of the Act, the recipient's decision is final unless the Secretary exercises the authority for Federal-level review in accordance with the provisions at §627.601 of this part, Complaints and grievances at the Federal level. Complaints alleging violations of section 143 of the Act shall be handled under the procedures set forth at §627.603 of this part, special handling of labor standards violations under section 143.

§ 627.504 Noncriminal grievance procedure at employer level.

(a) Recipients, SDA's, SSG's, and other subrecipients shall assure that other employers, including private-for-profit employers of participants under the Act, have a grievance procedure relating to the terms and conditions of employment available to their participants (section 144(b)).

(b)(1) Employers under paragraph (a) of this section may operate their own grievance system or may utilize the grievance system established by the recipient, the SDA, or the SSG under this subpart, except as provided for in paragraph (b)(2) of this section. Employers shall inform participants of the grievance procedures they are to follow when the participant begins employment.

(2) If an employer is required to use a certain grievance procedure under a covered collective bargaining agreement, then those procedures should be followed for the handling of JTPA complaints under this section.

(c) An employer grievance system shall provide for, upon request by the complainant, a review of an employer's decision by the SDA, or the SSG and the recipient if necessary, in accordance with §§627.501 and 627.502 of this part.

Subpart F—Federal Handling of Noncriminal Complaints and Other Allegations

§ 627.600 Scope and purpose.

(a) This subpart establishes the procedures which apply to the filing, handling, and reviewing of complaints at the Federal level. Nothing in the Act or this chapter shall be construed to allow any person or organization to join or sue the Secretary with respect to the Secretary's responsibilities under JTPA except after exhausting the remedies in subpart E of this part and this subpart F.

(b) Complaints of discrimination pursuant to section 167(a) of the Act shall be handled under 29 CFR part 34.

§ 627.601 Complaints and allegations at the Federal level.

(a) The types of complaints and allegations that may be received at the Federal level for review include:

(1) Complaints for which the recipient has failed to issue a timely decision as required by §627.503 of this part;

(2) Alleged violations of the Act and/or the regulations promulgated thereunder resulting from Federal, State, and/or SDA and SSG monitoring and oversight reviews;

(3) Alleged violations of the labor standards provisions at section 143 of the Act;

(4) Alleged violations of the relocation provisions in section 141(c) of the Act; and

(5) Other allegations of violations of the Act or the regulations promulgated thereunder.

(b) Upon receipt of a complaint or allegation alleging any of the violations listed in paragraph (a) of this section, the Secretary may:

(1) Direct the recipient to handle a complaint through local grievance procedures established under §627.502 of this part; or

(2) Investigate and determine whether the recipient or subrecipient(s) are

in compliance with the Act and regulations promulgated thereunder (section 163(b) and (c)).

(3) Allegations of violations of sections 141(c) or 143 of the Act and § 627.503 of this part shall be handled under paragraph (b)(2) of this section.

§ 627.602 Resolution of investigative findings.

(a)(1) As a result of an investigation or monitoring by the Department, or of the actions specified in paragraph (b)(2) of § 627.601 of this part, the Grant Officer shall notify the recipient of the findings of the investigation and shall give the recipient a period of time, not to exceed 60 days, depending on the nature of the findings, to comment and to take appropriate corrective actions.

(2) The Grant Officer shall review the complete file of the investigation and the recipient's actions. The Grant Officer's review shall take into account the sanction provisions of subpart G of this part. If the Grant Officer agrees with the recipient's handling of the situation, the Grant Officer shall so notify the recipient. This notification shall constitute final agency action.

(3) If the Grant Officer disagrees with the recipient's handling of the matter, the Grant Officer shall proceed pursuant to § 627.606 of this part, Grant officer resolution.

§ 627.603 Special handling of labor standards violations under section 143 of the Act.

(a) A complaint alleging JTPA section 143 violations may be submitted to the Secretary by either party to the complaint when:

(1) The complainant has exhausted the grievance procedures set forth at subpart E of this part, or

(2) The 60-day time period specified for reaching a decision under a procedure set forth at subpart E of this part has elapsed without a decision (section 144(a) and (d)(1)).

(b)(1) The Secretary shall investigate the allegations contained in a complaint alleging violations of JTPA section 143, make a determination whether a violation has occurred, and issue a decision within 120 days of receipt by the Secretary of the complaint (section 144(c) and (d)).

(2) If the results of the Secretary's investigation indicate that a decision by a recipient under a procedure set forth at subpart E of this part requires modification or reversal, or that the 60-day time period for decision under section 144(a) has elapsed, the Secretary shall modify, reverse, or issue such decision.

(3) If the Secretary modifies or reverses a decision made under a procedure set forth at subpart E of this part, or issues a decision where the 60-day time period has elapsed without a decision, the Secretary shall offer an opportunity for a hearing, in accordance with the procedures under section 166 of the Act and subpart H of this part (sections 144(d)(2) and 166(a)).

(4) If the Secretary upholds a recipient's decision, the determination is the final decision of the Secretary (section 144(d)(3)). This decision is not appealable to the Office of Administrative Law Judges.

(c) Except as provided in paragraph (d) of this section, remedies available under this section to a grievant for violations of section 143 of the Act shall be limited to:

(1) Suspension or termination of payments under the Act;

(2) Prohibition of placement of a participant, for an appropriate period of time, in a program under the Act with an employer that has violated section 143 of the Act, as determined under section 144(d) or (e) of the Act; and/or

(3) Appropriate equitable relief (other than back pay) (section 144(f)(1)).

(d) Available remedies for violations of section 143(a)(4), (b)(1), (b)(3), and (d) of the Act include the remedies listed in paragraph (c) of this section, and may include the following:

(1) Reinstatement of the grievant to the position held prior to displacement;

(2) Payment of lost wages and benefits; and/or

(3) Reestablishment of other relevant terms, conditions, and privileges of employment.

(e) Nothing in this section shall be construed to prohibit a grievant from pursuing a remedy authorized under another Federal, State, or local law for a violation of section 143 of the Act (section 144(g)).

§ 627.604 Alternative procedure for handling labor standards violations under section 143 of the Act—binding arbitration.

(a) A person alleging a violation of section 143 of the Act, as an alternative to processing the grievance under a procedure described at section 144 of the Act, may submit the grievance to a binding arbitration procedure, if a collective bargaining agreement covering the parties to the grievance so provides (section 144(e)(1)).

(b) A person electing to have her/his complaint on JTPA section 143 labor standard violations processed under binding arbitration provisions—

(1) Shall choose binding arbitration before, and in lieu of, initiating a complaint under other grievance procedures established pursuant to section 144 of the Act, and

(2) May not elect binding arbitration for a complaint that previously has been or is subject to any other grievance procedure established under the Act.

(c) Binding arbitration decisions under the provisions of section 144(e) of the Act are not reviewable by the Secretary.

(d) The remedies available to a grievant under binding arbitration are limited to those set forth at section 144(f)(1)(C) and (f)(2) of the Act (section 144(e)(2)).

(e) Nothing in this section shall be construed to prohibit a grievant from pursuing a remedy authorized under another Federal, State, or local law for a violation of section 143 of the Act (section 144(g)).

§ 627.605 Special Federal review of SDA- and SSG-level complaints without decision.

(a) Should the recipient fail to provide a decision as required in § 627.503 of this part, the complainant may then request from the Secretary a determination whether reasonable cause exists to believe that the Act or regulations promulgated thereunder have been violated.

(b) The Secretary shall act within 90 days of receipt of a request made pursuant to paragraph (a) of this section. Where there is reasonable cause to believe the Act or regulations promulgated thereunder have been violated, the Secretary shall direct the recipient to issue a decision adjudicating the dispute pursuant to recipient and local procedures. The Secretary's action does not constitute final agency action and is not appealable under the Act (sections 166(a) and 144(c)). If the recipient does not comply with the Secretary's order within 60 days, the Secretary may impose a sanction upon the recipient for failing to issue a decision.

(c) A request pursuant to paragraph (a) of this section shall be filed no later than 15 days from the date on which the complainant should have received a decision as required in § 627.503 of this part. The complaint shall contain the following:

(1) The full name, telephone number (if any), and address (if any) of the person making the complaint;

(2) The full name and address of the respondent against whom the complaint is made;

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged violation;

(4) The provisions of the Act, regulations promulgated thereunder, grant, or other agreement under the Act believed to have been violated;

(5) A statement disclosing whether proceedings involving the subject of the request have been commenced or concluded before any Federal, State, or local authority, and, if so, the date of such commencement or conclusion, the name and address of the authority, and the style of the case; and

(6) A statement of the date the complaint was filed with the recipient, the date on which the recipient should have issued decision, and an attestation that no decision was issued.

(d)(1) A request pursuant to paragraph (a) of this section will be considered to have been filed when the Secretary receives from the complainant a written statement sufficiently precise to evaluate the complaint and the grievance procedure used by the recipient, the SDA, or the SSG.

(2) When an imprecise request is received within the 15-day period prescribed in paragraph (a) of this section, the Secretary may extend the period for submission.

§ 627.606 Grant Officer resolution.

(a) When the Grant Officer is dissatisfied with the State's disposition of an audit, as specified in § 627.481 of this part, or other resolution of violations (including those arising out of incident reports or compliance reviews), with the recipient's response to findings resulting from investigations pursuant to § 627.503 of this part, or if the recipient fails to comply with the Secretary's decision pursuant to § 627.605(b) of this part, the initial and final determination process shall be used to resolve the matter.

(b) *Initial determination.* The Grant Officer shall make an initial determination on the findings for both those matters where there is agreement and those where there is disagreement with the recipient's resolution, including the allowability of questioned costs or activities. Such initial determination shall be based upon the requirements of the Act, regulations promulgated thereunder, grants, contracts, or other agreements under the Act.

(c) *Informal resolution.* The Grant Officer shall not revoke a recipient's grant in whole or in part, nor institute corrective actions or sanctions, without first providing the recipient with an opportunity to present documentation or arguments to resolve informally those matters in controversy contained in the initial determination. The initial determination shall provide for an informal resolution period which shall be at least 60 days from issuance of the initial determination. If the matters are resolved informally, the Grant Officer shall issue a final determination pursuant to paragraph (d) of this section which notifies the parties in writing of the nature of the resolution and may close the file.

(d) *Grant Officer's final determination.* (1) If the matter is not fully resolved informally, the Grant Officer shall provide each party with a written final determination by certified mail, return receipt requested. For audits of recipient-level entities and other recipients which receive JTPA funds directly from DOL, ordinarily the final determination will be issued not later than 180 days from the date that the OIG issues the final approved audit report to the Employment and Training Administration. For audits of subrecipients conducted by the OIG, ordinarily the final determination will be issued not later than 360 days from the date the OIG issues the final approved audit report to ETA.

(2) A final determination under this paragraph (d) shall:

(i) Indicate that efforts to informally resolve matters contained in the initial determination have been unsuccessful;

(ii) List those matters upon which the parties continue to disagree;

(iii) List any modifications to the factual findings and conclusions set forth in the initial determination;

(iv) Establish a debt, if appropriate;

(v) Require corrective action when needed;

(vi) Determine liability, method of restitution of funds and sanctions; and

(vii) Offer an opportunity for a hearing in accordance with subpart H of this part.

(3) Unless a hearing is requested, a final determination under this paragraph (d) constitutes final agency action and is not subject to further review.

(e) Nothing in this section shall preclude the Grant Officer from issuing an initial determination and/or final determination directly to a subrecipient, in accordance with section 164(e)(3) of the Act. In such a case, the Grant Officer shall inform the recipient of such action.

§ 627.607 Grant Officer resolution of Governor's failure to promptly take action.

(a) An allegation, whether arising from a complaint, from monitoring or other information available to the Department, that a Governor failed to promptly take remedial action of a substantial violation of the Act or the regulations under this Act, as required by § 627.477 of this part, shall be promptly investigated by the Department.

(b) The Grant Officer shall notify the Governor of the findings of the investigation or monitoring and shall give the Governor a period of time, not to exceed 30 days, to comment on the nature of the findings and to take appropriate corrective actions.

(c) The Grant Officer shall review the complete file of the investigation, monitoring, and the Governor's actions.

(d) If the Grant Officer determines that, (1) as a result financial and compliance audits or otherwise, the Governor determined that there was a substantial violation of a specific provision of the Act or the regulations under this Act, and corrective action had not been taken and, (2) the Grant Officer determines that the Governor has not taken the actions required by §627.477(a), the Grant Officer shall take such actions required by §627.477(a).

(e) The Grant Officer's determination, unless a hearing is requested, constitutes final agency action and is not subject to further review. (Section 164(b)(3)).

Subpart G—Sanctions for Violations of the Act

§627.700 Purpose and scope.

This subpart describes the sanctions and appropriate corrective actions that may be imposed by the Secretary for violations of the Act, regulations promulgated thereunder, or grant terms and conditions (sections 106(j)(5), 164 (b), (d), (e), (f), (g), and (h)).

§627.702 Sanctions and corrective actions.

(a) Except for actions under sections 106(j), 164 (b) and (f), and 167 of the Act and the funding restrictions specified at §627.423 of this part, Funding restrictions for ''high-risk'' recipients and subrecipients, the Grant Officer shall utilize initial and final determination procedures outlined in §627.606, Grant Officer resolution, of this part to impose a sanction or corrective action.

(b) To impose a sanction or corrective action regarding a violation of section 167 of the Act, the Department shall utilize the procedures of 29 CFR part 34.

(c) To impose a sanction or corrective action for failure to meet performance standards, where the recipient has not acted as required at section 106(j)(4), the Grant Officer shall utilize the procedures set forth at §627.470 (d) and (f).

(d) To impose a sanction or corrective action for noncompliance with the procurement standards provisions set forth at §§627.420 and 627.703 of this part, where the recipient has not acted, the Grant Officer may utilize the procedures set forth at section 164(b) of the Act.

(e) To impose a sanction or corrective action for the Governor's failure to promptly take remedial action of a substantial violation as required by §627.477 of this part, the Grant Officer shall utilize the procedure set forth in §627.607 of this part.

(f) The recipient shall be held responsible for all funds under its grant(s). The recipient shall hold subrecipients, including SDA's and SSG's, responsible for JTPA funds received through the grant, and may ultimately hold the units of local government which constitute the SDA or the SSG responsible for such funds.

(g) Nothing in this section shall preclude the Grant Officer from imposing a sanction directly against a subrecipient, as authorized in section 164(e)(3) of the Act. In such a case, the Grant Officer shall inform the recipient of such action.

§627.703 Failure to comply with procurement provisions.

(a) If, as part of the recipient's annual on-site monitoring of its SDA's/SSG's, the recipient determines that an SDA/SSG is not in compliance with the procurement requirements established in accordance with the provisions at section 164(a)(3) of the Act and §627.420, of this part, Procurement, and §627.422 of this part, Selection of service providers, the recipient shall:

(1) Require corrective action to secure prompt compliance; and

(2) Impose the sanctions provided for under the provisions at section 164(b) if the recipient finds that the SDA/SSG has failed to take timely corrective action under paragraph (a)(1) of this section (section 164(a) (4) and (5)).

(b) An action by the recipient to impose a sanction against either an SDA or SSG, in accordance with this section, may be appealed to the Secretary under the same terms and conditions as the disapproval of the respective plan, or plan modification, as set forth

at § 628.426(e), Review and approval (section 164(b)(2)).

(c) If, upon a determination under paragraph (a)(2) of this section to impose a sanction under section 164(b) of the Act, the recipient fails to promptly take the actions required under paragraph (a)(2) of this section, the Secretary shall take such actions against the recipient or the SDA/SSG as appropriate (section 164(b)(3)).

§ 627.704 Process for waiver of State liability.

(a) A recipient may request a waiver of liability as described in section 164(e)(2) of the Act.

(b)(1) When the debt for which a waiver of liability is desired was established in a non-Federal resolution, such requests shall be accompanied by a resolution report.

(2) When the ETA Grant Officer is resolving the finding(s) for which a waiver of liability is desired, such request shall be made no later than the informal resolution period described in § 627.606(c) of this part.

(c) A waiver of the recipient's liability can only be considered by the Grant Officer when the misexpenditure of JTPA funds:

(1) Occurred at a subrecipient level;

(2) Was not a violation of section 164(e)(1) of the Act, or did not constitute fraud; or

(3) If fraud did exist, it was perpetrated against the recipient/subrecipient; and:

(i) The recipient/subrecipient discovered, investigated, reported, and prosecuted the perpetrator of said fraud; and

(ii) After aggressive debt collection action, it can be documented that there is no likelihood of collection from the perpetrator of the fraud.

(4) The recipient has issued a final determination which disallows the misexpenditure, the recipient's appeal process has been exhausted, and a debt has been established; and

(5) The recipient requests such a waiver and provides documentation to demonstrate that it has substantially complied with the requirements of section 164(e)(2)(A), (B), (C), and (D) of the Act.

(d) The recipient shall not be released from liability for misspent funds under the determination required by section 164(e) of the Act unless the Grant Officer determines that further collection action, either by the recipient or subrecipient, would be inappropriate or would prove futile.

§ 627.706 Process for advance approval of a recipient's contemplated corrective actions.

(a) The recipient may request advance approval from the Grant Officer for contemplated corrective actions, including debt collection actions, which the recipient plans to initiate or to forego. The recipient's request shall include a description and an assessment of all actions taken by the subrecipient to collect the misspent funds.

(b) Based on the recipient's request, the Grant Officer may determine that the recipient may forego certain collection actions against a subrecipient where:

(1) The subrecipient was not at fault with respect to the liability criteria set forth in section 164(e)(2)(A), (B), (C), and (D) of the Act;

(2) The misexpenditure of funds:

(i) Was not made by that subrecipient but by an entity that received JTPA funds from that subrecipient;

(ii) Was not a violation of section 164(e)(1) of the Act, or did not constitute fraud; or

(iii) If fraud did exist, it was perpetrated against the subrecipient, and:

(A) The subrecipient discovered, investigated, reported, and prosecuted the perpetrator of said fraud; and

(B) After aggressive debt collection action, it can be documented that there is no likelihood of collection from the perpetrator of the fraud.

(3) A final determination which disallows the misexpenditure and establishes a debt has been issued at the appropriate level;

(4) Final action within the recipient's appeal system has been completed; and

(5) Further debt collection action by that subrecipient or the recipient would be either inappropriate or futile.

§ 627.708 Offset process.

(a) In accordance with section 164(d) of the Act, the primary sanction for

misexpenditure of JTPA funds is repayment.

(b) A recipient may request that a debt, or a portion thereof, be offset against amounts allotted to the recipient, and retained at the recipient level for administrative costs, under the current or a future JTPA entitlement.

(1) For title II grants, any offset shall be applied against the recipient level 5 percent administrative cost set-aside only and may not be distributed by the recipient among its subrecipients.

(2) For title III grants, any such offset must be applied against that portion of funds reserved by the recipient for recipient level administration only and may not be distributed by the recipient among its subrecipients.

(c) The Grant Officer may approve an offset request, under section 164(d) of the Act, if the misexpenditures were not in violation of section 164(e)(1) of the Act.

(d) If offset is granted, the debt shall not be fully satisfied until the Grant Officer reduces amounts allotted to the State by the amount of the misexpenditure.

(e) The recipient shall not have the authority to reduce allocations to an SDA or SSG for misexpenditure of JTPA funds under section 164(d) of the Act.

Subpart H—Hearings by the Office of Administrative Law Judges

§ 627.800 Scope and purpose.

(a) The jurisdiction of the Office of the Administrative Law Judges (OALJ) extends only to those complainants identified in sections 141(c), 144(d), 164(f), and 166(a) of the Act.

(b) Actions arising under section 167 of the Act shall be handled under 29 CFR part 34.

(c) All other disputes arising under the Act shall be adjudicated under the appropriate recipient or subrecipient grievance procedures or other applicable law.

§ 627.801 Procedures for filing request for hearing.

(a) Within 21 days of receipt of a final determination imposing a sanction or corrective action or denying financial assistance, the applicant, the recipient, the SDA, the SSG, or other subrecipient, or a vendor against which the Grant Officer has imposed a sanction or corrective action may appeal the Grant Officer's determination to the OALJ. A request for a hearing shall be transmitted by certified mail, return receipt requested, to the Chief Administrative Law Judge, U.S. Department of Labor, 800 K Street, NW., Suite 400, Washington, DC 20001, with one copy to the departmental official who issued the determination.

(b) The 21-day filing requirement in paragraph (a) of this section is jurisdictional. Failure to timely request a hearing acts as a waiver of the right to hearing.

(c) A request for a hearing under this section shall state specifically those issues of the final determination upon which review is requested. Those provisions of the final determination not specified for review, or the entire final determination when no hearing has been requested within the 21 days, shall be considered resolved and not subject to further review. Only alleged violations of the Act, regulations promulgated thereunder, grant or other agreement under the Act fairly raised in the determination and the request for hearing are subject to review.

(d) The procedures set forth in this subpart apply in the case of a complainant who has not had a dispute adjudicated under the alternative dispute resolution process set forth in § 627.805 of this part within 60 days, except that the request for hearing before the OALJ must be filed within 15 days of the conclusion of the 60-day period. In addition to including the final determination upon which review is requested, the complainant shall include a copy of any Stipulation of Facts and a brief summary of proceedings.

§ 627.802 Rules of procedure.

(a) The rules of practice and procedure promulgated by the OALJ, at subpart A of 29 CFR part 18, shall govern the conduct of hearings under this section, except that a request for hearing under this section shall not be considered a complaint to which the filing of an answer by DOL or a DOL agency or official is required. Technical rules of evidence shall not apply to hearings

conducted pursuant to this part; however, rules or principles designed to assure production of the most credible evidence available and to subject testimony to cross-examination shall apply.

(b) *Prehearing procedures.* In all cases, the ALJ should encourage the use of prehearing procedures to simplify and to clarify facts and issues.

(c) *Subpoenas.* Subpoenas necessary to secure the attendance of witnesses and the production of documents or things at hearings shall be obtained from the ALJ and shall be issued pursuant to the authority contained in section 163(b) of the Act, incorporating 15 U.S.C. 49.

(d) *Timely submission of evidence.* The ALJ shall not permit the introduction at the hearing of any documentation if such documentation has not been made available for review by the other parties to the proceeding either at the time ordered for any prehearing conference, or, in the absence of such an order, at least 3 weeks prior to the hearing date.

(e) *Burden of production.* The Grant Officer shall have the burden of production to support her or his decision. To this end, the Grant Officer shall prepare and file an administrative file in support of the decision which shall be made part of the record. Thereafter, the party or parties seeking to overturn the Grant Officer's decision shall have the burden of persuasion.

§ 627.803 Relief.

In ordering relief, the ALJ shall have the full authority of the Secretary under section 164 of the Act.

§ 627.804 Timing of decisions.

The ALJ should render a written decision not later than 90 days after the closing of the record.

§ 627.805 Alternative dispute resolution.

(a) Parties to a complaint under § 627.801 of this part, Procedures for filing a request for hearing, may choose to waive their rights to an administrative hearing before the OALJ by choosing to transfer the settlement of their dispute to an individual acceptable to all parties for the purpose of conducting an informal review of the stipulated facts and rendering a decision in accordance with applicable law. A written decision will be issued within 60 days after the matter is submitted for informal review.

(b) The waiver of the right to request a hearing before the OALJ may be revoked if a settlement has not been reached or a decision has not been issued within the 60 days provided in paragraph (a) of this section.

(c) The decision rendered under this informal review process shall be treated as a final decision of an Administrative Law Judge pursuant to section 166(b) of the Act.

§ 627.806 Other authority.

Nothing contained in this subpart shall be deemed to prejudice the separate exercise of other legal rights in pursuit of remedies and sanctions available outside the Act.

Subpart I—Transition Provisions

§ 627.900 Scope and purpose.

(a) Regulations set forth at parts 626, 627, 628, 629, 630, 631, and 637 of 20 CFR chapter V (1993) were amended, effective December 29, 1992, and were published as an interim final rule to provide planning guidance for States and SDA's on the changes made to the JTPA program as a result of the 1992 JTPA amendments (See 57 FR 62004 (December 29, 1992)). The transition provisions of the regulations were amended on June 3, 1992 (see 58 FR 31472, June 3, 1993). Those regulations and the statutory amendments were effective for the program year beginning July 1, 1993 (PY 1993), and succeeding program years. For PY 1992, JTPA programs and activities shall continue under the regulations set forth at 20 CFR parts 626, 627, 628, 629, 630, 631, and 637 (1992).

(b) In order to provide for the orderly transition to and implementation of the provisions of JTPA, as amended by the 1992 amendments, this subpart I applies to the use of JTPA title II and title III funds allotted by formula to the States. Additional guidance on transition matters may be provided in administrative issuances. The provisions in this subpart are operational

during the transition period for implementing the 1992 JTPA amendments.

§ 627.901 Transition period.

The transition period ended June 30, 1993 unless otherwise stated. The intent of the transition period is to complete, to the extent possible, activity begun on or before June 30, 1993 under current policy and regulations and to ensure that all requirements mandated by the 1992 JTPA amendments have been implemented.

§ 627.902 Governor's actions.

The following are actions required to be taken prior to July 1, 1993:

(a) Review current policies, practices, procedures, and delivery systems to ensure that they conform to the requirements of the amendments;

(b) Modify the Governor's coordination and special services plan in accordance with instructions issued by the Secretary;

(c) Ensure that SDAs modify job training plans as necessary;

(d) Execute a new Governor/Secretary agreement and a new grant agreement;

(e) Issue procurement standards that comply with the Act and these regulations, as described in §627.420 of this part, Procurement;

(f) Issue instructions necessary to implement program year 1993 cost categories pursuant to §627.440 of this part, Classification of costs;

(g) Issue instructions necessary for SDAs to report program expenditures by year of appropriation pursuant to §627.455 of this part, Reports required;

(h) Certify private industry councils pursuant to §628.410 of this chapter, Private Industry Council.

§ 627.903 Actions which are at the discretion of the Governor.

(a) Establish a State Human Resource Investment Council (HRIC);

(b) Issue instructions to ''grandparent'' participants in JTPA programs as of June 30, 1993 for purposes of completing training;

(c) Issue instructions for use of PY 1992 and prior year 6 percent performance standards incentive funds to further develop and implement data collection and management information systems to track the program experience of participants. PY 1993 and subsequent performance standards incentive funds may not to be used for this purpose;

(d) Of the Title II and Title III unobligated balance of funds available as of June 30, 1993, any amount may be reprogrammed into PY 1993 activity. The Department believes these amounts will be minimal and not represent a significant proportion of the funds available. Such reprogrammed funds will be subject to requirements contained in JTPA regulations effective July 1, 1993.

§ 627.904 Transition and implementation.

(a) *Review.* The Governor shall conduct a comprehensive review of the current policies, procedures, and delivery systems relating to programs authorized under the Job Training Partnership Act for the purpose of ensuring the effective implementation of the amendments. Such a review shall include consideration of the appropriateness of current SDA designations, the representation on current State and local councils, the adequacy of current administrative systems, the effectiveness of current outreach, service delivery, and coordination activities, and other relevant matters.

(b) *Governor's Coordination and Special Services Plan (GCSSP).* The GCSSP requires modification to assure conformance to the requirements of the amendments. The plan was to be modified pursuant to instructions issued by the Secretary and shall be submitted to the Secretary for review by May 15, 1993.

(c) *Job training plans.* Service delivery area job training plans will require modification to comply with §628.420 of this chapter, Job training plan.

(d) *Governor/Secretary agreement and grant agreement.* A new Governor/Secretary agreement is required to assure that the State shall comply with JTPA, as amended, and the applicable rules and regulations; the Wagner-Peyser Act, as amended, and the applicable rules and regulations. A new grant agreement is needed to provide the basis for Federal obligation of

funds for programs authorized by Titles I, II, and III, and such other funds as the Secretary may award under the grant.

(e) *Procurement standards.* In order to ensure fiscal accountability and prevent waste, fraud, and abuse in programs administered under JTPA, as amended, the Governor shall prescribe and implement procurement standards meeting the requirements of § 627.420 of this part, Procurement. All procurements initiated on or after July 1, 1993 shall be governed by and follow the requirements in § 627.420 of this part. Initiation of procurement means any sole source or small purchase awarded on or after July 1, 1993 and any Invitation for Bid or Request for Proposal issued on or after July 1, 1993.

(f) *Participants.* In order to have the least possible disruption to program participants, during PY 1993, Governors and SDAs have the flexibility to grandfather participants already enrolled in JTPA programs up to and including June 30, 1993 under existing rules and regulations. All participants in programs on June 30, 1993, will be eligible for transfer to programs operated under the new provisions at any time beginning on July 1, 1993. ''Hard to serve'' barriers to participation, assessment and Individual Service Strategy provisions of the amendments will not apply to participants enrolled prior to July 1, 1993 or to 1993 Title II–B participants.

(g) *Cost categories.* (1) Cost categories applicable to PY 1992 and earlier funds will be subject to prior regulations either until the funds have been exhausted or program activity has been completed. In order to assist the orderly transition to and implementation of the new requirements of the 1992 JTPA amendments, an increase is allowed in the administrative cost limitation for PY 1992 funds from 15 percent to 20 percent, with a corresponding adjustment to cost limitations for training and participant support. Specifically, not less than 80 percent of the title II–A funds shall be expended for training and participant support, and not less than 65 percent shall be expended for training.

(2) Any prior year's carryover funds made available for use in PY 1993 will be subject to the reporting requirements and cost categories applicable to PY 1993 funds.

(3) In determining compliance with the JTPA cost limitations for PY 1992, Governors may either:

(i) Determine cost limitation compliance separately for funds expended in accordance with paragraphs (g)(1) and (g)(2) of this section; or

(ii) Determine compliance for each cost category against the total PY 1992 funds, whether expended in accordance with the Act and regulations in effect prior to the 1992 amendments to JTPA or in accordance with the amended Act and these regulations. Using this option, the total combined funds expended for training and direct training should be at least 65 percent of PY 1992 SDA allocations.

(4) In addition to the institutions specified in § 627.440(d)(1)(vi)(B), the costs of tuition and entrance fees of a postsecondary vocational institution specified at section 481(c) of the Higher Education Act (20 U.S.C. 1088(c)) may be charged to direct training services through June 30, 1995, when such tuition charges or entrance fees are not more than the educational institution's catalog price, are necessary to receive specific training, are charged to the general public to receive such training, and are for the training of participants.

(h) *Financial reporting.* Notwithstanding reprogramming, expenditures must be recorded separately by year of appropriation.

(i) *Private Industry Council.* The private industry councils shall be certified pursuant to § 628.410 of this chapter, Private Industry Council.

(j) *Grievances, investigations, and hearings.* Generally, all grievances, investigations and hearings pending on or before June 30, 1993 should be resolved and settled under prior rules and procedures. Grievances, investigations, and hearings occurring on or after July 1, 1993 will be governed by the procedures described in subparts E, F, and H of this part 627.

(k) *Summer program.* (1) The Title II–B Summer Youth Employment Program for 1993 shall be governed by the Act and regulations in effect prior to

the Amendments (prior to September 7, 1992).

(2) Up to 10 percent of the 1993 title II–B funds available may be transferred to the title II–C program.

(l) *SDA designation*. At the Governor's discretion, SDA's designated prior to July 1, 1992 need not be subject to the provisions of §628.405, Service delivery areas.

(m) *Program implementation*. The implementation by the States and SDA's of certain new program design requirements, particularly objective assessment and development of individual service strategies (ISS), may require additional time to fully implement beyond July 1, 1993. Reasonable efforts to implement the provisions of §§628.515, 628.520, and 628.530. as soon as possible after July 1, 1993, are expected to be made. However, it is not expected that every new participant will initially receive objective assessment, ISS, and referral to non-title II services for a period of 6 months, or until January 1, 1994.

(n) *Out-of-school youth ratio.* The 50-percent out-of-school participants requirement for title II–C will be phased in during PY 1993 and will not be the subject of compliance review until PY 1994, beginning July 1, 1994. During PY 1993, however, SDA's must show significant improvement in the proportion of out-of-school youth being served and performance in increasing the service ratio will be monitored by the States and DOL during this implementation period.

(o) *Administrative issuances.* Other implementation issues may be handled by administrative issuance. ETA will transmit such guidance directly to all Governors via a Training and Employment Guidance Letter (TEGL). Such TEGL's will be published as Notices in the FEDERAL REGISTER (section 701(i)).

§ 627.905 Guidance on contracts and other agreements.

The Department does not intend for contracts, agreements, inter-agency agreements, retainers, and similar arrangements to be negotiated and/or entered into for the sole purpose of applying previously existing rules and regulations. The 1992 JTPA amendments were effective July 1, 1993. The Department intends that contracts, awards and agreements entered into on or before June 30, 1993 are to be used to serve and/or train participants enrolled on or before June 30, 1993, unless the contracts and agreements are modified to comply with the new amendments and regulations.

§ 627.906 Determinations on State and SDA implementation.

(a) The Department expects that the States and SDA's will fully implement the provisions of the Act and these regulations regarding procurement, cost principles, cost categories, cost limitations, participant service requirements and eligibility beginning July 1, 1993.

(b) The Department expects that the implementation by the States and SDA's of the program design features in these regulations, particularly objective assessment and development of the ISS, may require additional time beyond July 1, 1993 to fully implement.

(c) In deciding to allow or disallow questioned costs related to the implementation of the provisions described in paragraph (b) of this section, the Grant Officer will consider the extent to which the State's and SDA's have made good faith efforts in properly implementing such provisions in the period July 1, 1993 through June 30, 1994.

PART 628—PROGRAMS UNDER TITLE II OF THE JOB TRAINING PARTNERSHIP ACT

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Sec.

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AUTHORITY: 29 U.S.C. 1579(a).

SOURCE: 59 FR 45845, Sept. 2, 1994, unless otherwise noted.

Subpart A—Scope and Purpose

§ 628.100 Scope and purpose of part 628.

(a) This part sets forth requirements for implementation of programs under title II of the Job Training Partnership Act, and includes the councils described in subpart B that have responsibilities under titles I, II, and III. In this part, the provisions generally pertaining to title II are covered in subparts B, C, D, and E. Matters specific to titles IIA, II–B, or II–C are addressed in subparts F, G, or H, respectively.

(b) Title II–A Adult Training programs are to prepare adults for participation in the labor force by providing job training and other services that will result in increased employment and earnings, increased occupational and educational skills, reduced welfare dependency, and result in improved long-term employability.

(c) Title II–B Summer Youth Employment and Training programs are to provide eligible youth with exposure to the world of work, to enhance the basic education skills of youth, to encourage school completion or enrollment in supplemental or alternative school programs and to enhance the citizenship skills of youth.

(d) Title II–C Youth Training programs are to improve the long-term employability of youth; to enhance the educational, occupational and citizenship skills of youth; to encourage school completion or enrollment in alternative school programs; to increase the employment and earnings of youth; to reduce welfare dependency; and to assist youth in addressing problems that impair their ability to make successful transition from school to work, to apprenticeship, to the military or to postsecondary education and training.

Subpart B—State Planning

§ 628.200 Scope and purpose.

This subpart provides requirements for the submission of the Governor's Coordination and Special Services Plan, as well as the procedures for plan review. This subpart also contains requirements for the composition and responsibilities of the State Job Training Coordinating Council and the State Human Resource Investment Council.

§ 628.205 Governor's coordination and special services plan.

(a)(1) *Submittal.* By a date established by the Secretary, each State seeking financial assistance under the Act shall

submit to the Secretary, biennially, the Governor's coordination and special services plan (GCSSP) encompassing two program years (section 121(a)).

(2) The GCSSP shall address the requirements of section 121(b) of the Act, including a description of the Governor's coordination criteria; the measures taken by the State to ensure coordination and prevent duplication with the Job Opportunities and Basic Skills (JOBS) program; the certification of the implementation of the procurement system, as required at section 164(a)(6) of the Act; the technical assistance and training plan; goals, and the efforts to accomplish such goals, for the training and placement of women in nontraditional employment and apprenticeship; the projected use of resources, including oversight of program performance; program administration; program financial management and audit resolution procedures; capacity building; priorities and criteria for State incentive grants; and performance goals for State supported programs (section 121(b)).

(b) *GCSSP review.* The Secretary shall review the GCSSP for overall compliance with the provisions of the Act. If the GCSSP is disapproved, the Secretary shall notify the Governor, in writing, within 45 days of submission of the reasons for disapproval so that the Governor may modify the plan to bring it into compliance with the Act (section 121(d)).

(c) *Information to SDA's.* (1) In the year preceding the program years for which the plan is developed, the State shall make available to the SDA's in the State information on its plans to undertake State activities in program areas including education coordination grants, services to older workers, and capacity building.

(2) The information described in paragraph (c)(1) of this section shall be provided to SDA's in sufficient time for SDA's to take it into consideration in developing local job training plans.

§ 628.210 State Job Training Coordinating Council.

(a) The Governor shall appoint a State Job Training Coordinating Council (SJTCC) pursuant to section 122 of the Act. In lieu of a SJTCC, the Governor may establish and utilize a State Human Resource Investment Council (HRIC) pursuant to section 701 of the Act and in accordance with § 628.215 of this part.

(b) Consistent with section 122(a)(3) of the Act, the SJTCC shall be composed as follows: 30 percent, business and industry representatives; 30 percent, State and local government and local education agency representatives; 30 percent, organized labor and community-based organization representatives; and 10 percent, representatives from the general public. The SJTCC shall have the specific functions and responsibilities outlined in sections 122, 317, and 501 of the Act.

(c) Funding for the SJTCC shall be provided pursuant to sections 202(c)(1)(A) and 262(c)(1)(A) of the Act.

(d) The SJTCC shall:

(1) Analyze the SDAs' reports made pursuant to section 104(b)(13) of the Act and make recommendations for technical assistance and corrective action, and

(2) Prepare a summary of such reports and disseminate them to SDA's and service providers in the State and to the Secretary (section 122(a)(5) and (6)).

§ 628.215 State Human Resource Investment Council.

(a) *Establishment and responsibilities.* The State may, in accordance with sections 701, 702, and 703 of the Act, establish a State Human Resource Investment Council (HRIC). The HRIC's responsibilities are described at section 701(a) of the Act. The HRIC shall carry out the following responsibilities:

(1) Review the provision of services and the use of funds and resources under applicable Federal human resource programs and advise the Governor on methods of coordinating such provision of services and use of funds and resources consistent with the laws and regulations governing such programs;

(2) Advise the Governor on the development and implementation of State and local standards and measures relating to applicable Federal human resource programs and coordination of such standards and measures; and

(3) Carry out the duties and functions prescribed for existing State councils described under the laws relating to the applicable Federal human resource programs, including the responsibilities of the State Council on Vocational Education (SCOVE) under Section 112 of the Carl D. Perkins Vocational and Applied Technology Education Act.

(4) Perform other functions as specified by the Governor (section 701).

(b) *Applicable Programs.* For the purposes of this section, the programs included are those listed at section 701(b)(2) of the Act. A program shall be included only if the Governor and the head of the State agency responsible for the administration of the program jointly agree to include such program. In addition, programs under the Carl Perkins Vocational and Applied Technology Act shall require the agreement of the State council on vocational education (section 701(b)(1)(B)).

(c) *Composition.* (1) The Governor shall establish procedures to ensure appropriate representation on the HRIC from among the categories of representation specified in section 702 of the Act.

(2) In addition, when the functions and responsibilities of the SCOVE are included on the HRIC, the Governor is encouraged to consider appointing the State Director for Vocational Education as a representative on the HRIC.

(d) *Funding.* (1) Funding to carry out the functions of the HRIC shall be available pursuant to section 703(a) of the Act.

(i) The costs associated with the operation of the HRIC should be allocated among the various funding sources based on the relationship of each funding source or program to total spending of all applicable funding sources and programs (section 703(d)).

(ii) Costs of the HRIC that are in excess of costs paid by funds from participating State agencies are, subject to the availability of funds from applicable JTPA sources, allowable JTPA costs (section 703(a) and (d)).

(2) A HRIC which meets the requirements of title VII and includes each of the programs listed at section 701(b)(2)(A) of the Act shall be authorized to use JTPA State Education Coordination and Grants funds (section 123(a)(2)(D)(ii)).

(e) *Replacement of other councils.* A HRIC meeting the requirements of title VII of the Act shall replace the councils of the participating programs listed at section 701(b)(2)(A) of the Act.

(f) *Expertise.* The Governor shall ensure that in the composition of the HRIC and the staff of the HRIC there exists the proper expertise to carry out the functions of the HRIC and the council(s) it replaces (sections 702(c)(2) and 703(b)).

(g) *Certification.* Each State, as part of the certification process to the Secretary, shall ensure that the council meets the requirements of sections 701, 702, and 703. This certification shall be made in writing and submitted to the Secretary, with a copy provided to the Secretary of Education, at least 90 days before the beginning of each period of 2 program years for which a job training plan is submitted under the Act.

Subpart C—State Programs

§ 628.300 Scope and purpose.

This subpart provides requirements for the State-operated programs including the education coordination and grants, services to older workers, and incentive grants to SDA's and grants to SDA's for capacity building and technical assistance.

§ 628.305 State distribution of funds.

(a) The funds made available to the Governor under sections 202(c) and 262(c) of the Act shall be used to carry out activities and services under this subpart.

§ 628.310 Administration.

Funds provided to the Governor under sections 202(c)(1)(A) and 262(c)(1)(A) of the Act may be used for overall administration, management, oversight of program performance; technical assistance to SDA's failing to meet performance standards, as described in section 106(j)(1) of the Act; auditing; and activities under sections 121 and 122 of the Act.

§ 628.315 Education coordination and grants.

(a) *Governor's responsibilities.* The Governor shall allocate funds available pursuant to sections 202(c)(1)(C) and 262(c)(1)(C) of the Act to any State education agency. For the purposes of this section, ''State education agency'' shall not include the State agency which administers the JTPA program within the State or other agencies which do not have education as a primary and operational function, such as correctional agencies, although this limitation shall not preclude such an agency from being an ultimate subrecipient of funds (section 123(a)(1)).

(b) *Agreements.* (1) The State education agency to be allocated funds under section 123(a)(1) of the Act shall participate in joint planning activities with the Governor in order to develop a plan which shall be submitted in the GCSSP (section 123(c)).

(2) The Governor and the State education agency shall jointly agree on the plan required in paragraph (b)(1) of this section, which shall include a description of the agreements described in paragraph (b)(3) of this section (section 123(c)).

(3) Projects to undertake the activities set forth in section 123(a)(2) shall be conducted in accordance with agreements between the State education agency(ies) and administrative entities in service delivery areas in the State. The agreements may include other entities such as State agencies, local education agencies and alternative service providers (section 123(b)(1)(B)).

(4)(i) When there is a failure by the State education agency and the Governor to develop the joint plan described in paragraph (b)(2) of this section, the Governor shall not allocate funds under section 123(a)(1) to such education agency nor shall such funds be available for expenditure by the Governor (section 123(c)).

(ii) When no State education agency accepts the allocation of funds under section 123(a)(1), or when there is a failure to reach the agreement(s) specified in paragraph (b)(3) of this section, the funds may only be used by the Governor pursuant to section 123(e) and in accordance with the GCSSP (section 123(e)).

(c) *Allowable activities.* (1) Funds made available for education coordination and grants under section 123 of the Act shall be used to pay the Federal share of education coordination and grants projects (section 123(a)(2)).

(2) Projects, as defined at section 123(a)(2)(A), (B), and (C) of the Act shall be conducted for eligible individuals and should include those which:

(i) Provide school-to-work services of demonstrated effectiveness, including youth apprenticeship programs;

(ii) Provide literacy and lifelong learning opportunities and services of demonstrated effectiveness, including basic education and occupational skills training; and

(iii) Provide statewide coordinated approaches to education and training services, including model programs, designed to train, place, and retain women in nontraditional employment (section 123(a)).

(3) Projects for coordination of education and training may also be conducted which may include support activities pertaining to the HRIC which meets the requirements of title VII.

(d) *Expenditure requirements.* (1)(i) At least 80 percent of the funds allocated under section 202(c)(1)(C) and section 262(c)(1)(C) of the Act shall be expended to pay for the Federal share of projects described in paragraph (c)(2) of this section (section 123(d)(2)(B)).

(ii) The Governor shall assure that not less than 75 percent of the funds expended for such projects are expended for projects for eligible economically disadvantaged participants who experience barriers to employment. For purposes of meeting this requirement, participants meeting the conditions of section 263(a)(2)(B) and (C) and (g) of the Act may be considered economically disadvantaged (section 123(d)(2)(C)).

(iii) Priority for funds not expended for the economically disadvantaged shall be given to title III participants and persons with barriers to employment.

(iv) The Governor may assure compliance with the requirement to serve participants with barriers to employment by targeting projects to particular barrier groups (*e.g.*, school dropouts).

(2) Not more than 20 percent of funds allocated under section 202(c)(1)(C) of the Act may be expended to:

(i) Facilitate coordination of education and training services for participants in the projects described in section 123(a)(2)(A), (B) and (C), or

(ii)(A) Support activities pertaining to a HRIC that meets the requirements of § 628.215 of this part, or

(B) Support activities pertaining to a State council which carries out functions similar to those of a HRIC if such council was established prior to July 1, 1992.

(e) *Contribution*. (1) Except as provided in paragraph (e)(3) of this section, the State shall provide for the contribution of funds, other than the funds made available under this Act, of a total amount equal to the amounts allotted under Section 123;

(2) The Governor shall define and assure the provision of adequate resources by the State to meet the requirements of paragraph (e)(1) of this section. Such amount may include the direct cost of employment and training services provided by other Federal programs or agencies if such use for matching is in accordance with the applicable Federal law governing the use of such funds.

(3) When there is a failure to reach agreement between the State education agency and the administrative entity in the service delivery area, as set forth in paragraph (b)(3) of this section, the requirement for the contribution of funds shall not apply.

(f) Eligible youth, age 14 through 15, may be served in the program under this section to the extent set forth in the agreements under paragraph (b)(3) of this section.

§ 628.320 Services for older individuals.

(a) *Consultation*. (1) The Governor shall consult with the appropriate PIC's and chief elected official(s) prior to entering into agreements to provide services under section 204(d) and to assure that services provided to participants under section 204(d) are consistent with the programs and activities provided in the SDA to eligible older participants.

(2) The GCSSP shall specify the process for accomplishing the consultation required by paragraph (a)(2) of this section.

(b) Funds available under section 204(d) shall be used by the Governor to provide services on an equitable basis throughout the State, taking into account the relative share of the population of eligible older individuals residing in each SDA and the participation of such older individuals in the labor force.

(c) *Delivery of services*. (1) Services to participants eligible under section 204(d) shall be delivered through agreements with SDA's, private industry councils, public agencies, private nonprofit organizations (including veterans organizations) and private-for-profit organizations.

(2) Priority for delivery of services under this section shall be given to agencies and organizations which have a demonstrated effectiveness in providing training and employment services to such older individuals.

(d) *Eligibility*. (1) Individuals provided services under section 204(d) of the Act shall be economically disadvantaged, based on criteria applicable in the SDA in which they reside, and shall be age 55 or older. However, each program year not more than 10 percent of participants enrolled under section 204(d) may be individuals who are not economically disadvantaged but have serious barriers to employment as identified by the Governor and have been determined within the last 12 months to meet the income eligibility requirements for title V of the Older Americans Act of 1965 (section 204(d)(5)(B)(i)).

(2) The following criteria shall apply to joint programs for older workers.

(i) In order to carry out a joint program with operators of programs under title V of the Older Americans Act, there shall be a written financial or non-financial agreement, or written joint program description when the entity which operates the JTPA and title V program are the same.

(ii) Joint programs under this paragraph (d)(2) may include referrals between programs, co-enrollment and provision of services.

(iii) Under agreements pursuant to this paragraph (d)(2), individuals eligible under title V of the Older Americans Act shall be deemed to satisfy the requirements of section 203(a)(2) of the Act (Older Americans Act, Pub. L. 103–171, section 510).

(e) *Applicable requirements.* Except as provided in the Act, the provisions of title II–A shall apply to programs conducted under section 204(d) (section 204(d)(6)).

(f) The Governor shall make efforts to coordinate the delivery of services under section 204(d) with the delivery of services under title V of the Older Americans Act of 1965. Such coordination may include coenrollment, coordination of a continuum of services between this section and title V of the Older Americans Act and other appropriate linkages.

(g) The Governor shall give consideration to assisting programs involving training for jobs in growth industries and jobs reflecting the use of new technological skills (section 204(d)(3)).

§ 628.325 Incentive grants, capacity building, and technical assistance.

(a) Funds available to the Governor under sections 202(c)(1)(B) and 262(c)(1)(B) of the Act shall be used to provide incentive grants to SDA's and for capacity building and technical assistance.

(b) *Incentive grants.* (1) Not less than 67 percent of the funds available under sections 202(c)(1)(B) and 262(c)(1)(B) of the Act shall be used by the Governor to provide incentive grants for programs, except programs under section 204(d) of the Act, exceeding title II performance standards (section 106(b)(7)).

(2) Incentive grant funds under this section shall be distributed by the Governor among SDA's within the State pursuant to section 106(b)(7) of the Act.

(3) The Governor shall, as part of the annual statement of goals and objectives required by section 121(a)(1) of the Act, provide SDA's with the specific policies and procedures to implement section 106(b)(7) of the Act.

(4) In a State which is the service delivery area, incentive grant funds shall be distributed in a manner determined by the Governor and described in the GCSSP. The Governor shall give consideration to recognizing the performance of service providers within the State.

(5) SDA's should use incentive grant funds for capacity building and technical assistance activities and/or for the conduct of allowable Title II activities for eligible youth, eligible adults, or both, at the discretion of the SDA.

(c) *Capacity building and technical assistance.* (1) Up to 33 percent of the funds available under sections 202(c)(1)(B) and 262(c)(1)(B) of the Act may be used by the Governor to provide capacity building and technical assistance efforts aimed at improving the competencies of the personnel who staff and administer JTPA including SDA's, service providers, State staff, private industry councils, other job training councils and related human service systems provided for in section 205(a) of the Act.

(2) In providing capacity building and technical assistance activities, the Governor shall:

(i) Consult with SDA's concerning capacity building and technical assistance activities consistent with the process specified in the GCSSP;

(ii) Ensure that the use of funds will assist front line staff providing services to participants by directing resources to SDA and service provider staff for capacity building efforts, building a statewide capacity building strategy based on an assessment of local capacity building needs developed in cooperation with the SDA's, and/or delivering training and technical assistance directly to the local level;

(iii) Ensure that expenditures for the purchase of hardware/software are only for the development of Statewide communications and training mechanisms involving computer-based communication technologies that directly facilitate interaction with the National Capacity Building and Information Dissemination Network (National Network) described in section 453 of the Act and that facilitate the use of computer-based training techniques in capacity building and technical assistance activities;

(iv) Ensure that State and local capacity building efforts are coordinated and integrated with the National Network, pursuant to sections 202(c)(3)(B)

and 262(c)(3)(B) of the Act, and that materials developed with funds under this section are made available to be shared with other States, SDA's and the National Network. States and SDA's retain the flexibility to tailor Network products to their own needs and/or to produce and train on similar or related products when local circumstances so dictate and;

(v) Provide technical assistance to service delivery areas failing to meet performance standards pursuant to section 106(j)(2) of the Act.

(d) *Cost sharing.* (1) Cost sharing approaches are encouraged among States, SDA's and/or among other Federal, State, and local human service programs, including those listed in section 205(a) of the Act, in developing electronic communications, training mechanisms and/or contributing to the National Network.

(2) All shared costs shall be allocated among the contributing funding sources on the basis of benefits received.

Subpart D—Local Service Delivery System

§ 628.400 Scope and purpose.

This subpart sets forth requirements for the selection of service delivery areas, the establishment and responsibilities of the private industry council, and the selection of the SDA grant recipient and administrative entity. This subpart also contains the requirements for the local job training plan as well as the procedures for its review and approval by the State.

§ 628.405 Service delivery areas.

(a)(1) The Governor, after receiving recommendations from the SJTCC, shall designate SDA's within the State in accordance with the provisions of section 101 of the Act.

(2) SDA's may not be designated by the Governor more frequently than once every two years, and such designations shall be made to coincide with the two-year plan cycle for the GCSSP and local job training plans (*i.e.,* the designation cannot be made for an off-year in this cycle).

(3) Each request for designation as an SDA shall be submitted in a form and by a date established by the Governor. The procedures established by the Governor shall provide for the treatment of existing SDA's for the purposes of submitting SDA designation requests.

(b)(1) The Governor shall approve SDA designation requests from entities with a population of 200,000 or more that satisfy the criteria specified in section 101(a)(4)(A) of the Act.

(2) When there are competing applications under paragraph (b)(1) of this section for the same geographic area, the Governor shall designate the entity with the population closest to 200,000, if the remaining reduced area also continues to satisfy the criteria specified in section 101(a)(4)(A) of the Act. The Governor shall offer to designate the remaining reduced area as an SDA as well.

(3) When there are competing applications under paragraph (b)(1) of this section for the same geographic area and the designation of the entity with the population closest to 200,000 would have the effect of reducing the population of the competing entity to below a population of 200,000, the Governor has the discretion to determine which request to honor.

(d) The Governor may, in accordance with section 101(a)(4)(B) of the Act, approve a request to be a SDA from any unit, or contiguous units, of general local government, without regard to population, which serves a substantial portion of a labor market area. In making such designations, the Governor shall evaluate the degree to which a proposed service delivery area meets criteria established by the Governor which, at a minimum, shall include:

(1) The capability to effectively deliver job training services;

(2) The capacity to administer the job training program in accordance with the Act, applicable rules and regulations and State standards; and

(3) The portion of a labor market to be served.

(e) For the purposes of SDA designations under section 101(a)(4)(A) and (B) of the Act, the term ''substantial part'' and ''substantial portion'' of a labor market area shall be defined by the Governor, but shall not be less than 10% of the population of a labor market area.

(f) All areas within the State shall be covered by designated SDA's. After honoring all requests for designation from eligible entities under section 101(a)(4)(A) of the Act, and making any qualified discretionary designations under section 101(a)(4)(B) of the Act, the Governor shall include uncovered areas in the State within other designated SDA's willing to accept them or within a State administered SDA.

(g) *Appeals.* (1) Only an entity which meets the requirements of section 101(a)(4)(A) of the Act for designation as a service delivery area, but which has had its request to be an SDA denied, may appeal the Governor's denial of service delivery area designation to the Secretary of Labor.

(2) Appeals made pursuant to paragraph (g)(1) of this section shall be submitted by certified mail, return receipt requested, to the Secretary, U.S. Department of Labor, Washington, DC 20210, Attention: ASET. A copy of the appeal shall simultaneously be provided to the Governor.

(3) The Secretary shall not accept an appeal dated later than 30 days after receipt of written notification of the denial from the Governor.

(4) The appealing party shall explain why it believes the denial is contrary to the provisions of section 101 of the Act.

(5) The Secretary shall accept the appeal and make a decision only with regard to whether or not the denial is inconsistent with section 101 of the Act. The Secretary may consider any comments submitted by the Governor. The Secretary shall make a final decision within 30 days after receipt of the appeal (section 101(a)(4)(C)).

(6) The Secretary shall notify the Governor and the appellant in writing of the Secretary's decision.

§ 628.410 Private Industry Council.

(a) *Certification of the PIC.* (1) The chief elected official(s) of the SDA shall establish and the Governor shall certify the private industry council (PIC) pursuant to section 102 of the Act.

(2) The Governor shall review the certification of the PIC biennially, one year prior to the effective date of the 2-year SDA job training plan to the Governor. The Governor's review shall include:

(i) The PIC composition, which shall be consistent with section 102(a), (b), (c), and (d) of the Act and shall include the names of individuals nominated and their qualifications;

(ii) The nomination process;

(iii) The written agreement(s) among the appropriate chief elected official(s) and the PIC, including procedures for the development of the SDA job training plan and the selection of the grant recipient and administrative entity.

(3) The chief elected official shall select labor representatives for the PIC from individuals recommended by recognized State and local labor federations. For purposes of this section, a labor federation is an alliance of two or more organized labor unions for the purpose of mutual support and action. An example of a recognized labor federation is the AFL–CIO.

(b) *Responsibilities of the PIC.* Pursuant to section 103 of the Act, the PIC shall:

(1) Provide policy and program guidance for all activities under the job training plan for the SDA;

(2) In accordance with agreements negotiated with the appropriate chief elected official(s), determine the procedures for development of the job training plan and select the grant recipient and administrative entity for the SDA;

(3) *Independent oversight.* As specified in subpart D of part 627 of this chapter, the PIC shall exercise independent oversight over programs and activities under the job training plan, which oversight shall not be circumscribed by agreements with the appropriate chief elected official(s) of the SDA;

(4) Be a party to the designation of substate grantees under title III, as set forth in § 631.35 of this chapter;

(5) Establish guidelines for the level of skills to be provided in occupational skills training programs funded by the administrative entity;

(6) Consult with the Governor on agreements to provide services for older individuals under section 204(d) of the Act;

(7) Establish youth and adult competency levels consistent with performance standards established by the Secretary, based on such factors as entry

level skills and other hiring requirements, in consultation with educational agencies and, where appropriate, with representatives of business, organized labor and community-based organizations pursuant to section 106(b)(5) and 107(d); and

(8) Identify occupations for which there is a demand in the area served.

(c) *Substate plan.* The PIC shall be provided the opportunity to review and comment on a substate grantee plan under title III of the Act prior to the submission of such plan to the Governor (section 313(a)).

(d) [Reserved]

(e) The State Employment Service agency shall develop jointly with each appropriate PIC and chief elected official(s) for the SDA those components of the plans required under the Wagner-Peyser Act which are applicable to the SDA. (See part 652 of this chapter).

(f) *Single SDA States.* (1) In any case in which the service delivery area is a State, the SJTCC or a portion of the SJTCC may be reconstituted as a PIC if the PIC meets the requirements of section 102(a) of the Act.

(2) When the service delivery area is a State and the functions of the SJTCC are embodied in the HRIC, the HRIC or a portion of the HRIC may be reconstituted as a PIC if the requirements for private sector business representation at section 102(a)(1) of the Act are met (section 102(h)).

§ 628.415 Selection of SDA grant recipient and administrative entity.

(a) *Selection of SDA grant recipient.* (1) The SDA grant recipient and the entity to administer the SDA's job training plan for title II, developed pursuant to section 104 of the Act, shall be selected by agreement of the PIC and chief elected official(s) of the SDA. These may be the same or different entities.

(2) The specific functions and responsibilities of the entities described in paragraph (a)(1) of this section shall be spelled out in the agreement between the PIC and the chief elected official(s), and shall specifically address the provisions of section 141(i) of the Act (section 103(b)(1)).

(b) *Subrecipient requirements.* (1) The Governor may establish requirements pertaining to subrecipient, including SDA grant recipient, responsibility for JTPA funds.

(2) The requirements of paragraph (b)(1) of this section shall not preclude the selection of any entity identified in section 103(b) of the Act as SDA grant recipient.

§ 628.420 Job training plan.

(a) The Governor shall issue instructions and schedules to assure that job training plans and plan modifications for SDA's within the State conform to all requirements of the Act.

(b) The Governor's instructions for development of the SDA's job training plan shall require that the plan contain the following information:

(1) A complete and detailed discussion of the elements found in section 104(b) of the Act, including goals for the training and training related placement of women in nontraditional employment and apprenticeships;

(2) A discussion of the SDA's compliance with the Secretary's program goals, as outlined in the planning guidance provided to the Governor; and

(3) An oversight plan for the SDA which includes: (i) A description of the oversight activities of the PIC and the chief elected official(s), and (ii) the SDA administrative entity's monitoring plan which includes the Governor's monitoring requirements for service providers.

(c) The Governor may also require that the SDA job training plan contain a capacity building and technical assistance strategy that includes plans for designating capacity building as a staff function, assessing local capacity building needs, and developing and participating in computerized communication mechanisms.

(d) The SDA job training plan shall be jointly approved and jointly submitted to the Governor by the PIC and the chief elected official(s) (section 103(d)).

(e) *Modifications.* (1) Any major modification to the SDA job training plan shall be jointly approved and jointly submitted by the PIC and chief elected official(s) of the SDA to the Governor for approval.

(2) For the purposes of this section, the circumstances which constitute a

''major'' modification shall be specified by the Governor.

§ 628.425 Review and approval.

(a) *Standards and procedures.* The Governor shall establish standards and procedures for the review and approval or disapproval of the SDA job training plan and plan modifications that shall be provided to the SDA's at the same time as the instructions and schedules for preparation of the plans are provided.

(b) *Plan approval.* Except when the Governor makes a finding under the provisions of section 105(b)(1) of the Act, the Governor shall approve the SDA job training plan or plan modification. The notice of approval shall be provided in writing to the chief elected official(s) and to the private industry council.

§ 628.426 Disapproval or revocation of the plan.

(a) If the Governor disapproves the SDA job training plan or plan modification for any reason, the Governor shall notify the PIC and chief elected official(s) for the SDA in writing as provided in section 105(b)(2) of the Act.

(b) If the Governor disapproves the SDA job training plan or plan modification, the Governor shall provide the PIC and the chief elected official(s) for the SDA 30 days to correct the deficiencies and resubmit the plan or plan modification. Within 15 days after the plan or plan modification is resubmitted, the Governor shall make a final decision and shall notify the PIC and the appropriate chief elected official(s) of the SDA in writing of the final disapproval or approval.

(c) *Governor mediation.* If the PIC and the appropriate chief elected official(s) of an SDA are unable to reach an agreement under the provisions of section 103 (b)(1) or (d) of the Act, any such party may request the Governor to mediate.

(d) *Failure to reach agreement.* If the PIC and the chief elected official(s) fail to reach the required agreements in section 103 (b)(1) or (d) of the Act, funds may not be made available to an SDA under section 104 of the Act and the Governor shall merge the affected area into one or more other existing service delivery areas (section 105(c)(1)).

(e) *Appeals.* (1) In accordance with section 105(b)(2) of the Act, any final disapproval by the Governor of the SDA job training plan or modification may be appealed by the PIC and chief elected official(s) of the SDA to the Secretary.

(2) The Secretary shall not accept an appeal dated later than 30 days after receipt by the PIC and chief elected official(s) of the final disapproval of the SDA job training plan or modification from the Governor.

(3) The Secretary shall accept an appeal under paragraph (e)(1) of this section and shall determine only whether the disapproval is clearly erroneous under section 105(b)(1) of the Act. The Secretary may consider any comments submitted by the Governor. In accordance with section 105(b)(2) of the Act, the Secretary shall make a final decision within 45 days after the appeal is received by the Secretary.

(4) The Secretary shall notify the Governor and the appellant in writing of the Secretary's decision.

(f) *Appeals of plan revocations.* Pursuant to section 164(b)(1) of the Act, a notice of intent to revoke approval of all or part of a plan may be appealed to the Secretary. Such appeals shall be treated as a disapproval under paragraphs (c) and (e) of this section, except that the revocation shall not become effective until the later of:

(1) The time for appeal under paragraph (e) of this section has expired; or

(2) The date on which the Secretary issues a decision affirming the revocation.

(g) In the event that a plan is disapproved and the Governor's decision is upheld upon appeal, the Governor shall merge the affected area into other designated SDA's willing to accept it or include it in another SDA within the State.

§ 628.430 State SDA Submission.

(a) Pursuant to section 105(d) of the Act, when the SDA is the State, the Governor shall submit to the Secretary, not less that 60 days before the beginning of the first of the two program years covered by the job training

plan and in accordance with instructions issued by the Secretary, an SDA job training plan covering two program years. When the SDA is the State, modifications to the plan shall be submitted to the Secretary for approval.

(b) When a State submits an SDA job training plan or plan modification pursuant to paragraph (a) of this section, the Secretary shall review the plan or plan modification for overall compliance with the provisions of the Act. The State's plan shall be considered approved unless, within 45 days of receipt of the submission described in paragraph (a) of this section, the Secretary notifies the Governor in writing of inconsistencies between the submission and requirements of specific provisions of the Act. If the plan or plan modification is disapproved, the Governor may appeal the decision by requesting a hearing before an administrative law judge pursuant to subpart H of part 627 of this chapter.

Subpart E—Program Design Requirements for Programs Under Title II of the Job Training Partnership Act

§ 628.500 Scope and purpose.

This subpart contains the regulations pertaining to the program design requirements common to all programs conducted under titles I (i.e., sections 121 and 123) and II of the Act. Regulations specifically pertaining to the Adult Program can be found in subpart F of this part. Regulations pertaining to the Summer Youth Employment and Training Program can be found in subpart G of this part. Regulations pertaining to the Youth Training Program can be found in subpart H of this part.

§ 628.505 Eligibility.

(a) *Eligibility criteria.* (1) Individuals who apply to participate in a program under title II shall be evaluated for eligibility based on age and economic disadvantage. Specific eligibility criteria for programs under title II, parts A, B, and C are described in this part.

(2) Individuals served under title II shall be residents of the SDA, as determined by local government policy, except for the limited exceptions described in the job training plan, including joint programs operated by SDA's (section 141(e)).

(b) *Eligibility documentation.* (1) In order to promote the uniform and standard application of eligibility criteria for participation in the JTPA program, the Department has issued an Eligibility Documentation TAG that provides guidance on acceptable documentation.

(2) *SDA utilization of eligibility guidance.* When it is determined that the SDA or service provider has followed the guidance contained in the Eligibility Documentation TAG, the Grant Officer will not disallow questioned costs related to the required documentation concerning an individual's eligibility.

§ 628.510 Intake, referrals and targeting.

(a) *Collection of personal data.* In addition to determining an applicant's eligibility, the intake process shall include a preliminary review of information relating to whether an applicant is included in one or more of the categories listed in section 203(b) of the Act.

(b) *Information on services.* Upon application, an eligible individual shall be provided information by the SDA or its service providers on the full array of services available through the SDA and its service providers, including information for women about the opportunities for nontraditional training and employment.

(c) *Assessment during intake.* Some limited assessment activities may be conducted during the intake process in order to determine an eligible applicant's suitability for title II program services. This assessment should be a method, in difficult cases, to finalize determinations for enrollment. The amount of assessment provided during intake is not restricted, however, assessment during intake shall be charged in accordance with § 627.440(d)(3).

(d) *Referral of eligible applicants.* During the intake process, determinations may be made prior to enrollment to refer an eligible applicant to another human service, training or education program deemed more suitable for the

individual, including the Job Corps program. In these cases, information on the full array of services available in the SDA may be provided in written form with recommendations and written referrals to other appropriate programs. Copies of or notations of referrals will be maintained as documentation and may be recorded in an incomplete ISS. Further tracking or follow-up of referrals out of title II is not required.

(e) *Referrals from service providers to service delivery areas for additional assessment.* (1) Each service provider shall ensure that an eligible applicant who cannot be served by its particular program shall be referred to the SDA for assessment, as necessary, and suitable referral to other appropriate programs. Each service provider shall also ensure that a participant who cannot be served by its particular program shall be referred to the SDA for further assessment, as necessary, and suitable referral to other appropriate programs, consistent with § 628.515.

(2) Each SDA shall take the appropriate steps (e.g., contract provisions, local administrative issuances, and/or PIC policies) to ensure that its service providers adhere to the provisions of this section and that they maintain documentation of referrals.

(3) Each SDA shall develop an appropriate mechanism to ensure suitability screening for eligible applicants or to apply the provisions of § 628.530 for participants referred by service providers and describe such mechanism in its SDA job training plan.

(f)(1) ''*Most in need.*'' SDA's that satisfy the requirements of sections 203(b) and 263 (b) and (d) pertaining to hard to serve individuals shall be deemed to meet the ''most in need'' criteria at section 141(a) of the Act.

(2) The requirements referred to in paragraph (h)(1) of this section shall be calculated on the basis of new participants for whom services or training have been provided subsequent to the objective assessment.

(g) The SDA's method of meeting the requirements of sections 203(b) and 263(b) pertaining to hard to serve individuals shall be implemented consistent with the equal opportunity provisions of 29 CFR part 34.

§ 628.515 Objective assessment.

(a) *General.* The requirements of this section shall apply to programs conducted under title I (i.e., sections 121 and 123) and title II, parts A, B, and C.

(b) *Definition.* (1) For purposes of this part, an *objective assessment* means an examination of the capabilities, needs, and vocational potential of a participant and is to be used to develop an individual service strategy and employment goal. Such assessment is customer-centered and a diagnostic evaluation of a participant's employment barriers taking into account the participant's family situation, work history, education, basic and occupational skills, interests, aptitudes (including interests and aptitudes for nontraditional occupations), attitude towards work, motivation, behavior patterns affecting employment potential, financial resources and needs, supportive service needs, and personal employment information as it relates to the local labor market.

(2) For the program under title II–B, the objective assessment shall include an examination of the basic skills and supportive service needs of each participant and may include the other areas listed in paragraph (b)(1) of this section (sections 204(a)(1)(A), 253(c)(1) and 264(b)(1)(A)).

(c) *Methods of objective assessment.* (1) The SDA shall choose the most appropriate means to measure skills, abilities, attitudes, and interests of the participants. The methods used in conducting the objective assessment may include, but are not limited to, structured interviews, paper and pencil tests, performance tests (e.g., skills, and/or work samples, including those that measure interest and capability to train in nontraditional employment), behavioral observations, interest and/or attitude inventories, career guidance instruments, aptitude tests, and basic skills tests.

(2) Instruments used for objective assessment may be developed at the local level; however, any formalized instruments nationally available should be used only for the specific populations for which they are normed.

(d) *Updating of assessments.* Objective assessment should be treated as an ongoing process. As additional relevant

information relating to a participant becomes available, it should be reviewed and considered for inclusion in the individual service strategy.

(e) *Other sources of objective assessment.* Other non-JTPA assessments (e.g., through the Job Opportunities and Basic Skills (JOBS) program under title IV of the Social Security Act, or through schools) which have been completed within one year of application for services, and which meet the requirements of this section, may be used to comply with the requirement to assess each participant.

§ 628.520 Individual service strategy.

(a) *General.* The requirements of this section shall apply to programs conducted under title I (i.e., sections 121 and 123) and title II, parts A, B and C.

(b) *Definition.* (1) Individual service strategy (ISS) means an individual plan for a participant, which shall include an employment goal (including, for women, consideration of nontraditional employment), appropriate achievement objectives, and the appropriate combination of services for the participant based on the objective assessment conducted pursuant to § 628.515 of this part, Objective assessment. In developing the ISS, the participant shall be counseled regarding required loan repayments if the participant chooses to incur personal indebtedness to participate in an education program. The participant shall also be apprised of the requirements for self-sufficiency and the occupational demands within the labor market.

(2) Decisions concerning appropriate services shall be customer-centered, and ensure that the participant is not excluded from training or career options consistent with the provisions of 29 CFR part 34 concerning nondiscrimination and equal opportunity.

(3) For the title II–B program, the ISS may include the components specified in paragraph (b)(1) of this section (sections 204(a)(1)(B), 253(c)(2) and 264(b)(1)(B)). For purposes of titles II–B and II–C, the employment goal may be interpreted broadly and based on long-term career guidance.

(c) *Joint Development of ISS.* The ISS shall be developed in partnership with the participant and reflect the needs indicated by the objective assessment and the expressed interests and desires of the participant. It is not a formal contract and signatures are not a requirement.

(d) *Review of ISS.* The ISS shall be reviewed periodically to evaluate the progress of each participant in meeting the objectives of the service strategy, including an evaluation of the participant's progress in acquiring basic skills, and occupational skills, as appropriate, and the adequacy of the supportive services provided.

(e) *Provision of services.* If JTPA resources are not sufficient to provide the full range of training or supportive services which might be identified in the ISS, the SDA shall make every reasonable effort to arrange for, through other community resources, basic and occupational skills training and supportive services identified as needed in the ISS for participants under titles II–A and II–C and, in addition, preemployment and work maturity skills training and work experience combined with skills training for participants under title II–C (sections 204(a)(1)(D) and 264(b)(1)(D).

(f) *SDA review of objective assessment and ISS.* (1) The objective assessment and development of the ISS may be conducted by service providers.

(2) The SDA administrative entity shall ensure that development of the ISS and the services provided, respond to the individual needs of the participant and that the combination of services to the participant is indicated by the results of the objective assessment.

(g) *ISS record of decisions.* The ISS shall be used as the basic instrument for the SDA to record the results of decisions made about the combination and sequence of services for the participant based on the objective assessment. Justification for decisions may be referenced but need not be recorded in the ISS. These decisions shall include, but are not limited to, the employment goal and/or career cluster; referrals to other programs for specified activities; the provision and amount of supportive services; and the delivery agents and schedules for training and supportive services activities. The decisions for time and duration of OJT

(§ 627.240 of this chapter) shall be briefly recorded in the ISS and may not reference other documents.

(h) The ISS is a customer-centered case management tool and shall not be used as a compliance document.

§ 628.525 Limitations.

Neither eligibility for nor participation in a JTPA program creates an entitlement to services, and nothing in the Act or this part shall be construed to establish a private right of action for a participant to obtain services described in the objective assessment or ISS.

§ 628.530 Referrals of participants to non-title II programs.

(a) When it is determined, through the objective assessment and the ISS, that a participant would be better served by a program other than one under title II (*e.g.,* Job Corps, Vocational Rehabilitation, State or local education, substance abuse treatment center, and/or dislocated worker programs), the participant shall be referred to the appropriate program. Such referral shall be recorded in the ISS.

(b) In cases where there will be a continuing relationship with a participant, a referral to another program(s) for specific services will be part of the participant's title II program strategy and will be recorded in the ISS.

(c) When there will not be a continuing relationship with a participant as the result of a referral to a program other than title II, and an assessment but no training component has been provided, the referral should be recorded in a partial ISS and the individual shall not be counted for purposes of calculating performance against the SDA's performance standards. Further tracking or follow-up of referrals out of title II is not required.

§ 628.535 Limitations on job search assistance.

(a) *General.* Job search assistance is designed to give a participant skills in acquiring full time employment. (See § 626.5 of this chapter, Definitions.)

(b) *Conditions.* Job search activities may be conducted only:

(1) For participants when specified as appropriate in the ISS; and

(2) When delivered in conjunction with other training or educational services designed to increase the participant's ability to acquire employment. Additional services which may be provided in conjunction with job search include the direct training services listed in JTPA section 204(b)(1) of the Act, excluding standalone skill assessment, counseling, work experience and case management and the direct training services listed in 264(b) of the Act excluding tutoring, standalone skill assessment, counseling, work experience and case management. (See § 627.245 of this chapter, ''Work Experience,'' especially § 627.245(d) regarding combination of other services.)

(c) *Exceptions.* (1) Job search assistance activities, including job search skills, training, and job clubs may be provided without the accompanying services specified in paragraph (b) of this section only when:

(i) The objective assessment and the ISS indicate that the additional services are not appropriate; and

(ii) The activities are not available or accessible through other public agencies, including the Employment Service.

(2) The exceptions in paragraph (c)(1) of this section apply to Title II–A and II–B and are not applicable to Title II–C programs (see § 628.804 (d) and (e)).

(d) *Determination of job search availability.* For purposes of this section, a determination of the availability of the job search assistance activity will be made by the SDA, in consultation with the employment service and documented in the local job training plan.

(e) *Older individuals.* For purposes of this section, when an individual aged 55 or older indicates in the assessment a preference for immediate job placement, job search assistance may be provided on a stand-alone basis. The individual's preference shall be recorded in the ISS.

§ 628.540 Volunteer program.

Pursuant to sections 204(c)(6) and 264(d)(7) of the Act, the SDA shall make opportunities available for individuals who have successfully participated in programs under this part to

volunteer assistance, in the form of mentoring, tutoring, and other activities.

§ 628.545 Linkages and coordination.

(a) *General requirements.* (1) To the extent practicable, and as permitted by law and regulations, the Governor shall, at the State level, facilitate coordination among the programs set forth at section 205(a) and 265(b) of the Act, including, but not limited to, the establishment of State-level coordination agreements. The Governor may focus coordination through the SJTCC or the HRIC.

(2) The SDA, in conducting programs under this part, shall establish appropriate linkages and coordination procedures with other Federal programs and appropriate State and local educational, social service, and public housing agencies, including with CBO's, business and labor organizations, volunteer groups and others, such as women and older worker organizations, and with appropriate education and training agencies, such as local JOBS programs, Employment Service offices which provide services for JTPA participants, and the local agencies on aging, to avoid duplication and to enhance the delivery of services, which shall be described in the SDA job training plan. Where a local agency declines to complete such a linkage with an SDA, the SDA shall reflect this information in its job training plan (section 104(b)).

(b) SDA's are encouraged to facilitate effective ''one stop shop career centers'' and ''single point of contact'' delivery systems which may include:

(1) The development of individual service strategy plans and of a common program application; and

(2) A unified job development effort and comprehensive programmatic design (sections 104(b) (3) and (4), 205 (a) and (b) and 265).

(c) *Requirements for youth.* For the youth programs under this part, formal agreements shall be established with appropriate local educational agencies which participate in JTPA programs which, at a minimum, shall specify:

(1) The procedures for referring and serving in-school youth;

(2) The methods of assessment of in-school youth; and

(3) Procedures for notifying the SDA when a youth drops out of the school system.

(d) *Schoolwide projects.* (1) In conducting a schoolwide project for low income individuals under sections 263(g) and 265(d) of the Act, the SDA shall establish a cooperative agreement with the appropriate local educational agency.

(2) In addition to the requirements listed in paragraphs (a) and (b) of this section, the cooperative agreement shall include:

(i) A description of the ways in which the JTPA schoolwide project will supplement the educational program of the school;

(ii) Identification of measurable goals to be achieved by the schoolwide project and a provision for assessing the extent to which such goals are met;

(iii) A description of the ways in which the program will use available JTPA and other education program resources;

(iv) A description of the number of individuals to be served by the schoolwide project; and

(v) Assurances that JTPA resources shall be used in coordination with existing sources of funds to supplement and not supplant them (section 107(b)).

(3) In areas where there is more than one local educational agency, cooperative agreements for schoolwide projects are required only with those local education agencies that will participate in programs under schoolwide projects (section 263(g)).

§ 628.550 Transfer of funds.

If described in the job training plan and approved by the Governor:

(a) An amount up to 10 percent of the funds allocated to the SDA under section 202(b) of the Act for title II–A may be transferred to the program under title II–C of the Act;

(b) An amount up to 20 percent of the funds allocated to the SDA under section 252(b) of the Act for title II–B may be transferred to the program under title II–C of the Act; and

(c) An amount up to 10 percent of the funds allocated to the SDA under section 262(b) of the Act for title II–C may

be transferred to the program under title II–A of the Act.

Subpart F—The Adult Program

§ 628.600 Scope and purpose.

This subpart contains the regulations for the Adult Program under part A of Title II of the Act. The regulations in part 627 of this chapter and subpart E of this part apply to the Adult Program to the extent that they do not conflict with the provisions of this subpart.

§ 628.605 Eligibility.

(a) *Age and economic disadvantage.* Except as provided in paragraph (b) of this section, an individual shall be eligible to participate under this part only if he or she is economically disadvantaged and 22 years of age or older. There is no maximum age for eligibility.

(b) *Non-economically disadvantaged individuals.* Up to 10 percent of the individuals served under this subpart in each SDA may be individuals who are not economically disadvantaged, if such individuals face serious barriers to employment in accordance with section 203(c) of the Act.

(c) *Requirement to assist hard-to-serve individuals.* (1) Not less than 65 percent of adults who participate in the program under this subpart, including those who are not economically disadvantaged, shall have one or more of the additional barriers to employment as described in section 203(b) of the Act.

(2) The 65 percent barrier requirement in paragraph (c)(1) of this section shall be calculated on the basis of participants for whom services or training have been provided subsequent to an objective assessment on July 1, 1993 or later.

(d) *Addition of barrier.* An SDA may identify and add one additional serious barrier to employment to the categories listed at section 203(b) of the Act, in accordance with the specific procedures and requirements in section 203(d) of the Act.

(e) *Criteria for older workers under joint programs.* (1) The SDA may establish written financial or non-financial agreements with sponsors of programs under title V of the Older Americans Act to carry out joint programs.

(2) Joint programs under this paragraph (e) may include referrals between programs, co-enrollment and provision of services.

(3) Under agreements entered into pursuant to this paragraph (e), individuals eligible under title V of the Older Americans Act shall be deemed to satisfy the requirements of section 203(a)(2) of the JTPA (Older Americans Act, Pub. L. 102–375, section 510).

§ 628.610 Authorized services.

(a) The services that may be provided under this subpart are those described at section 204(b) of the Act.

(b) *Counseling and supportive services.* Counseling and supportive services provided under this subpart may be provided to a participant for a period of up to 1 year after the date on which the participant completes the program.

Subpart G—The Summer Youth Employment and Training Program

§ 628.700 Scope and purpose.

This subpart contains the regulations for the Summer Youth Employment and Training Program (SYETP) under part B of title II of the Act. The regulations in part 627 of this chapter and subpart E of this part apply to the SYETP to the extent that they do not conflict with the provisions of this subpart.

§ 628.701 Program goals and objectives.

(a) Each SDA shall establish written goals and objectives that shall be used in evaluating the effectiveness of its SYETP activities. Such goals and objectives may include enhancement of basic educational skills through improvement in school retention or academic performance (including mathematics and reading comprehension); encouragement of school completion or enrollment in supplementary or alternative school programs; improvement of employability skills, including provision of vocational exploration opportunities and exposure to the world of

work; enhancement of youth citizenship skills; and demonstrated coordination with other appropriate community organizations.

(b) Each SDA shall ensure that the activities and services offered under the SYETP are consistent with and will contribute to the achievement of the goals and objectives developed pursuant to paragraph (a) of this section.

§ 628.702 Eligibility.

(a) *Age and economic disadvantage.* An individual is eligible to participate in programs funded under title II-B of the Act, if such individual is

(1) Age 14 through 21; and

(2)(i) Economically disadvantaged; or

(ii) Has been determined to meet the eligibility requirements for free meals under the National School Lunch Act during the most recent school year. *Most recent school year* means the current school year unless the eligibility determination is made during an interim period between school terms, in which case the term means the preceding school year; or

(iii) Is participating in a compensatory education program under Chapter I of title I of the Elementary and Secondary Education Act of 1965; or

(iv) Is participating in a schoolwide project as set forth at section 263(g) of the Act.

(b) *Eligibility determination verification.* The SDA may accept the same documentation utilized by the local educational agency for approving free lunch meals or an assurance by school officials concerning the students' participation in the free school lunch program under the National School Lunch Act.

§ 628.705 SYETP authorized services.

(a) The services that may be provided under this subpart are those described at section 253 of the Act.

(b) *Basic and remedial education and preemployment and work maturity skills training.* The SDA shall ensure the availability of basic or remedial education and preemployment and work maturity skills training for SYETP participants pursuant to the assessment process described in § 628.515 of this part from funds available to the SDA or by other education and training programs, including, but not limited to, the Job Corps, the JOBS program, youth corps programs or alternative or secondary schools.

(c) *Work experience.* (1) Work experience shall be conducted consistent with the provisions of § 627.245 of this chapter.

(2) Work experience provided under this subpart, to the extent feasible, shall include contextual learning opportunities which integrate the development of general competencies with the development of academic skills.

(d) *Concurrent enrollment.* (1) Youth being served under the SYETP or the Youth Training Program authorized under title II–C of the Act (see subpart H of this part) are not required to be terminated from participation in one program to enroll in the other. The SDA may enroll such youth concurrently in programs under this subpart and subpart H of this part, pursuant to guidance to be issued by the Secretary, in order to promote continuity and coordination of services.

(2) The requirement that not less than 65 percent of the total number of title II–C participants shall have one or more barriers to employment pursuant to section 263(c) and (d) of the Act shall apply to youth who are concurrently enrolled and will participate in the program under title II–C.

(e) *Followup services.* (1) The SDA shall make followup services available for participants if the ISS indicates that such services are appropriate (section 253(d)).

(2) Title II–B funds may be used for such followup services for one year after program participation, which may be concurrent with a period of any subsequent participation in the Title II–C program.

(3) Followup services include the full array of supportive services described in section 4(24) of the Act, except for financial assistance, and may include such followup services as counseling, mentoring, or tutoring.

(f) *Classroom training.* Classroom training provided under this subpart shall, to the extent feasible, include opportunities to apply knowledge and skills relating to academic subjects to the world of work.

(g) *Educational linkages.* (1) In conducting the program assisted under this subpart, service delivery areas shall establish linkages with the appropriate educational agencies responsible for service to participants.

(2) Such linkages shall include arrangements to ensure that there is a regular exchange of information relating to the progress, problems and needs of participants, including the results of assessments of the skill levels of participants.

§ 628.710 Period of program operation.

(a) Except as provided under paragraph (b) of this section, the SYETP shall be conducted during the school vacation period occurring duri the summer months.

(b) An SDA operating within the jurisdiction of one or more local educational agencies that operate schools on a year-round full-time basis may offer SYETP activities to participants in such a jurisdiction during the school vacation period(s) treated as the period(s) equivalent to a school summer vacation.

Subpart H—Youth Training Program

§ 628.800 Scope and purpose.

This subpart contains the regulations for the Year-round Youth Program under part C of title II of the Act. The regulations in part 627 of this chapter and subpart E of this part apply to the Year-round Youth program to the extent that they do not conflict with the provisions of this subpart.

§ 628.803 Eligibility.

(a) *Out-of-school youth.* An out of school youth is a youth who does not meet the definition of in-school youth as set forth in paragraph (b) of this section. An out-of-school youth shall be eligible to participate in programs under this subpart, if such individual is:

(1) Age 16 through 21, and

(2) Economically disadvantaged.

(b) *In-school youth. Definition.* In-school youth means a youth who has not yet attained a high school diploma and is attending school full time. An in-school youth shall be eligible to participate in programs under this subpart, if such individual is:

(1)(i) Age 16 through 21, or

(ii) If provided in the job training plan, age 14 through 21 inclusive; and

(2)(i) Economically disadvantaged; or

(ii) Participating in a compensatory education program under Chapter I of title I of the Elementary and Secondary Education Act of 1965; or

(iii) Has been determined to meet the eligibility requirements for free meals under the National School Lunch Act during the most recent school year. *Most recent school year* means the current school year unless the eligibility determination is made during an interim period between school terms, in which case the term means the preceding school year.

(c) *Eligibility determination verification.* The SDA may accept the same documentation utilized by the local educational agency for approving free lunch meals or an assurance by school officials concerning the students' participation in the free school lunch program under the National School Lunch Act. The Department shall provide guidance on this verification separate from these regulations.

(d) *Requirement to serve hard-to-serve individuals.* (1) Not less than 65 percent of the in-school youth who participate in the program under this subpart, including those who are not economically disadvantaged, shall have one or more additional barriers to employment, as described in section 263(b) of the Act.

(2)(i) Not less than 65 percent of the out-of-school youth who participate in the program under this subpart, including those who are not economically disadvantaged, shall have one or more barriers to employment, as described in section 263(d) of the Act, in addition to any criterion listed in paragraph (b)(2) of this section.

(ii) All Job Corps participants shall be considered out-of-school and as having a barrier to employment.

(3) The requirement of paragraphs (d)(1) and (2) of this section shall be calculated on the basis of participants for whom services or training have been provided subsequent to the objective assessment on July 1, 1993 or later.

(e) *Addition of barrier.* An SDA may identify and add one additional serious barrier to employment to the categories listed at sections 263(b) and (d) of the Act in accordance with the specific procedures and requirements in section 263(h) of the Act.

(f) *Services to non-economically disadvantaged individuals.* Up to 10 percent of the youth served by an SDA under this subpart may be individuals who are not economically disadvantaged, but such individuals shall face one or more serious barriers to employment in accordance with section 263(e) of the Act.

(g) *Eligibility based on schoolwide project participation.* (1) In addition to the individuals who meet the conditions described in § 628.803 of this part, individuals who are not economically disadvantaged may participate in programs under this subpart if they are enrolled in a schoolwide project pursuant to section 263(g) of the Act.

(2) For purposes of paragraph (g)(1) of this section, the term *school* means an individual building, facility, campus or a portion of the school such as the 11th or 12th grade.

(3) A schoolwide project may be operated in a public school located in an urban census tract or non-metropolitan county with a poverty rate of 30 percent or above, and in which 70 percent or more of the students have at least one barrier to employment. The school shall make the determination on whether its students meet the barrier requirements.

(4) The SDA shall determine which will be its schoolwide projects. Examples of schoolwide projects include, but are not limited to, school-to-work programs; college awareness and application assistance programs; school restructuring to make the schools career academies or magnet schools; mentoring programs; business-education compacts; integration of work and learning; year-round extensions of summer STEP programs; community service programs, including linkages with youth service corps; programs to encourage teen parents to stay in school, including establishing child care centers; and work experience slots provided as incentives to stay in school.

(h)(1) *Out-of-school ratio.* Not less than 50 percent of the total title II–C participants in each SDA shall be out-of-school youth (section 263(f)(1) of the Act). The Governor shall be responsible for determining the period for which the 50 percent requirement will be calculated based either on the period covered by the job training plan or on a program year basis.

(2) For purposes of paragraph (h)(1) of this section, a youth who has attained a high school diploma or an equivalency, is habitually truant, as defined by State law, or is attending an alternative school program may be considered out of school. An alternative school program includes an alternative high school, an alternative course of study approved by the local educational agency, or a high school equivalency program. Such programs may be operated either within or outside of the local public school system, and can offer either a high school diploma or equivalency.

(3) *Schoolwide project ratios.* Those in-school participants who are served under a schoolwide project shall not be counted in determining the ratio of in-school to out-of-school youth in paragraph (h)(1) of this section.

§ 628.804 Authorized services.

(a) The SDA and the PIC shall take into consideration exemplary program strategies and services, including those selected for replication pursuant to section 453(c) of the Act concerning capacity building, in the development of services for programs under this subpart.

(b) Except as provided in paragraph (c) of this section, in order to participate in programs under this part an individual who is under the age of 18 and a school dropout, as defined in section 4(38) of the Act, shall enroll in and attend a school, course or program described in section 264(d)(2)(B)(ii) and (iii). An alternative course of study shall be approved by the LEA and may include educational programs provided by community-based organizations.

(c) An individual who is a school dropout, as defined in section 4(38) of the Act, and under the age of 18 may participate in programs under this part without meeting the requirements of

paragraph (b) of this section for a limited interim period which may be during the summer months, during periods between school terms, or when a course of study is not immediately available.

(d) The provision of preemployment and work maturity skills training shall be accompanied either by work experience or by other additional services which are designed to increase the basic education or occupational skills of the participant (section 264(d)(3)(A)).

(e) The provision of work experience, job search assistance, job search skills training, and job club activities under programs conducted under this subpart shall be accompanied by other additional services which are designed to increase the basic education or occupational skills of the participant (section 264(d)(3)(B)).

(f) The additional services offered pursuant to paragraphs (d) and (e) of this section may be provided concurrently or sequentially with services provided under other education and training programs (e.g., Job Opportunities and Basic Skills programs under title IV of the Social Security Act, Job Corps (see part 638 of this chapter), or schools).

(g) Schoolwide projects for low-income schools shall meet the conditions in sections 263(g)(1) and (2) of the Act.

(h) Entry employment experience is a training activity which may be conducted in public or private agencies. In all cases, this training activity shall increase or develop the long term employability of eligible in-school and out-of-school youth. Entry employment experiences may include, but are not limited to:

(1) Work experience as described in § 627.245 of this chapter; and

(2) Cooperative education programs that coordinate educational programs with work in the private sector. Subsidized wages are not permitted in cooperative education programs.

(i) Limited internships in the private sector under this subpart shall be designed to enhance the long-term employability of youth.

(1) A limited internship shall be conducted pursuant to an agreement with an employer to provide structured onsite private sector exposure to work and the requirements for successful job retention.

(2) A limited internship should be combined with classroom instruction relating to a particular position, occupation, industry or the basic skills and abilities to successfully compete in the local labor market.

(j)(1) On-the-job (OJT) training activities approved under this subpart shall be consistent with the provisions of subpart B of part 627 of this chapter and shall:

(i) Be for positions that pay the participant a wage that equals or exceeds on the average wage at placement based on the most recent available data in the SDA for participants under title II–A;

(ii) Be for positions that have career advancement potential; and

(iii) Include a formal, written program of structured job training that will provide the participant with an orderly combination of instruction in work maturity skills, general employment competencies, and occupational specific skills.

(2) In those cases where the OJT participant is a school dropout, the participant shall participate in an education program in accordance with paragraph (b) of this section.

(k) Counseling and supportive services provided under this subpart may be provided to a participant for a period of up to 1 year after the date on which the participant completes the program. These include the full array of supportive services described in section 4(24) of the Act except for financial assistance.

(l) *Year-round operations.* Programs for youth under this subpart shall:

(1) Provide for a year-round education and training program that is coordinated with the appropriate local educational agencies, service providers, and other programs; and

(2) As appropriate, ensure services for youth are available on a multiyear basis, consistent with the determined needs and goals of the youth served.

(3) The year-round program delivery requirement of this paragraph does not prohibit schools on a 9-month operations schedule from providing services for programs under this part.

PARTS 629—630 [RESERVED]

PART 631—PROGRAMS UNDER TITLE III OF THE JOB TRAINING PARTNERSHIP ACT

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AUTHORITY: 29 U.S.C. 1579(a); Sec. 6305(f), Pub. L. 100–418, 102 Stat 1107; §631.30(d)(7) also issued under 29 U.S.C. 2107(a); §631.37(e) also issued under Sec. 402, Pub. L. 100–689, 102 Stat. 4178–4179 (29 U.S.C. 1751 note).

SOURCE: 59 FR 45857, Sept. 2, 1994, unless otherwise noted.

Subpart A—General Provisions

§631.1 Scope and purpose.

This part implements Title III of the Act. Title III programs seek to establish an early readjustment capacity for workers and firms in each State; to provide comprehensive coverage to workers regardless of the cause of dislocation; to provide early referral from the unemployment insurance system to adjustment services as an integral part of the adjustment process; to foster labor, management and community partnerships with government in addressing worker dislocation; to emphasize retraining and reemployment services rather than income support; to create an on-going substate capacity to deliver adjustment services; to tailor services to meet the needs of individuals; to improve accountability by establishing a system of mandated performance standards; to improve financial management by monitoring expenditures and reallotting available funds; and to provide the flexibility to

target funds to the most critical dislocation problems.

§ 631.2 Definitions.

In addition to the definitions contained in sections 4, 301, and 303(e) of the Act and Part 626 of this chapter, the following definitions apply to programs under Title III of the Act and this part:

Substantial layoff (for participant eligibility) means any reduction-in-force which is not the result of a plant closing and which results in an employment loss at a single site of employment during any 30 day period for:

(a)(1) At least 33 percent of the employees (excluding employees regularly working less than 20 hours per week); and

(2) At least 50 employees (excluding employees regularly working less than 20 hours per week); or

(b) At least 500 employees (excluding employees regularly working less than 20 hours per week).

Substantial layoff (for rapid response assistance) means any reduction-in-force which is not the result of a plant closing and which results in an employment loss at a single site of employment during any 30 day period for at least 50 employees (excluding employees regularly working less than 20 hours per week) (section 314(b)(4)).

§ 631.3 Participant eligibility.

(a) Eligible dislocated workers, as defined in section 301 of the Act, may participate in programs under this part. For the purposes of determining eligibility under section 301(a)(1)(A) of the Act, the term ''eligible for'' unemployment compensation includes any individual whose wages from employment would be considered in determining eligibility for unemployment compensation under Federal or State unemployment compensation laws.

(b)(1) Except as provided in paragraph (b)(3) of this section, workers who have not received an individual notice of termination but who are employed at a facility for which the employer has made a public announcement of planned closure shall be considered eligible dislocated workers with respect to the provision of basic readjustment services specifically identified in section 314(c) of the Act with the exception of supportive services and relocation assistance.

(2) Individuals identified in paragraph (b)(1) of this section shall be eligible to receive all services authorized in sections 314 of the Act after a date which is 180 days prior to the scheduled closure date of the facility, subject to the provisions of § 631.20 of this part and other applicable provisions regarding receipt of supportive services.

(3) Paragraphs (b)(1) and (b)(2) of this section shall not apply to individuals who are likely to remain employed with the employer or to retire instead of seeking new employment.

(4) For the purposes of paragraph (b)(1) of this section, the Governor shall establish criteria for defining *public announcement*. Such criteria shall include provisions that the public announcement shall be made by the employer and shall indicate a planned closure date for the facility (section 314(h)).

(c) Eligible dislocated workers include individuals who were self-employed (including farmers and ranchers) and are unemployed:

(1) Because of natural disasters, subject to the provisions of paragraph (e) of this section; or

(2) As a result of general economic conditions in the community in which they reside.

(d) For the purposes of paragraph (c) of this section, categories of economic conditions resulting in the dislocation of a self-employed individual may include, but are not limited to:

(1) Failure of one or more businesses to which the self-employed individual supplied a substantial proportion of products or services;

(2) Failure of one or more businesses from which the self-employed individual obtained a substantial proportion of products or services;

(3) Substantial layoff(s) from, or permanent closure(s) of, one or more plants or facilities that support a significant portion of the State or local economy.

(e) The Governor is authorized to establish procedures to determine the eligibility to participate in programs under this part of the following categories of individuals:

(1) Self-employed farmers, ranchers, professionals, independent tradespeople and other business persons formerly self-employed but presently unemployed.

(2) Self-employed individuals designated in paragraph (d)(1) of this section who are in the process of going out of business, if the Governor determines that the farm, ranch, or business operations are likely to terminate.

(3) Family members and farm or ranch hands of individuals identified under paragraphs (d)(1) and (2) of this section, to the extent that their contribution to the farm, ranch, or business meets minimum requirements as established by the Governor.

(f) The Governor is authorized to establish procedures to identify individuals permanently dislocated from their occupations or fields of work, including self-employment, because of natural disasters. For the purposes of this paragraph (f), categories of natural disasters include, but are not limited to, any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, drought, fire, or explosion.

(g) The State may provide services to displaced homemakers (as defined in section 4 of the Act) under this part only if the Governor determines that such services may be provided without adversely affecting the delivery of such services to eligible dislocated workers (section 311(b)(4)).

(h) An eligible dislocated worker issued a certificate of continuing eligibility, as provided in §631.53 of this part, shall remain eligible for assistance under this part for the period specified in the certificate, not to exceed 104 weeks. The 45-day enrollment provisions described in subpart B of part 627 of this chapter shall be waived for eligible individuals who possess a valid certificate under this paragraph and it is not required that a new application be taken prior to participation.

(i) An eligible dislocated worker who does not possess a valid certificate shall remain eligible if such individual:

(1) Remains unemployed, or

(2) Accepts temporary employment for the purpose of income maintenance prior to and/or during participation in a training program under this part with the intention of ending such temporary employment at the completion of the training and entry into permanent unsubsidized employment as a result of the training. Such temporary employment must be with an employer other than that from which the individual was dislocated. This provision applies to eligible individuals both prior to and subsequent to enrollment.

(j) The Governor shall ensure that rapid response and basic readjustment services under Title III of JTPA are made available to workers who, under the NAFTA Worker Security Act (Pub. L. 103–182), are members of a group of workers (including workers in any agricultural firm or subdivision of an agricultural firm) for which the Governor has made a finding that (1) the sales or production, or both, of such firm or subdivision have decreased absolutely, and (2) imports from Mexico or Canada of articles like or directly competitive with articles produced by such firm or subdivision have increased; or (3) there has been a shift in production by such workers' firm or subdivision to Mexico or Canada of articles which are produced by the firm or subdivision.

§ 631.4 Approved training rule.

An eligible dislocated worker who is participating in any retraining activity, except on-the-job training, under Title III of the Act or this part shall be deemed to be in training with the approval of the State agency for purposes of section 3304(a)(8) of the Internal Revenue Code of 1986. Participation in the approved training shall not disqualify the individual from receipt of unemployment benefits to which the individual is otherwise entitled (section 314(f)(2)).

Subpart B—Additional Title III Administrative Standards and Procedures

§ 631.11 Allotment and obligation of funds by the Secretary.

(a) Funds shall be allotted among the various States in accordance with section 302(b)(1) of the Act, subject to paragraph (b) of this section.

(b) Funds shall be allotted among the various States in accordance with section 302(b)(2)(A) and (B) of the Act as soon as satisfactory data are available under section 462(e) of the Act.

(c) Allotments for the Commonwealth of the Northern Mariana Islands and other territories and possessions of the United States shall be made by the Secretary in accordance with the provisions of section 302(e) of the Act.

§ 631.12 Reallotment of funds by the Secretary.

(a) Based upon reports submitted by States pursuant to § 631.15 of this part, the Secretary shall make determinations regarding total expenditures of funds within the State with reference to the amount required to be reallotted pursuant to section 303(b) of the Act. For purposes of this paragraph (a)—

(1) The funds to be reallotted will be an amount equal to the sum of:

(i) Unexpended funds in excess of 20 percent of the prior program year's formula allotment to the State, and

(ii) All unexpended funds from the formula allotment for the program year preceding the prior program year.

(2)(i) The current program year is the year in which the determination is made; and

(ii) The prior program year is the year immediately preceding the current program year.

(3) Unexpended funds shall mean the remainder of the total funds made available by formula that were available to the State for the prior program year minus total accrued expenditures at the end of the prior program year.

(4) Reallotted funds will be made available from current year allotments made available by formula.

(b) Based upon the most current and satisfactory data available, the Secretary shall identify eligible States, pursuant to the definitions in section 303(e) of the Act.

(c) The Secretary shall recapture funds from States identified in paragraph (a) of this section and reallot and reobligate such funds by a Notice of Obligation (NOO) adjustment to current year funds to eligible States as identified in paragraph (b) of this section, as set forth in section 303(a), (b), and (c) of the Act.

(d) Reallotted funds shall be subject to allocation pursuant to § 631.32 of this part, and to the cost limitations at § 631.14 of this part.

§ 631.13 Classification of costs at State and substate levels.

(a)(1) Allowable costs under Title III shall be planned, controlled, and charged by either the State or the substate grantee against the following cost categories: rapid response services, basic readjustment services, retraining services, needs-related payments and supportive services, and administration. Costs shall be reported to the Secretary of Labor in accordance with the reporting requirements established pursuant to § 631.15 of this part.

(2) All costs shall be allocable to a particular cost category to the extent that benefits are received by such category; and no costs shall be chargeable to a cost category except to the extent that benefits are received by such category.

(b) Rapid response services shall include the cost of rapid response activities identified at section 314(b) of the Act.

(1) Staff salary and benefit costs are chargeable to the rapid response services cost category only for that portion of staff time actually spent on rapid response activities.

(2) All other costs are chargeable to the rapid response services cost category only to the extent that they are for rapid response purposes.

(c) Basic readjustment services shall include the cost of basic readjustment services identified at section 314(c) of the Act, except that the cost of supportive services under section 314(c)(15) of the Act shall be charged to the needs-related payments and supportive services cost category, as provided in paragraph (e) of this section.

(d) Retraining services shall include the cost of retraining services identified at section 314(d) of the Act.

(e) Needs-related payments and supportive services shall include the cost of needs-related payments identified in section 314(e) of the Act, and supportive services identified in section 4(24) of the Act and provided for in section 314(c)(15) of the Act.

(f)(1) Administration shall include the costs incurred by recipients and subrecipients in the administration of programs under Title III of the Act, and shall be that portion of necessary and allowable costs which is not directly related to the provision of services and otherwise allocable to the cost categories in paragraphs (b) through (e) of this section. The description of administrative costs in subpart D of part 627 of this chapter shall be used by States and substate grantees as guidance in charging administration costs to Title III programs.

(2) Administration does not include the costs of activities under section 314(b) of the Act and which are provided for in paragraph (b) of this section.

(3) Administration shall include Title III funds used for coordination of worker adjustment programs with the Federal-State unemployment compensation system and with Chapter 2 of Title II of the Trade Act of 1974 (19 U.S.C. 2271, *et seq.*) and part 617 of this chapter (sections 311(b)(10) and 314(f)).

§ 631.14 Limitations on certain costs.

(a) *Retraining services.* Of the funds allocated to a substate grantee under part A of Title III for any program year, not less than 50 percent shall be expended for retraining services specified under section 314(d) of the Act, unless a waiver of this requirement is granted by the Governor. The Governor shall prescribe criteria that will allow substate grantees to apply in advance for a waiver of this requirement, pursuant to section 315(a)(2) of the Act. The Governor shall prescribe the time and form for the submission of an application for such a waiver, as provided for at section 315(a)(3) of the Act. The Governor shall not grant a waiver that allows less than 30 percent of the funds expended by a substate grantee to be expended for retraining activities.

(b) *Needs-related payments and supportive services.* Of the funds allocated to the Governor, or allocated to any substate grantee, under part A of Title III for any program year, not more than 25 percent may be expended to provide needs-related payments and other supportive services.

(c) *Administrative cost.* Of the funds allocated to the Governor, or allocated to any substate grantee, under part A of Title III for any program year, not more than 15 percent may be expended to cover the administrative cost of programs.

(d) Reallotted funds are subject to the cost limitations in paragraphs (a), (b) and (c) of this section.

(e) Funds allocated (or distributed) to substate areas under the provisions of section 302(c)(1)(E) of the Act shall be considered funds allocated to a substate grantee for the program year of the funds' initial allotment to the State, and included in the cost limitations in paragraphs (a), (b) and (c) of this section.

(f) Funds reserved by the Governor under the provisions of Section 302(c)(1) of the Act, other than funds distributed to substate grantees under the provisions of JTPA section 302(c)(1)(E), shall be considered funds allocated to the Governor for the program year of the funds' initial allotment to the State and included in the cost limitations applicable to the Governor.

(g) States and substate grantees shall have the full period of time that the funds are available to them to comply with the cost limitations described in JTPA section 315 and paragraphs (a), (b), and (c) of this section.

(h) *Combination of funds.* (1) Substate grantees within a State may combine funds allocated under part A of Title III for provision of services to eligible dislocated workers from two or more substate areas. Funds contributed by the substate grantees under this section remain subject to the cost limitations which apply to each substate grantee's total allocation (section 315(d)).

(2) To combine funds under this provision, substate grantees must be in contiguous substate areas or part of the same labor market area.

(i) For the purposes of this section:

(1) *Allotment to the State* means allotted by the formula described in section 302(b) of the Act, as adjusted by reallotments among the States, in accordance with section 303 of the Act. For purposes of determining availability and of applying cost limitations, funds will retain the identity of

the program year in which they were initially allotted to a State, irrespective of subsequent reallotments.

(2) *Allocated to the substate grantee* means allocated by the formula prescribed by the Governor under section 302(b) of the Act, and allocated (or distributed) under the provisions of section 302(c)(1)(E), as adjusted by within State reallocations implemented by the Governor through procedures established pursuant to section 303(d) of the Act. For purposes of determining availability and of applying cost limitations, funds will retain the identity of the program year in which they were initially allotted to the State.

(3) *Allocated to the Governor* refers to funds reserved by the Governor for use in accordance with the provisions of section 302(c)(1) of the Act, exclusive of any such funds which are distributed or allocated to substate grantees pursuant to section 302(c)(1)(E).

(j) The cost limitations described in this section do not apply to any designated substate grantee which served as a concentrated employment program grantee for a rural area under the Comprehensive Employment and Training Act (section 108(d)).

§ 631.15 Federal reporting requirements.

Notwithstanding the requirements in subpart D of part 627 of this chapter, the Governor shall report to the Secretary pursuant to instructions issued by the Secretary for programs and activities funded under this part. Such reports shall include a cost breakdown of all funds made available under this part used by the State Dislocated Worker Unit for administrative expenditures. Reports shall be provided to the Secretary within 45 calendar days after the end of the report period (sections 165(a)(2) and 311(b)(11)).

§ 631.16 Complaints, investigations, and penalties.

The provisions of this section apply in addition to the sanctions provisions in subpart G of part 627 of this chapter.

(a) The Secretary shall investigate a complaint or report received from an aggrieved party or a public official which alleges that a State is not complying with the provisions of the State plan required under section 311(a) of the Act (section 311(e)(1)).

(b) Where the Secretary determines that a State has failed to comply with its State plan, and that other remedies under the Act and part 627 of this chapter are not available or are not adequate to achieve compliance, the Secretary may withhold an amount not to exceed 10 percent of the allotment to the State for the program year in which the determination is made for each such violation (section 311(e)(2)(A)).

(c) The Secretary will not impose the penalty provided for under paragraph (b) of this section until all other remedies under the Act and part 627 of this chapter for achieving compliance have been exhausted or are determined to be unavailable or inadequate to achieve State compliance with the terms of the State plan.

(d) The Secretary will make no determination under this section until the affected State has been afforded adequate written notice and an opportunity to request and to receive a hearing before an administrative law judge pursuant to the provisions of subpart H of part 627 of this chapter (section 311(e)(2)(B)).

§ 631.17 Federal monitoring and oversight.

The Secretary shall conduct oversight of State administration of programs under this part, including the administration by each State of the rapid response assistance services provided in such State. The Secretary shall take the appropriate actions to ensure the effectiveness, efficiency and timeliness of services conducted by the State in accordance with §631.30(b) of this part (section 314(b)(3)).

§ 631.18 Federal by-pass authority.

(a) In the event that a State fails to submit a biennial State plan that is approved under §631.36 of this part, the Secretary shall make arrangements to use the amount that would be allotted to that State for the delivery in that State of the programs, activities, and services authorized under Title III of the Act and this part.

(b) No determination may be made by the Secretary under this section until

the affected State is afforded written notification of the Secretary's intent to exercise by-pass authority and an opportunity to request and to receive a hearing before an administrative law judge pursuant to the provisions of subpart H of part 627 of this chapter.

(c) The Secretary will exercise by-pass authority only until such time as the affected State has an approved plan under the provisions of § 631.36 of this part (section 321(b)).

§ 631.19 Appeals.

Except as provided in this part, disputes arising in programs under this part shall be adjudicated under the appropriate State or local grievance procedures required by subpart E of part 627 of this chapter or other applicable law. Complaints alleging violations of the Act or this part may be filed with the Secretary, pursuant to subpart F of part 627 of this chapter. Paragraphs (a) through (e) of this section refer to appeal rights set forth in this part.

(a) Section 628.405(g) of this chapter (appeals of denial of SDA designation) shall apply to denial of substate area designations under § 631.34(c)(1) and (3) of this part.

(b) Section 628.426(e) of this chapter (appeals of final disapproval of SDA job training plans or modifications) shall apply to final disapproval of substate plans under § 631.50(f) of this part.

(c) Section 628.426(f) of this chapter (appeals of a Governor's notice of intent to revoke approval of all or part of a plan) shall apply to a Governor's notice of intent to exercise by-pass authority under § 631.38 of this part.

(d) Section 628.430(b) of this chapter (appeals of the Secretary's disapproval of a plan when the SDA is the State) shall apply to plan disapproval when the substate area is the State, as set forth in § 631.50(g) and (h) of this part.

(e) Decisions pertaining to designations of substate grantees under § 631.35 of this part are not appealable to the Secretary.

Subpart C—Needs-related payments

§ 631.20 Needs-related payments.

(a) Title III funds available to States and substate grantees may be used to provide needs-related payments to participants in accordance with the approved State or substate plan, as appropriate.

(b) In accordance with the approved substate plan, needs-related payments shall be provided to an eligible dislocated worker only in order to enable such worker to participate in training or education programs under this part. To be eligible for needs-related payments:

(1) An eligible worker who has ceased to qualify for unemployment compensation must have been enrolled in a training or education program by the end of the thirteenth week of the worker's initial unemployment compensation benefit period, or, if later, by the end of the eighth week after an employee is informed that a short-term layoff will in fact exceed 6 months.

(2) For purposes of paragraph (b)(1) of this section, the term *enrolled in a training or education program* means that the worker's application for training has been approved and the training institution has furnished written notice that the worker has been accepted in the approved training program beginning within 30 calendar days.

(3) An eligible worker who does not qualify for unemployment compensation must be participating in a training or education program (section 314(e)(1)).

(c) Needs-related payments shall not be provided to any participant for the period that such individual is employed, enrolled in, or receiving on-the-job training, out-of-area job search, or basic readjustment services in programs under the Act, nor to any participant receiving trade readjustment allowances, on-the-job training, out-of-area job search allowances, or relocation allowances under Chapter 2 of Title II of the Trade Act of 1974 (19 U.S.C. 2271, *et seq.*) or part 617 of this chapter (section 314(e)(1)).

(d) The level of needs-related payments to an eligible dislocated worker in programs under this part shall not exceed the higher of:

(1) The applicable level of unemployment compensation; or

(2) The poverty level (as by the published by the Secretary of Health and Human Services) (section 314(e)(2)).

Subpart D—State Administration

§ 631.30 Designation or creation and functions of a State dislocated worker unit or office, and rapid response assistance.

(a) *Designation or creation of State dislocated worker unit or office.* The State shall designate or create an identifiable State dislocated worker unit or office with the capabilities and functions identified in paragraph (b) of this section. Such unit or office may be an existing organization or new organization formed for this purpose (section 311(b)(2)). The State dislocated worker unit or office shall:

(1) Make appropriate retraining and basic adjustment services available to eligible dislocated workers through substate grantees, and in statewide, regional or industrywide projects;

(2) Work with employers and labor organizations in promoting labor-management cooperation to achieve the goals of this part;

(3) Operate a monitoring, reporting, and management system to provide adequate information for effective program management, review, and evaluation;

(4) Provide technical assistance and advice to substate grantees;

(5) Exchange information and coordinate programs with the appropriate economic development agency, State education and training and social services programs;

(6) Coordinate with the unemployment insurance system, the Federal-State Employment Service system, the Trade Adjustment Assistance program and other programs under this chapter;

(7) Receive advance notice of plant closings and mass layoffs as provided at section 3(a)(2) of the Worker Adjustment and Retraining Notification Act (29 U.S.C. 2102(a)(2) and part 639 of this chapter);

(8) Immediately notify (within 48 hours) the appropriate substate grantees following receipt of an employer notice of layoff or plant closing or of any other information that indicates a projected layoff or plant closing by an employer in the grantee's substate area, in order to continue and expand the services initiated by the rapid response team (section 311(b)(3)(D));

(9) Fully consult with labor organizations where substantial numbers of their members are to be served; and

(10) Disseminate throughout the State information on the availability of services and activities under Title III of the Act and this part.

(b) *Rapid response capability.* The dislocated worker unit shall have one or more rapid response specialists, and the capability to provide rapid response assistance, on-site, for dislocation events such as permanent closures and substantial layoffs throughout the State. The State shall not transfer the responsibility for the rapid response assistance functions of the State dislocated worker unit to another entity, but the State may contract with another entity to perform rapid response assistance services. Nothing in this paragraph shall remove or diminish the dislocated worker unit's accountability for ensuring the effective delivery of rapid response assistance services throughout the State (section 311(b)(12)).

(1) State rapid response specialists should be knowledgeable about the resources available through programs under this part and all other appropriate resources available through public and private sources to assist dislocated workers. The expertise required by this part includes knowledge of the Federal, State, and local training and employment systems; labor-management relations and collective bargaining activities; private industry and labor market trends; programs and services available to veterans; and other fields necessary to carry out the rapid response requirements of the Act.

(2) The rapid response specialists should have:

(i) The ability to organize a broad-based response to a dislocation event, including the ability to coordinate services provided under this part with other State-administered programs available to assist dislocated workers, and the ability to involve the substate grantee and local service providers in the assistance effort;

(ii) The authority to provide limited amounts of immediate financial assistance for rapid response activities, including, where appropriate, financial

assistance to labor-management committees formed under paragraph (c)(2) of this section;

(iii) Credibility among employers and in the employer community in order to effectively work with employers in difficult situations; and

(iv) Credibility among employee groups and in the labor community, including organized labor, in order to effectively work with employees in difficult situations.

(3) The dissemination of information on the State dislocated worker unit's services and activities should include efforts to ensure that major employers, organized labor, and groups of employees not represented by organized labor, are aware of the availability of rapid response assistance. The State dislocated worker unit should make equal effort in responding to dislocation events without regard to whether the affected workers are represented by a union.

(4) In a situation involving an impending permanent closure or substantial layoff, a State may provide funds, where other public or private resources are not expeditiously available, for a preliminary assessment of the advisability of conducting a comprehensive study exploring the feasibility of having a company or group, including the workers, purchase the plant and continue it in operation.

(5) Rapid response specialists may use funds available under this part:

(i) To establish on-site contact with employer and employee representatives within a short period of time (preferably 48 hours or less) after becoming aware of a current or projected permanent closure or substantial layoff in order to—

(A) Provide information on and facilitate access to available public programs and services; and

(B) Provide emergency assistance adapted to the particular permanent closure or substantial layoff; such emergency assistance may include financial assistance for appropriate rapid response activities, such as arranging for the provision of early intervention services and other appropriate forms of immediate assistance in response to the dislocation event;

(ii) To promote the formation of labor-management committees as provided for in paragraph (c) of this section, by providing:

(A) Immediate assistance in the establishment of the labor-management committee, including providing immediate financial assistance to cover the start-up costs of the committee;

(B) A list of individuals from which the chairperson of the committee may be selected;

(C) Technical advice as well as information on sources of assistance, and liaison with other public and private services and programs; and

(D) Assistance in the selection of worker representatives in the event no union is present;

(iii) To provide ongoing assistance to labor-management committees described in paragraph (c) of this section by:

(A) Maintaining ongoing contact with such committees, either directly or through the committee chairperson;

(B) Attending meetings of such committees on an *ex officio* basis; and

(C) Ensuring ongoing liaison between the committee and locally available resources for addressing the dislocation, including the establishment of linkages with the substate grantee or with the service provider designated by the substate grantee to act in such capacity;

(iv) To collect information related to:

(A) Economic dislocation (including potential closings or layoffs); and

(B) All available resources within the State for serving displaced workers, which information shall be made available on a regular basis to the Governor and the State Council to assist in providing an adequate information base for effective program management, review, and evaluation;

(v) To provide or obtain appropriate financial and technical advice and liaison with economic development agencies and other organizations to assist in efforts to avert worker dislocations;

(vi) To disseminate information throughout the State on the availability of services and activities carried out by the dislocated worker unit or office; and

(vii) To assist the local community in developing its own coordinated response and in obtaining access to State economic development assistance.

(6) Notwithstanding the definition of ''substantial layoff (for rapid response assistance)'' at § 631.2 of this part;

(i) The Governor shall provide rapid response and basic readjustment services to members of a group of workers under the NAFTA Worker Security Act for which the Governor has made a finding under § 631.3(j); and

(ii) The Governor may, under exceptional circumstances, authorize rapid response assistance provided by a State dislocated worker unit when the layoff is less than 50 or more individuals, is not at a single site of employment, or does not take place during a single 30 day period. For purposes of this provision, *exceptional circumstances* include those situations which would have a major impact upon the community(ies) in which they occur (section 314(b)).

(c) *Labor-management committees.* As provided in sections 301(b)(1) and 314(b)(1)(B) of the Act, labor-management committees are a form of rapid response assistance which may be voluntarily established to respond to actual or prospective worker dislocation.

(1) Labor management committees ordinarily include (but are not limited to) the following:

(i) Shared and equal participation by workers and management, with members often selected in an informal fashion;

(ii) Shared financial participation between the company and the State, using funds provided under Title III of the Act, in paying for the operating expenses of the committee; in some instances, labor union funds may help to pay committee expenses;

(iii) A chairperson, to oversee and guide the activities of the committee who—

(A) Shall be jointly selected by the labor and management members of the committee;

(B) Is not employed by or under contract with labor or management at the site; and

(C) Shall provide advice and leadership to the committee and prepare a report on its activities;

(iv) The ability to respond flexibly to the needs of affected workers by devising and implementing a strategy for assessing the employment and training needs of each dislocated worker and for obtaining the services and assistance necessary to meet those needs;

(v) A formal agreement, terminable at will by the workers or the company management, and terminable for cause by the Governor; and

(vi) Local job identification activities by the chairperson and members of the committee on behalf of the affected workers.

(2) Because they include employee representatives, labor-management committees typically provide a channel whereby the needs of eligible dislocated workers can be assessed, and programs of assistance developed and implemented, in an atmosphere supportive to each affected worker. As such, committees must be perceived to be representative and fair in order to be most effective.

§ 631.31 Monitoring and oversight.

The Governor is responsible for monitoring and oversight of all State and substate grantee activities under this part. In such monitoring and oversight of substate grantees, the Governor shall ensure that expenditures and activities are in accordance with the substate plan or modification thereof, and with the cost limitations described in § 631.14 of this part.

§ 631.32 Allocation of funds by the Governor.

Of the funds allotted to the Governor by the Secretary under §§ 631.11 and 631.12 of this part:

(a) The Governor shall issue allocations to substate grantees, the sum of which shall be no less than 50 percent of the State's allotment (section 302(d)).

(b)(1) The Governor shall prescribe the formula to be used in issuing substate allocations required under paragraph (a) of this section to substate grantees.

(2) The formula prescribed pursuant to paragraph (b)(1) of this section shall utilize the most appropriate information available to the Governor. In prescribing the formula, the Governor

shall include (but need not be limited to) the following information:

(i) Insured unemployment data;

(ii) Unemployment concentrations;

(iii) Plant closing and mass layoff data;

(iv) Declining industries data;

(v) Farmer-rancher economic hardship data; and

(vi) Long-term unemployment data.

(3) The Governor may allow for an appropriate weight for each of the formula factors set forth in paragraph (b)(2) of this section. A weight of zero for any of the factors required in section 302(d) of the Act and identified in paragraph (b)(2) of this section shall only be made when a review of available data indicates that the factor is not relevant to determining the incidence of need for worker dislocation assistance within the State. The formula may be amended no more frequently than once each program year (section 302(d)).

(c) The Governor may reserve an amount equal to not more than 40 percent of the funds allotted to the State under § 631.11 and § 631.12 of this part for State activities and for discretionary allocations to substate grantees (section 302(c)(1)).

(d) The Governor may reserve an additional amount equal to not more than 10 percent of the funds allotted to the State under § 631.11 of this part. The Governor shall allocate such funds, subject to the SJTCC or HRIC review and comment, during the first three quarters of the program year among substate grantees on the basis of need. Such funds shall be allocated to substate grantees and shall not be used for statewide activities. Such funds shall be included in each substate grantee's allocation for purposes of cost limitations, as described in § 631.14 of this part (sections 302(c)(2) and 317(1)(B)).

§ 631.33 State procedures for identifying funds subject to mandatory Federal reallotment.

The Governor shall establish procedures to assure the equitable identification of funds required to be reallotted pursuant to section 303(b) of the Act. Funds so identified may be funds reserved by the State pursuant to section 302(c)(1)(A) through (D) of the Act and/or allocated to substate grantees pursuant to section 302(c)(1)(E), (c)(2) and/or (d) of the Act (section 303(d)). Such procedures may not exempt either State or substate funds from reallotment.

§ 631.34 Designation of substate areas.

(a) The Governor, after receiving recommendations from the SJTCC or HRIC, shall designate substate areas for the State (section 312(a)).

(b) In designating substate areas, the Governor shall:

(1) Ensure that each service delivery area within the State is included within a substate area and that no SDA is divided among two or more substate areas; and

(2) Consider the availability of services throughout the State, the capability to coordinate the delivery of services with other human services and economic development programs, and the geographic boundaries of labor market areas within the State.

(c) Subject to paragraph (b) of this section, the Governor shall designate as a substate area:

(1) Any single SDA that has a population of 200,000 or more;

(2) Any two or more contiguous SDA's that:

(i) In the aggregate have a population of 200,000 or more; and

(ii) Request such designation; and

(3) Any concentrated employment program grantee for a rural area as described in section 101(a)(4)(A)(iii) of the Act.

(d) In addition to the entities identified in paragraph (c) of this section, the Governor may, without regard to the 200,000 population requirement, designate SDAs with smaller populations as substate areas.

(e) The Governor may deny a request for substate area designation from a consortium of two or more SDAs that meets the requirements of paragraph (c)(2) of this section only upon a determination that the request is not consistent with the effective delivery of services to eligible dislocated workers in the relevant labor market area, or would otherwise not be appropriate to carry out the purposes of title III. The

Governor will give good faith consideration to all such requests by a consortium of SDAs to be a substate area. In denying a consortium's request for substate area designation, the Governor shall set forth the basis and rationale for the denial (section 312(a)(5)).

(f) In the case where the service delivery area is the State, the entire State shall be designated as a single substate area.

(g)(1) Entities described in paragraphs (c)(1) and (3) of this section may appeal the Governor's denial of substate area designation to the Secretary of Labor. The procedures that apply to such appeals shall be those set forth at §628.405(g) for appeals of the Governor's denial of SDA designation.

(2) An entity described in paragraph (c)(2) of this section that has been denied substate area designation may utilize the State-level grievance procedures required by section 144(a) of the Act and subpart E of part 627 of this chapter for the resolution of disputes arising from such a denial.

(h) Designation of substate areas shall not be revised more frequently than once every two years. All such designations must be completed no later than four months prior to the beginning of any program year (section 312(a)(6)).

§631.35 Designation of substate grantees.

The Governor may establish procedures for the designation of substate grantees.

(a) Designation of the substate grantee for each substate area shall be made on a biennial basis.

(b) Entities eligible for designation as substate grantees include:

(1) Private industry councils in the substate area;

(2) Service delivery area grant recipients or administrative entities designated under Title II of the Act;

(3) Private non-profit organizations;

(4) Units of general local government in the substate area, or agencies thereof;

(5) Local offices of State agencies; and

(6) Other public agencies, such as community colleges and area vocational schools.

(c) Substate grantees shall be designated in accordance with an agreement among the Governor, the local elected official or officials of such area, and the private industry council or councils of such area. Whenever a substate area is represented by more than one such official or council, the respective officials and councils shall each designate representatives, in accordance with procedures established by the Governor (after consultation with the SJTCC or HRIC), to negotiate such agreement.

(d) The agreement specified in paragraph (c) of this section shall set forth the conditions, considerations, and other factors related to the selection of substate grantees in accordance with section 312(b) of the Act.

(e) The Governor shall negotiate in good faith with the parties identified in paragraph (c) of this section and shall make a good faith effort to reach agreement. In the event agreement cannot be reached on the selection of a substate grantee, the Governor shall select the substate grantee.

(f) Decisions under paragraphs (c), (d), and (e) of this section are not appealable to the Secretary (section 312(b) and (c)).

§631.36 Biennial State plan.

(a) In order to receive an allotment of funds under §§631.11 and 631.12 of this part, the State shall submit to the Secretary, in accordance with instructions issued by the Secretary, on a biennial basis, a biennial State plan (section 311). Such plan shall include:

(1) Assurances that—

(i) The State will comply with the requirements of Title III of the Act and this part;

(ii) Services will be provided only to eligible displaced workers, except as provided in paragraph (a)(2) of this section;

(iii) Services will not be denied on the basis of State of residence to eligible dislocated workers displaced by a permanent closure or substantial layoff within the State; and may be provided to other eligible dislocated workers regardless of the State of residence of such workers;

(2) Provision that the State will provide services under this part to displaced homemakers only if the Governor determines that the services may be provided to such workers without adversely affecting the delivery of services to eligible dislocated workers;

(3) A description of the substate allotment and reallotment procedures and assurance that they meet the requirements of the Act and this part;

(4) A description of the State procurement system and procedures to be used under Title III of the Act and this part which are consistent with the provisions in subpart D of part 627 of this chapter; and

(5) Assurance that the State will not prescribe any performance standard which is inconsistent with §627.470 of this chapter.

(b) The State biennial plan shall be submitted to the Secretary on or before the May 1 immediately preceding the first of the two program years for which the funds are to be made available.

(c) Any plan submitted under paragraph (a) of this section may be modified to describe changes in or additions to the programs and activities set forth in the plan. No plan modification shall be effective unless reviewed pursuant to paragraph (d) of this section and approved pursuant to paragraph (e) of this section.

(d) The Secretary shall review State biennial plans and plan modifications, including any comments thereon submitted by the SJTCC or HRIC, for overall compliance with the provisions of the Act, this part, and the instructions issued by the Secretary.

(e) A State biennial plan or plan modification is submitted on the date of its receipt by the Secretary. The Secretary shall approve a plan or plan modification within 45 days of submission unless, within 30 days of submission, the Secretary notifies the Governor in writing of any deficiencies in such plan or plan modification.

(f) The Secretary shall not finally disapprove the State biennial plan or plan modification of any State except after written notice and an opportunity to request and to receive a hearing before an administrative law judge pursuant to the provisions of subpart H of part 627 of this chapter.

§ 631.37 Coordination activities.

(a) Services under this part shall be integrated or coordinated with services and payments made available under Chapter 2 of Title II of the Trade Act of 1974 (19 U.S.C. 2271, *et seq.*) and part 617 of this chapter and programs provided by any State or local agencies designated under section 239 of the Trade Act of 1974 (19 U.S.C. 2311) or part 617 of this chapter (section 311(b)(10)). Such coordination shall be effected under provisions of an interagency agreement when the State agency responsible for administering programs under this part is different from the State agency administering Trade Act programs.

(b) States may use funds allotted under §§631.11 and 631.12 of this part for coordination of worker readjustment programs, (i.e., programs under this part and trade adjustment assistance under part 617 of this chapter) and the unemployment compensation system consistent with the limitation on administrative expenses (see §631.14(a)(1) of this part). Each State shall be responsible for coordinating the unemployment compensation system and worker readjustment programs (section 314(f)).

(c) Services under this part shall be coordinated with dislocated worker services under Title III of the Carl D. Perkins Vocational Education Act (20 U.S.C. 2351, et seq.) (section 311(b)(5)).

(d) In promoting labor management cooperation, including the formation of labor-management committees under this part, the dislocated worker unit shall consider cooperation and coordination with labor-management committees established under other authorities (section 311(b)(3)(B)).

(e) In accordance with section 402 of the Veterans' Benefits and Programs Improvement Act of 1988 (29 U.S.C. 1751 note) services under this part shall be coordinated with programs administered by the Department of Veterans Affairs and with other veterans' programs such as the Veterans' Job Training Act (29 U.S.C. 1721 note), title IV-C of the Job Training Partnership Act (29 U.S.C. 1721, *et seq.*), part 635 of this

chapter, and the Transition Assistance Program.

§ 631.38 State by-pass authority.

(a)(1) In the event that a substate grantee fails to submit a plan, or submits a plan which is not approved by the Governor (see § 631.50(f) of this part), the Governor may direct the expenditure of funds allocated to the substate area.

(2) The Governor's authority under this paragraph (a) to direct the expenditure of funds remains in effect only until such time as a plan is submitted and approved, or a new substate grantee is designated (section 313(c)).

(3) The Governor shall not direct the expenditure of funds under this paragraph (a) until after the affected substate grantee has been afforded advance written notice of the Governor's intent to exercise such authority and an opportunity to appeal to the Secretary pursuant to the provisions of § 628.426(e) of this chapter.

(b)(1) If a substate grantee fails to expend funds allocated to it in accordance with its plan, the Governor, subject to appropriate notice and opportunity for comment in the manner required by section 105(b)(1), (2), and (3) of the Act, may direct the expenditure of funds only in accordance with the substate plan.

(2) The Governor's authority under this paragraph (b) to direct the expenditure of funds shall remain in effect only until:

(i) The substate grantee corrects the failure;

(ii) The substate grantee submits an acceptable modification; or

(iii) A new substate grantee is designated (section 313(a) and (d)).

(3) The Governor shall not direct the expenditure of funds under this paragraph (b) until after the affected substate grantee has been afforded advance written notice of the Governor's intent to exercise such authority and an opportunity to appeal to the Secretary pursuant to the provisions of § 628.426(e) of this chapter.

(c) When the substate area is the State, the Secretary shall have the same authority as the Governor under paragraphs (a) and (b) of this section.

Subpart E—State Programs

§ 631.40 State program operational plan.

(a) The Governor shall submit to the Secretary biennially, in accordance with instructions issued by the Secretary, a State program operational plan describing the specific activities, programs and projects to be undertaken with the funds reserved by the Governor under § 631.32(c) of this part.

(b) The State program operational plan shall include a description of the mechanisms established between the Federal-State Unemployment Compensation System, the Trade Adjustment Assistance Program, the State Employment service and programs authorized under title III of the Act and this part to coordinate the identification and referral of dislocated workers and the exchange of information.

§ 631.41 Allowable State activities.

(a) States may use funds reserved under § 631.32(c) of this part, subject to the provisions of the State biennial and program operational plans, for:

(1) Rapid response assistance;

(2) Basic readjustment services when undertaken in Statewide, regional or industrywide projects, or, initially, as part of rapid response assistance;

(3) Retraining services, including (but not limited to) those in section 314(d) of the Act when undertaken in Statewide, industrywide and regional programs;

(4) Coordination with the unemployment compensation system, in accordance with § 631.37(b) of this part;

(5) Discretionary allocation for basic readjustment and retraining services to provide additional assistance to substate areas that experience substantial increases in the number of dislocated workers, to be expended in accordance with the substate plan or a modification thereof;

(6) Incentives to provide training of greater duration for those who require it; and

(7) Needs-related payments in accordance with section 315(b) of the Act.

(b) Activities shall be coordinated with other programs serving dislocated workers, including training under Chapter 2 of Title II of the Trade Act of

1974 (19 U.S.C. 2271, et seq.) and part 617 of this chapter.

(c) Where appropriate, State-level activities should be coordinated with activities and services provided by substate grantees.

(d) Retraining services provided to individuals with funds available to a State should be limited to those individuals who can most benefit from and are in need of such services.

(e) Other than basic and remedial education, literacy and English for non-English speakers training, retraining services provided with funds available to a State shall be limited to those for occupations in demand in the area or another area to which the participant is willing to relocate, or in sectors of the economy with a high potential for sustained demand or growth.

(f) Services provided to displaced homemakers should be part of ongoing programs and activities under Title III and this part and not separate and discrete programs.

(g) Basic readjustment services described in § 631.3(b)(1), provided to individuals who have not received a specific notice of termination or layoff and who work at a facility at which the employer has made a public announcement that such facility will close shall, to the extent practicable be funded by the State with funds reserved under § 631.32(c) (section 314(h)).

(h) The provisions of section 107(a), (b) and (e) of the Act (but not subsections (c) and (d) of section 107) and § 627.422 of this chapter apply to State selection of service providers for funded activities authorized in § 631.32(c) of this part.

Subpart F—Substate Programs

§ 631.50 Substate plan.

(a) In order to receive an allocation of funds under § 631.32 of this part, the substate grantee shall submit to the Governor a substate plan, in accordance with instructions issued by the Governor. Such plan shall meet the requirements of this section and shall be approved by the Governor prior to funds being allocated to a substate grantee.

(b) The Governor shall issue instructions and schedules that assure that substate plans and plan modifications conform to all requirements of the Act and this part and contain the statement required by section 313(b) of the Act.

(c) Substate plans shall provide for compliance with the cost limitation provisions of § 631.14 of this part.

(d) The SJTCC or HRIC shall review and submit to the Governor written comments on substate plans.

(e) Prior to the submission of the substate plan to the Governor, the substate grantee shall submit the plan to the parties to the agreement described in § 631.35(c) of this part for review and comment (section 313(a)).

(f) The Governor's review and approval (or disapproval) of a substate plan or plan modification, and appeals to the Secretary from disapprovals thereof, shall be conducted according to the provisions of section 105 of the Act and § 628.426 of this chapter (section 313(c)).

(g) If a substate grantee fails to meet the requirements for plan submission and approval found in this section, the Governor may exercise the by-pass authority set forth at § 631.38 of this part.

(h) When the substate area is the State, the substate plan (and plan modification(s)) shall be submitted by the Governor to the Secretary. The dates for submission and consideration and the Secretary's review and approval (or disapproval) of the plan or plan modification, and appeals to administrative law judges from disapproval thereof, shall be conducted according to the provisions of § 628.430 of this chapter.

§ 631.51 Allowable substate program activities.

(a) The substate grantee may use JTPA section 302(c)(1), (c)(2), and (d) funds allocated by the Governor under § 631.32 of this part for basic readjustment services, retraining services, supportive services and needs-related payments.

(b) The provisions of §§ 627.420 and 627.435 of this chapter (Procurement, Cost principles and allowable costs) apply to funds allocated to substate

grantees under this part unless otherwise specifically provided for.

(c) Other than basic and remedial education, literacy and English for non-English speakers training, retraining services provided with funds available to a substate area shall be limited to those for occupations in demand in the area or another area to which the participant is willing to relocate, or in sectors of the economy with a high potential for sustained demand or growth.

(d) Retraining services provided to individuals with funds available to a substate area should be limited to those individuals who can most benefit from and are in need of such services (sections 312(e) and 141(a)).

§ 631.52 Selection of service providers.

(a) The substate grantee shall provide authorized JTPA Title III services within the substate area, pursuant to an agreement with the Governor and in accordance with the approved State plan and substate plan, including the selection of service providers.

(b) The substate grantee may provide authorized JTPA Title III services directly or through contract, grant, or agreement with service providers (section 312(d)).

(c) Services provided to displaced homemakers should be part of ongoing programs and activities under Title III of the Act and this part and not separate and discrete programs.

(d) The provisions of section 107(a), (b), (c) and (e) of the Act and § 627.422 of this chapter apply to substate grantee selection of service providers as specified in this section.

§ 631.53 Certificates of continuing eligibility.

(a) A substate grantee may issue to any eligible dislocated worker who has applied for the program authorized in this part a certificate of continuing eligibility. Such a certificate of continuing eligibility:

(1) May be effective for periods not to exceed 104 weeks;

(2) Shall not include any reference to any specific amount of funds;

(3) Shall state that it is subject to the availability of funds at the time any such training services are to be provided; and

(4) Shall be non-transferable.

(b) Acceptance of a certificate of continuing eligibility shall not be deemed to be enrollment in training.

(c) Certificates of continuing eligibility may be used, subject to the conditions included on the face of the certificate, in two distinct ways:

(1) To defer the beginning of retraining: any individual to whom a certificate of continuing eligibility has been issued under paragraph (a) of this section shall remain eligible for retraining and education services authorized under this part for the period specified in the certificate, notwithstanding the definition of ''eligible dislocated worker'' in section 301(a) of the Act or the participant eligibility provisions in § 631.3 of this part, and may use the certificate in order to receive retraining services, subject to the limitations contained in the certificate; or

(2) To permit eligible dislocated workers to seek out and arrange their own retraining with service providers approved by the substate grantee; retraining provided pursuant to the certificate shall be in accord with requirements and procedures established by the substate grantee and shall be conducted under a grant, contract, or other arrangement between the substate grantee and the service provider.

(d) Substate grantees shall ensure that records are maintained showing to whom such certificates of continuing eligibility have been issued, the dates of issuance, and the number redeemed by substate grantees.

Subpart G—Federal Delivery of Dislocated Worker Services Through National Reserve Account Funds

§ 631.60 General.

This subpart provides for the use of funds reserved to the Secretary for use under part B of title III of the Act. These funds may be used for the allowable activities, described in section 323 of the Act; demonstration programs, described in section 324 of the Act; the Defense Conversion Adjustment Program (DCAP), described in section 325 of the Act; the Defense Diversification

Program (DDP), described in section 325A of the Act; Clean Air Employment Transition Assistance (CAETA), described in section 326 of the Act; and similar uses and programs which may be added to part B of title III of the Act.

§ 631.61 Application for funding and selection criteria.

To qualify for consideration for funds reserved by the Secretary for activities under section 323 of the Act, applications shall be submitted to the Secretary pursuant to instructions issued by the Secretary specifying application procedures, selection criteria, and approval process. Separate instructions will be issued for each category of grant awards, as determined by the Secretary.

§ 631.62 Cost limitations.

The expenditure of funds provided to grantees under this subpart shall be consistent with the cost limitations specified in the grant. Applicants for grants under this subpart may propose, in their grant applications, reasonable costs to be incorporated into the grant. The Grant Officer may accept or modify such proposals at his/her discretion. Where proposals do not adequately justify to the Grant Officer's satisfaction the costs to be incorporated into the grant, the cost limitations that shall be applied shall be those specified in section 315 of the Act and described in paragraphs (a), (b) and (c) of § 631.14 of this part.

§ 631.63 Reporting.

(a) Grantees under part B of title III of the Act shall submit reports as prescribed by the Secretary.

(b) *Significant developments.* Grantees shall notify the Secretary of developments that have a significant impact on the grant or subgrant supported activities, including problems, delays, or adverse conditions which may materially impair the ability to meet the objectives of the project. This notification shall include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

§ 631.64 General administrative requirements.

(a) Activities under this subpart may be carried out and funding provided directly to grantees other than States.

(b) All grantees and subgrantees under this subpart that are States or substate grantees are subject to the provisions in part 627 of this chapter.

(c) For grantees other than States and substate grantees, the following provisions shall apply to grants under this subpart.

(1) *Grievance procedures.* (i) Each grantee shall establish and maintain a grievance procedure for grievances or complaints about its programs and activities from participants, subgrantees, subcontractors, and other interested persons. Hearings on any grievance shall be conducted within 30 days of filing of a grievance and decisions shall be made not later than 60 days after the filing of a grievance. Except for complaints alleging fraud or criminal activity, complaints shall be made within one year of the alleged occurrence.

(ii) Grantees shall be subject to the provisions of section 144 of the Act, and 29 CFR part 95 or 97, as appropriate.

(iii) If the grantee is already subject to the grievance procedure process and requirements established by the Governor (i.e., through another JTPA grant, subgrant, or contract), its adherence to that procedure shall meet the requirements of this paragraph (c)(1).

(2) *Uniform Administrative Standards.* Grantees shall be subject to the standards and requirements described in 29 CFR part 95 or 97, as appropriate, as well as any additional standards prescribed in grant documents or Secretarial guidelines. If the grantee/ subgrantee is already subject to additional standards established by the Governor (*i.e.*, through another JTPA grant, subgrant, or contract), its adherence to those standards shall meet the requirements of this paragraph (c)(2).

§ 631.65 Special provisions for CAETA and DDP.

(a) *Allowances for Job Search Outside the Commuting Area under CAETA.* Allowances for job search outside the commuting area shall be an allowable

activity under CAETA, only where it has been determined that the dislocated worker cannot reasonably be expected to secure suitable employment within the commuting area in which the worker resides. Procedures for determining whether a dislocated worker cannot reasonably be expected to secure suitable employment within the commuting area in which the dislocated worker resides shall be described in the grant application and shall be subject to approval by the Grant Officer. The cost of job search outside the commuting area shall be an allowable cost, but shall not provide for more than 90 percent of the cost of necessary job search expenses, and may not exceed a total of $800, unless the need for a greater amount is justified in the grant application and approved by the Grant Officer.

(b) *Relocation Allowances under CAETA.* Relocation allowances under CAETA shall be allowable only where the eligible dislocated worker cannot reasonably be expected to secure suitable employment in the commuting area in which the worker resides and has obtained suitable employment affording a reasonable expectation of long-term duration in the area in which the worker wishes to relocate, or has obtained a bona fide offer of such employment, provided that the worker is totally separated from employment at the time relocation commences. The cost of relocation for an eligible dislocated worker shall not exceed an amount which is equal to the sum of the reasonable and necessary expenses incurred in transporting the dislocated worker and the dislocated worker's family, if any, and household effects, and a lump sum relocation allowance, equivalent to three times such worker's average weekly wage. The maximum relocation allowance, however, shall not exceed $800, unless a greater amount is justified in the grant application and approved by the Grant Officer. Necessary expenses shall be travel expenses for the dislocated worker and the dislocated worker's family and for the transfer of household effects. Reasonable costs for such travel and transfer expenses shall be by the least expensive, most reasonable form of transportation.

(c) *Needs-related payments under CAETA and DDP.* Funds from grants for CAETA and DDP shall be available for needs-related payments to enable participants to participate in and complete training or education programs under those grants, subject to the following:

(1) Needs-related payments shall be provided to the participant only if the participant:

(i) Does not qualify or has ceased to qualify for unemployment compensation;

(ii) Has been enrolled in training programs by the end of the 13th week of an individual's initial unemployment benefit period following the layoff or termination, or, if later, the end of the 8th week after an individual is informed that a short-term layoff will exceed six months;

(iii) Is making satisfactory progress in training or education programs under this section, except that an individual shall not be disqualified pursuant to this clause for a failure to participate that is not the fault of the individual; and

(iv) Currently receives, or is a member of a family which currently receives, a total family income (exclusive of unemployment compensation, child support payments, and welfare payments) which, in relation to family size, is not in excess of the lower living standard income level.

(2) Needs-related payments shall be equal to the higher of:

(i) The applicable level of unemployment compensation; or

(ii) The poverty level determined in accordance with the criteria established by the Director of the Office of Management and Budget.

(3) Total family income shall be reviewed periodically, based upon information obtained from participants with respect to such income and changes therein, to determine continued eligibility, or to begin payments to individuals previously found ineligible for needs-related payments under this section.

Subpart H—[Reserved]

Subpart I—Disaster Relief Employment Assistance

§ 631.80 Scope and purpose.

This subpart establishes a Disaster Relief Employment Assistance program under title IV, part J of JTPA which shall be administered in conjunction with the title III National Reserve Grants Programs.

§ 631.81 Availability of funds.

Funds appropriated to carry out this subpart may be made available by grant to the Governor of any State within which is located an area that has suffered an emergency or a major disaster as defined in paragraphs (1) and (2), respectively, of section 102 of the Disaster Relief Act of 1974 (42 U.S.C. 5122(1) and (2)) (referred to in this subpart as the ''disaster area''). The Secretary shall prescribe procedures for applying for funds.

§ 631.82 Substate allocation.

(a) Not less than 80 percent of the grant funds available to any Governor under § 631.81 of this part shall be allocated by the Governor to units of general local government located, in whole or in part, within such disaster areas. The remainder of such funds may be reserved by the Governor for use, in concert with State agencies, in cleanup, rescue, repair, renovation, and rebuilding activities associated with such major disaster.

(b) The JTPA title III program substate grantee for the disaster area shall be the designated local entity for administration of the grant funds under this subpart.

§ 631.83 Coordination.

Funds made available under this subpart to Governors and units of general local government shall be expended in consultation with—

(a) Agencies administering programs for disaster relief provided under the Disaster Relief Act of 1974; and

(b) The JTPA title II administrative entity and the private industry council in each service delivery area within which disaster employment programs will be conducted under this subpart.

§ 631.84 Allowable projects.

Funds made available under this subpart to any unit of general local government in a disaster area—

(a) Shall be used exclusively to provide employment on projects that provide food, clothing, shelter and other humanitarian assistance for disaster victims; and on projects involving demolition, cleanup, repair, renovation, and reconstruction of damaged and destroyed structures, facilities, and lands located within the disaster area; and

(b) May be expended through public and private non-profit agencies and organizations engaged in such projects.

§ 631.85 Participant eligibility.

An individual shall be eligible for disaster employment under this subpart if such individual is—

(a)(1) Eligible to participate or enroll, or is a participant or enrolled, under Title III of the Act, other than an individual who is actively engaged in a training program; or

(2) Eligible to participate in programs or activities assisted under Native American and Migrant Programs; and

(3) Unemployed as a consequence of the disaster.

(b) [Reserved].

§ 631.86 Limitations on disaster relief employment.

No individual shall be employed under this subpart for more than 6 months for work related to recovery from a single natural disaster (described in § 631.3(f) of this part).

§ 631.87 Definitions.

As used in this subpart, the term *unit of general local government* includes:

(a) In the case of a community conducting a project in an Indian reservation or Alaska Native village, the grantee designated under the JTPA section 401 Indian and Native American Program (see part 632 of this chapter), or a consortium of such grantees and the State; and

(b) In the case of a community conducting a project in a migrant or seasonal farmworker community, the grantee designated under the JTPA section 402 Migrant and Seasonal Farmworker Program (see part 633 of

this chapter), or a consortium of such grantees and the State.

PART 632—INDIAN AND NATIVE AMERICAN EMPLOYMENT AND TRAINING PROGRAMS

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AUTHORITY: 29 U.S.C. 1579(a).

SOURCE: 48 FR 48754, Oct. 20, 1983, unless otherwise noted.

Subpart A—Introduction

§ 632.1 [Reserved]

§ 632.2 Scope and purpose.

It is the purpose of Native American programs to provide job training and employment activities consistent with the intent of title IV, part A, section 401. Such programs shall be administered in such a manner as to maximize the Federal commitment to support growth and development as determined by representatives of the communities and groups served by this section including furtherance of the policy of Indian Self-Determination.

§ 632.3 Format for these regulations.

Regulations promulgated by the Department of Labor to implement the provisions of title IV, section 401 and Indian programs under title II–B of the Act are set forth in 20 CFR part 632. This part in conjunction with part 636 contains all the regulations under the Act applicable to Indian and Native American programs.

§ 632.4 Definitions.

Act— means the Job Training Partnership Act (29 U.S.C. section 1501 et seq.).

Capital Improvement— means any modification, addition, restoration or other improvement:

(a) Which increases the usefulness, productivity, or serviceable life of an existing building, structure, or major item of equipment;

(b) Which is classified for accounting purposes as a ''fixed asset;'' and

(c) The cost of which increases the recorded value of the existing building, structure, or major item of equipment and is subject to depreciation.

Community Based Organization— means a private nonprofit organization which is representative of the Indian and Native American community or significant segments of the community and which provides employment and training services or activities.

Comprehensive Annual Plan (CAP)— means the annual update to the Master Plan. The CAP will identify the work plan and budget for the annual 401 and title II, part B funding allocations.

Construction— means the erection, installation, assembly or painting of a new structure or a major addition, expansion or extension of an existing structure and the related site preparation, excavation, filling and landscaping or other land improvements.

Contract— means a procurement instrument, other than a grant, by which the Department, a Native American grantee or a subgrantee acquires and pays for property, services, supplies, materials or equipment.

Contractor— means any person, corporation, partnership, public agency, or other entity which enters into a contract with the DOL, a Native American grantee or subgrantee under the Act.

Department— means the United States Department of Labor (DOL) including its agencies and organizational units.

Dependent— means any person for whom, both currently and during the previous 12 months, the participant has assumed 50 percent of the person's support.

DINAP—means the Division of Indian and Native American Programs of the Department of Labor.

DOL—means the U.S. Department of Labor.

Economically Disadvantaged—means an individual who (a) receives, or is a member of a family which receives, cash welfare payments under a Federal, State, or local welfare program; (b) has, or is a member of a family which has, received a total family income for the six-month period prior to application for the program involved (exclusive of unemployment compensation, child support payments, and welfare payments) which, in relation to family

size, was not in excess of the higher of (1) the poverty level determined in accordance with criteria established by the Department of Health and Human Services, or (2) 70 percent of the lower living standard income level; (c) is receiving food stamps pursuant to the Food Stamp Act of 1977; (d) is a foster child on behalf of whom State or local government payments are made; or (e) is a handicapped individual whose own income meets the requirements of paragraph (a) or (b) of this definition, but who is a member of a family whose income does not meet such requirements.

Entered Employment—means the act of securing unsubsidized employment for or by a participant.

Entry Level—means the lowest position in any promotional line, as defined locally by collective bargaining agreements, past practice, or applicable personnel rules.

Family—(a) means one or more persons living in a single residence who are related to each other by blood, marriage, or adoption. A step-child or a step-parent is considered to be related by marriage.

(b) (1) For purposes of paragraph (a) of this definition, one or more persons not living in the single residence but who are claimed as a dependent on another person's Federal Income Tax return for the previous year is presumed, unless otherwise demonstrated, to be part of the other person's family.

(2) A handicapped individual may be considered a family of one when applying for programs under the Act.

(3) An individual 18 years of age or older, except as provided in (b) (1) or (2) of this definition, who receives less than 50 percent of support from the family, and who is not the principal earner nor the spouse of the principal earner shall not be considered a member of the family. Such an individual shall be considered a family of one.

Family Income—means all income actually received from all sources by all members of the family for the six-month period prior to application. Family size is the maximum number of family members during the six-month period prior to application. When computing family income, income of a spouse and other family members is counted for the portion of the six-month period prior to application that the person was actually a part of the family unit.

(a) For the purposes of determining participant eligibility (and not for grantee allocations), family income includes:

(1) Gross wages, including CSE, Work Experience and OJT paid from JTPA funds, and salaries (before deductions);

(2) Net self-employment income (gross receipts minus operating expenses); and

(3) Other money income received from sources such as interest, net rents, OASI (Old Age and Survivors Insurance) social security benefits, pensions, alimony, and periodic income from insurance policy annuities, and other sources of income.

(b) Family income does not include:

(1) Non-cash income such as food stamps, or compensation received in the form of food or housing;

(2) Imputed value of owner-occupied property, i.e., rental value;

(3) Public assistance payments;

(4) Cash payments received pursuant to a State plan approved under titles I, IV, X or XVI of the Social Security Act, or disability insurance payments received under title II of the Social Security Act;

(5) Federal, State or local unemployment benefits;

(6) Capital gains and losses;

(7) One time unearned income, such as, but not limited to:

(i) Payments received for a limited fixed term under income maintenance programs and supplemental (private) unemployment benefits plans;

(ii) One-time or fixed-term scholarship and fellowship grants;

(iii) Accident, health, and casualty insurance proceeds;

(iv) Disability and death payments, including fixed term (but not lifetime) life insurance annuities and death benefits;

(v) One-time awards and gifts;

(vi) Inheritance, including fixed term annuities;

(vii) Fixed term workers' compensation awards;

(viii) Terminal leave pay;

(ix) Soil bank payments; and

(x) Agriculture crop stabilization payments;

(8) Pay or allowances which were previously received by any veteran while serving on active duty in the Armed Forces;

(9) Educational assistance and compensation payments to veterans and other eligible persons under chapters 11, 13, 31, 34, 35, and 36, of title 38, United States Code;

(10) Payments received under the Trade Act of 1974;

(11) Black Lung payments received under the Benefits Reform Act of 1977, Pub. L. 95–239, 30 U.S.C. 901;

(12) Child support payments; and

(13) Any income directly or indirectly derived from, or arising out of, any property held by the United States in trust for any Indian tribe, band or group or any individual; per capita payments; and services, compensation or funds provided by the United States in accordance with, or generated by, the exercise of any right guaranteed or protected by treaty; and any property distributed or income derived therefrom, or any amounts paid to or for any individual member, or distributed to or for the legatees or next of kin of any member, derived from or arising out of the settlement of an Indian claim.

Financial Assistance— means any grant, loan, or any other arrangement by which the Department or Native American grantee provides or otherwise makes available assistance in the form of:

(a) Funds;

(b) Services of Federal or Native American grantee personnel; or

(c) Real and personal property or any interest in or use of such property, including:

(1) Transfers or leases of such property for less than fair market value or for reduced consideration and

(2) Proceeds from a subsequent transfer or lease of such property if the Federal or Native American grantee share of its fair market value is not returned to the Federal Government or Native American grantee.

Governing Body— means a body consisting of duly elected or designated representatives, a body appointed by duly elected officials, or a body selected in accordance with traditional tribal means which has the authority to provide services to, and to enter into contracts, agreements and grants under this part on behalf of the organization or individuals who elected or designated them, elected the appointing official, or recognize the body selected in accordance with traditional tribal means.

Governor— means the chief executive of any State.

Handicapped Individual— means any individual who has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment.

Hawaiian Native— means any individual, any of whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii (Sec. 3(12)).

JTPA—means the Job Training Partnership Act.

Local Educational Agency (LEA)—means such an agency as defined in section 195(10) of the Vocational Educational Act of 1963. It shall further mean the governing bodies of any Bureau of Indian Affairs, tribal or reservation run agencies or school districts, or any nonprofit agency or tribally chartered entity providing educational services to Indian and Native American persons as determined by the Native American grantee.

Low Income Housing— means: (a) For weatherization or winterization projects, those dwellings occupied by persons whose family income does not exceed 125 percent of the poverty level and which are:

(1) Owned by the occupant;

(2) Publicly owned;

(3) Owned by a private nonprofit organization;

(4) Cooperatively owned; or

(5) For projects funded and approved by the Federal Energy Administration, privately owned rental housing.

(b) For rehabilitation as part of community revitalization or stabilization, housing built or improved with the assistance of Federal, State or tribal programs, and those dwellings occupied by persons whose family income does not exceed 80 percent of the median income for the area, in accordance with section

8(f)(1) of the United States Housing Act of 1937 (42 U.S.C. 1437f) and which are:

(1) Owned by the occupant;

(2) Publicly owned;

(3) Owned by a private nonprofit organization; or

(4) Cooperatively owned.

Lower Living Standard Income Level— means that income level (adjusted for regional, metropolitan, urban, and rural differences and family size) determined annually by the Secretary based on the most recent ''lower living family budget'' issued by the Secretary.

Master Plan— means the basic long term agreement between the Department and the Native American grantee. The master plan contains all basic eligibility determination and administrative information.

Native American Community Benefit— means the outcome of allowable activities undertaken for the advancement of economic and social development in the Indian, Alaskan Native, and Hawaiian Native communities consistent with their goals and life styles as determined by representatives of the community.

Offender— means any adult or juvenile who is or has been subject to any stage of the criminal justice process for whom services under this part may be beneficial or who requires assistance in overcoming artificial barriers to employment resulting from a record of arrest or conviction.

Older Worker— means a person who is 55 years of age or older.

Participant— means an individual who has:

(a) Been determined eligible for participation; and

(b) Started receiving employment, training or services (except post-termination services) funded under the Act, within 45 days of such determination.

Poverty Level— means the annual income level at or below which families are considered to live in poverty, as annually determined by the Department of Health and Human Services.

Program Income— means net income earned from grant or agreement supported activities. Such earnings include but are not limited to: income from service fees, sale of commodities, usage or rental fees, and royalities on patents or copyrights.

Program year— means that 12-month period of time during which job training activities and services and provided to participants.

Public Assistance— means Federal, State, tribal, or local government cash payments for which eligibility is determined by a need or income test.

Secretary— means the Secretary of Labor.

Similarly Employed— means that status of a person who is working for the same employer as the JTPA participant, is doing the same type of work, and is similarly classified with respect to employment status (e.g., full-time, permanent, or temporary).

State— means the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Northern Marianas Islands, American Samoa, and the Trust Territory of the Pacific Islands.

State Employment Security Agency (SESA)— means the State agency which exercises control over the Unemployment Insurance Service and the Employment Service.

Subgrantee— means any person, corporation, partnership, public agency, or other entity, excluding private for profits concerns, which enters into a grant with the Native American Grantee.

Underemployed Persons—means:

(a) Persons who are working part-time but seeking full-time work; or

(b) Persons who are working full-time but whose current annualized wage rate (for a family of one), or whose family's current annualized income, is not in excess of:

(1) The poverty level, or

(2) 70 percent of the lower living standard income level.

Unemployed Persons—means individuals who are without jobs and who want and are available for work. The determination of whether individuals are without jobs shall be made in accordance with the criteria used by the Bureau of Labor Statistics of the Department of Labor in defining individuals as unemployed.

Subpart B—Designation Procedures for Native American Grantees

§ 632.10 Eligibility requirements for designation as a Native American grantee.

(a) All funds specifically identified in the Act as reserved for the benefit of Indian and Native American participants shall be disbursed by the Department only to Native American grantees designated pursuant to this subpart. Except for FY 1984, designation will be for a period of two years.

(b) To be designated as a Native American grantee, an applicant must have:

(1) A governing body;

(2) For new grantees, an Indian or Native American population within its designated service area of at least 1,000 persons;

(3) The capability to administer an Indian and Native American employment and training program. For purposes of this paragraph, ''capability to administer'' means that the applicant can demonstrate that it possesses, or can acquire the managerial, technical, or administrative staff with the ability to properly administer government funds, develop employment and training opportunities, evaluate program performance and comply with the provisions of the Act and the regulations. In judging the applicant's request for designation, consideration shall be given to factors such as:

(i) Previous experience in operating an effective employment and training program serving Indians or Native Americans;

(ii) The number and kind of activities of similar magnitude and complexity that the applicant has successfully completed;

(iii) Information from other Federal agencies regarding program performance or financial and management capability.

(c) The Department will not designate an organization in cases where it is established that:

(1) The agency's efforts to recover debts (for which three demand letters have been sent) established by final agency action have been unsuccessful, or

(2) Fraud or criminal activity has been proven to exist within the organization, or

(3) The amount under the funding formulas will not total at least $120,000 in all JTPA funds for the first year of the two-year designation period. In the event that this amount cannot be determined at the time of the Department's decision on the request for designation, the amount shall be estimated in part by reference to the funding levels for Native American programs for the prior fiscal or program year. An applicant for designation shall be designated notwithstanding the limitation in this paragraph of this subsection if it demonstrates that:

(i) It has or expects to receive a combined total of $120,000 in funds or services for the first year of the 2-year designation period from JTPA and other human resource development programs, including but not limited to those providing for employment, education, vocational education, health, social or similar services; or

(ii) It is recognized and directly funded by Federal agencies, such as the Indian-serving agencies within the Departments of the Interior, Health and Human Services or Education as the primary service delivery organization for the provision of human resource development services to Indians or Native Americans within the organization's customary service area. This provision shall be interpreted consistent with the Federal policy established in Pub. L. 96–638, the Indian Self-Determination Act; or

(iii) It has demonstrated successful operation of an employment and training program at a level below $120,000 within the previous two years. For this purpose, success is the ability to adequately meet planned goals and stay within the grant's cost limits.

(4) For a consortium to be designated, it must submit the consortium agreement which meets the requirements of this subpart.

(d) Types of eligible Native American grantees:

(1) *Indian tribe, band or group.* The Department shall designate as a Native American grantee an Indian tribe, band or group which meets the requirements

in paragraphs (b) and (c) of this section.

(2) *Alaskan Native entity.* The Department shall designate as a Native American grantee an Alaskan Native entity as defined in the Alaskan Native Claims Settlement Act which meets the requirements in paragraphs (b) and (c) of this section.

(3) *Hawaiian Native grantee.* The Department may designate as a Native American grantee any private nonprofit organization or public agency representative of the Native Hawaiian community which meets the requirements in paragraphs (b) and (c) of this section and which the Department determines will best meet the needs of Native Hawaiians.

(4) *Public or private agencies.* The Department may designate as a section 401 grantee a private nonprofit organization or public agency which meets the requirements in paragraphs (b) and (c) of this section to serve areas where there are significant numbers of Indians or Native Americans, but where there are no Indian tribes, bands or groups, Alaskan Native entities or Hawaiian sponsors or consortia of such sponsors eligible for designation.

(5) *Consortium grantees.* The Department may designate as a Native American grantee a consortium of any of the types of grantees described in paragraphs (c), (1), (2), (3), and (4) of this section which may or may not be independently eligible. All such consortia shall meet the following requirements, in addition to the requirements in paragraphs (b) and (c) of this section:

(i) All the members shall be in geographic proximity to one another. A consortium may operate in more than one State.

(ii) An administrative unit shall be designated for operating the program, which may be a member of the consortium or an agency formed by the members. The administrative unit shall be delegated all powers necessary to administer the program effectively, including the power to enter into contracts and subgrants and other necessary agreements, to receive and expend funds, to employ personnel, to organize and train staff, to develop procedures for program planning, to monitor financial and program performance, and to modify the grant agreement through agreement with the Secretary. The right of reallocating funds within the consortium area shall be reserved to the consortium's members.

(iii) The consortium shall be the Native American grantee. The consortium agreement shall be signed by an official or officials of each member of the consortium authorized to enter into a binding consortium and shall specify that each member shall be liable jointly or separately for claims established against the grantee. Additional standardized requirements for consortium agreements will be communicated to grantees under separate order.

(e) In the situation where the Department does not designate Indian tribes, bands or groups or Alaska Native groups to serve such groups, the Department shall, to the maximum extent feasible, enter into arrangements for the provision of services to such groups with other types of section 401 grantees which meet with the approval of the Indian tribes, bands, groups or Alaska Native groups to be served (section 401(d)). In such cases, the Department shall consult with the governing body of such Indian tribes, bands, groups or Alaska Native groups prior to the designation of a Native American grantee.

(f) In designating Native American grantees to serve groups other than those in paragraph (e) of this section, such as nonreservation Indians and Native Hawaiians, the Department shall, whenever feasible, designate grantees which are directly controlled by Indian or Native American people. Where it is not feasible to designate such types of grantees, DINAP shall consult with Indian or Native American-controlled organizations in the area with respect to the designation of a Native American grantee. Where a private nonprofit organization is designated, DINAP shall require any such grantees not directly controlled by Indian or Native American people to establish a Native American Employment and Training Planning Council and to implement an Indian preference policy with respect to hiring of staff and contracting for services with regard to all funds provided pursuant to this part (sec. 7(b) of the

Indian Self-Determination and Education Assistance Act).

§ 632.11 Designation of Native American grantees.

(a) When designations are required and the potential grantee is not under a Master Plan agreement, an applicant for designation as a Native American grantee shall submit a notice of intent to apply for funds. Such notices of intent shall be postmarked by January 1 and be submitted to the Division of Indian and Native American Programs (DINAP), Employment and Training Administration, U.S. Department of Labor, 601 D Street NW., Washington, DC. 20213. Notices of intent may also be delivered to that office in person not later than the close of business on January 2 or the first business day of the designation year. Such notices of intent to apply shall be submitted on Standard Form 424 as a preapplication for Federal assistance. For applicants not under an active Master Plan agreement or the Master Plan agreement is due to expire during the year of designation, the following information shall be included in the notice of intent:

(1) Evidence that the applicant meets the requirements for a Native American grantee contained in § 632.10.

(2) A description of the geographic area or areas which the applicant proposes to serve, together with the Indian and Native American population in such areas, to the extent known. The description must include a list of States (if more than one), in alphabetical order, and under each State, a list of counties in alphabetical order, followed by a list of tribes, bands or groups (if any) in alphabetical order. If the applicant was a Native American grantee for the period prior to the one which is being applied for, the applicant must also list any counties and tribes, bands or groups which are being added to, or deleted from, the previous fiscal year's service area;

(3) A description of the applicant's organization, including the legal status of the applicant, the process of selection of the governing body, the duties and responsibilities of the governing body, and in the case of private non-profit organizations, a copy of the articles of incorporation;

(4) Evidence of the applicant's capability to operate an Indian or Native American employment and training program, including a statement of the applicant's past successes in operating programs for Indians or other Native Americans and a statement of the applicant's experience in managing the types of programs and activities allowable under the Act;

(5) A description of the planning process including employer involvement which the applicant proposes to undertake in developing a plan for the use of funds;

(6) Information related to a grantee's administrative responsibility. The DOL will conduct an independent review to determine whether each applicant is currently delinquent in repaying any DOL claims or has any outstanding administrative problems. Applicants are, therefore, encouraged to submit any documents related to these factors including documents and correspondence previously submitted to DOL. Submittal of such materials will enable DOL to move rapidly to complete the Notice of Intent and grantee designation review process.

(7) If the applicant is applying as a consortium, evidence that the consortium meets the requirements for a consortium in this part and a consortium agreement as specified in § 632.10(d)(5)(iii).

(b) If more than one organization submits a Notice of Intent for a geographic area, the Department will notify the organizations involved and conduct a special review for the area in question. The notice to the organizations will indicate any additional information needed and the review process to be followed.

(c) If the applicant for designation is a current grantee, under a master plan agreement, and there is no change in the service area requested, only the Standard Form 424 and a statement(s) indicating that to the best of the applicant's knowledge, it meets the requirements of § 632.10(c)(4) will be necessary and shall be submitted within the timeframe established in § 632.11(a).

(d) *Responsibility Review.* Prior to finally designating, conditionally designating or nondesignating the Department will conduct a review of the available records to determine whether or not the organization has failed any responsibility test. This review is intended to establish overall responsibility to administer Federal funds. With the exception of §632.11 (c)(1) and (c)(3), the failure to meet any one of the following responsibility test factors would not establish that the organization is irresponsible unless the failure is substantial or persistent. The responsibility tests are as follows:

(1) The agency's efforts to recover debts (for which three demand letters have been sent) established by final agency action have been unsuccessful, or failure to comply with an approved repayment plan.

(2) Serious administrative deficiencies have been identified in final findings and determination—such as failure to maintain a financial management system as required by Federal regulations.

(3) Established fraud or criminal activity exists within the organization.

(4) Wilfull obstruction of the audit process.

(5) Substantial failure to provide services to applicants as agreed to in a current or recent grant or to meet performance standards requirements as provided for and developed pursuant to §632.89.

(6) Failure to correct deficiencies brought to the grantee's attention in writing as a result of monitoring activities, reviews, assessments, etc.

(7) Failure to return a grant closeout package on outstanding advances within 90 days of expiration date or receipt of closeout package, whichever is later, unless an extension has been requested and granted; final billings reflecting serious cost category or total budget cost overrun.

(8) Failure to submit required reports.

(9) Failure to properly report and dispose of government property as instructed by DOL.

(10) Failure to have maintained cost controls resulting in excess cash on hand.

(11) Failure to procure or arrange for audit coverage for any two year period when required by DOL.

(12) Failure to audit subrecipient within the required period when applicable.

(13) Final disallowed costs in excess of five percent of the grant or contract award.

(14) Failure to establish a mechanism to resolve subrecipient's audit within established time frames.

(e) On March 1 of each designation year, the Department shall designate or conditionally designate Native American grantees for the coming two program years. Each applicant shall be notified in writing of the determination. Those applicants that are not designated in whole or in part as Native American grantees may appeal under the complaint procedures available for this part. Conditional designations will include the nature of the conditions and the actions required to be finally designated.

(Approved by the Office of Management and Budget and assigned OMB control number 1205–0213)

§632.12 Alternative arrangements for the provision of services, nondesignation.

(a) If no application for Native American grantee designation for an area is filed, or if the Department has denied such application for that area, the Department may designate and fund an entity to serve that area, pending the final resolution of any Petitions for Reconsideration or other actions taken pursuant to §632.13. An organization not designated in whole or in part may also appeal to an ALJ under the provisions of part 636. This further appeal will not in any way interfere with the Department's designation and funding of another organization to serve the area in question. The available remedy under such an appeal will be the right to be designated in the future rather than a retroactive or immediately effective designation status. Therefore, in the event the ALJ rules that the organization should have been designated and the organization continues to meet the requirements at §§632.10 and 632.11, the Department will designate the successful appellant organization and fund

within 90 days of the ALJ decision unless the end of the 90 day period is within six months of the end of the two year designation period. Any organization designated or funded for the area in question would be affected by this remedial action and undesignated. All parties must agree to this arrangement prior to funding. The alternate organization which loses its designation as a result of the application of this remedy may not appeal the undesignation.

(b) If the grant officer finally disapproves a CAP pursuant to § 632.21 he/she may withdraw the Native American grantee's designation and immediately designate another entity to serve the area, pending the final resolution of any Petitions for Reconsideration or other actions taken pursuant to part 636.

(c) If a Native American grantee's CAP is terminated or suspended in whole or in part, the Department (after an opportunity for a hearing except in emergency situations as described in section 164(f) of the Act) may designate another entity to serve the area.

(d) If it is not feasible for the Department to designate another entity to serve the area under the conditions described in paragraphs (a), (b), and (c) of this section, the funds involved may be distributed at the Secretary's discretion to Native American grantees serving other areas.

§ 632.13 Review of denial of designation as a Native American grantee, or rejection of a Comprehensive Annual Plan.

(a) An applicant for designation as a Native American grantee which is refused such designation in whole or in part may file a Petition for Reconsideration with the Grant Officer within 14 days of receipt of a letter from the Department indicating its failure to be designated as a Native American grantee.

(1) A Petition for Reconsideration shall be in writing, shall be signed by a responsible official of the applicant entity, and shall enumerate the factors which the applicant entity asserts should be reviewed by the Grant Officer in reconsidering the denial of its application.

(2) Upon receipt of the Petition for Reconsideration, the Grant Officer shall, within 30 days, make one of the following determinations:

(i) That based on the available information from the original request for designation and information supplied in the Petition for Reconsideration, the applicant entity should be designated as a Native American grantee;

(ii) That the original determination made was correct; or

(iii) That an informal conference between representatives of the applicant entity and the Grant Officer shall be held at a specified time and place to discuss the Petition for Reconsideration.

(3) If an informal conference is held, the applicant entity shall have the opportunity to present any pertinent information which may further substantiate its petition. The Grant Officer shall notify the applicant entity of its final decision within 14 days after the informal conference is held.

(4) All final determinations of the Grant Officer, which deny a Petition for Reconsideration, shall be in writing, shall state the reasons for the denial, shall be sent to the applicant by certified mail, return receipt requested, and shall notify the applicant entity that, within 21 days of its receipt of the notice, it may request a hearing pursuant to part 636.

(b) A designated Native American grantee whose CAP has been rejected may file a Petition for Reconsideration pursuant to paragraph (a) of this section. Such petitions shall be handled under the procedures described in paragraph (a) of this section.

Subpart C—Program Planning, Application and Modification Procedures

§ 632.17 Planning process.

(a) Each Native American grantee shall establish a planning process for the development of its Master Plan and Comprehensive Annual Plan. This planning process shall involve consideration of the need for job training and employment services, appropriate means of providing needed services and methods of monitoring and assessing the services provided. Recognizing the

importance of employer involvement in designing and implementing programs, each Native American grantee shall involve employers in program planning.

(b) (1) Each Native American grantee's planning process shall involve consultation with major employers or organizations representing employers inside the grantee's designated service or surrounding labor market area. Such consultation shall include consideration of the opportunities for placement of program participants and the design of training activities and related services.

(2) A description of the procedures used for this consultation shall be included in the grantee's Master Plan. The results of the consultation shall be described in the grantee's Comprehensive Annual Plan.

(3) Native American grantees are encouraged to establish or to use existing formal advisory councils, such as Private Industry Councils, as vehicles for such consultation. Grantees are also encouraged to use all appropriate mechanisms, including Tribal Employment Rights Offices (TEROs), to insure maximum opportunity for the placement of participants in unsubsidized employment.

(4) A Native American grantee will not be held responsible for the refusal of any employer or organization representing employers to engage in the consultation process described in this section.

(c) In addition to the requirement in paragraph (b) of this section, the planning process shall provide the opportunity for the involvement of the client community, service providers (such as appropriate community-based organizations) and educational agencies, tribal agencies or other Indian and Native American organizations whose programs are relevant to the provision of job training services within the grantee's service area.

§ 632.18 Regional and national planning meetings.

Grant funds may be used for holding regional and national planning meetings, subject to restrictions of allowable costs.

§ 632.19 Grant application content.

The basic document will be a four year Master Plan which will be supplemented each fiscal year by submission and approval of a Comprehensive Annual Plan (CAP). The Master Plan and CAP system will be implemented for 1985 or the first designation period following the FY 1984 designations. Each designated grantee will be informed of and provided the necessary documents and requirements in sufficient time to complete grant actions without interrupting services to participants.

§ 632.20 Submission of grant application.

(a) Beginning with 1985 or the first designation period after 1984, a Master Plan must be submitted by a date and pursuant to instructions issued by the Department. The approved Master Plan will remain in effect for four years unless terminated. During the fourth year of the Master Plan a new Master Plan must be submitted by a date and pursuant to instructions issued by the Department.

(b) Each year a completed CAP is to be submitted for approval by registered mail to the Chief, DINAP by a date and pursuant to instructions announced by the Department. The CAP will be approved by DINAP if it is consistent with the basic provisions or the Master Plan and applicable regulations and formal directives.

§ 632.21 Application disapproval.

(a) A CAP shall be disapproved by the Grant Officer if it fails to meet the requirements of the Act or the regulations.

(b) No CAP shall be finally disapproved until the designated Native American grantee is provided with a description by the Chief, DINAP in writing of the CAP's defects and has been provided with at least 30 days to remedy such defect(s), but has failed to do so.

(c) When a CAP is finally disapproved a notice of disapproval shall be transmitted by certified mail, return receipt requested, to the applicant, accompanied by a statement of the grounds of the disapproval and a statement that the applicant may file a Petition

for Reconsideration with respect to the disapproval.

§ 632.22 Modification of a Comprehensive Annual Plan (CAP) and/or Master Plan.

(a) The requirements for modifying a Master Plan and/or CAP will be included in administrative instructions issued by the Grant Officer upon final implementation of the Master Plan/CAP system.

(b) Prior to implementing the Master Plan/CAP system, a formal modification will be required when:

(1) There is a change of at least 25 percent or $25,000 (whichever is greater) in any cost category; or

(2) There is a change of at least 25 percent or 25 individuals (whichever is greater) in the number of individuals to be served in any category of program activity.

(c) The documentation to be submitted to the DINAP Federal Representative requesting such a modification shall consist of a letter explaining the need for the change and four copies of the proposed modification.

(d) The Grant Officer should notify the Native American grantee of tentative approval or disapproval within 10 calendar days of receipt of the proposed modifications. The Grant Officer should notify the Native American grantee in writing of final approval or disapproval within 30 calendar days of the receipt of the proposed modification.

(e) A Native American grantee may make any change in its Program Planning Summary and Budget Information Summary without prior approval, except as provided in this section.

(f) Native American grantees shall notify DINAP by submitting a modification whenever there is a change in a name, address, or other similar information.

(g) The Department will unilaterally modify a grant when a simple funding or performance period increase is required and it is consistent with the approved plan.

(Approved by the Office of Management and Budget and assigned OMB control number 1205–0213)

§ 632.23 Termination and corrective action of a CAP and/or Master Plan.

(a) *Emergency Termination.* The Department may terminate or suspend a CAP designation or Master Plan under emergency termination procedures in accordance with section 164(f) of the Act. The provisions in part 636 shall not apply in instances of emergency termination.

(1) Instances under which emergency termination can occur include but are not limited to: Audit reports identifying numerous adverse findings in the area of financial control and management; information gathered through onsite monitoring which substantiates serious management, fiscal and/or performance problems, information from the Inspector General or gained through incident reports of poor performance, serious administrative problems and/or inability to protect and account for Federal funds.

(2) Within 30 days of written termination notification to a grantee, the Department will secure applicable documents onsite, seize bank accounts relating to the program, arrange for the payment of legitimate bills and debts and arrange, to the degree feasible, for the continued provision of services to program enrollees.

(b) *Termination for Cause.* Termination for cause can occur whenever there is a substantial or persistent violation of the governing rules and regulations or failure to comply with the grant terms and conditions. The following factors will be considered for termination:

(1) Poor performance and inability to meet Federal standards related to such debt collection requirements as:

(i) Failure to respond to demand letters from DOL for repayment of debts within the stated timeframe;

(ii) Failure to comply with an approved repayment agreement revealed through monitoring or subsequent audit;

(iii) Failure to take necessary corrective action to improve underperformance and to plan for more effective subsequent operations.

(2) Nonperformance related to such requirements as:

(i) Failure to submit required quarterly financial reports for two successive periods within 45 days after they are due;

(ii) Failure to submit required quarterly performance reports for two successive periods within 45 days after they are due;

(iii) Failure to develop a plan of action to correct deficiencies identified in an audit report or by an onsite monitoring review.

(3) Nonperformance related to such requirements as:

(i) Failure to comply with formal corrective action after due notice;

(ii) Failure to comply with the requirements of the Act related to a grievance procedure and other requirements;

(iii) Failure to submit a required modification within 10 days to adjust the grant award due to reduction in available funds, reductions due to debt collection action, etc.

(c) In addition, the Department, by written notice, may terminate a grant in whole or in part in the event of a reduction in the funds available or a change in provisions for JTPA title IV, section 401 programs by reason of congressional action.

Subpart D—Administrative Standards and Procedures

§ 632.31 General.

(a) This subpart describes requirements relating to the administration of grants by Native American grantees. Administrative requirements found in this subpart apply to all programs under the Act unless stated to the contrary for any specific program.

(b) As referenced in this subpart, the requirements set forth in 41 CFR parts 29–70, ''Administrative requirements governing all grants and agreements by which Department of Labor agencies award funds to State and local governments, Indian and Native American entities, public and private institutions of higher education and hospitals, and other quasi-public and private nonprofit organizations,'' shall apply to grants under JTPA. Whenever the provisions of 41 CFR part 29–70 conflict with the provisions of part 632, the provisions of part 632 shall prevail.

(1) The requirements in 41 CFR 29–70.1 set forth the policies which apply to all basic grants and agreements.

(2) The requirements in 41 CFR 29–70.2 implement OMB Circular Nos. A–102 and A–110, and apply to all JTPA grants and agreements unless otherwise indicated in these regulations.

§ 632.32 Financial management systems.

(a) Each Native American grantee, subgrantee and contractor shall maintain a financial management system which will provide accurate, current and complete disclosure of the financial transactions under each grant, subgrant or contract activity, and will enable each Native American grantee, subgrantee or contractor to evaluate the effectiveness of program activities and meet the reporting requirements of this subpart.

(b) Each Native American grantee, subgrantee and contractor shall maintain its financial accounts so that the reports required by the Department may be prepared therefrom.

(c) To be acceptable for audit under this subpart, a Financial Status Report shall be:

(1) Current as of the cut-off date of the audit;

(2) Taken directly from or linked by worksheet to the Native American grantee's books of original entry; and

(3) Traceable to source documentation of the unit transaction.

§ 632.33 Audits.

(a) *General.* The audit provisions of 41 CFR part 29–70 shall apply to Native American grantees. Until unified or single audit procedures are promulgated and implemented for nonprofit entities, the Office of the Inspector General shall be responsible for arranging and conducting audits of Native American grantees that are not Indian tribal governments.

(b) *Audit reports.* Upon receipt of a final audit report the Inspector General will promptly transmit the audit report to the grantee for a comment period not to exceed 30 days.

(c) *Initial Determination.* After the conclusion of the comment period for audits provided the grantee, the Grant

Officer shall make an initial determination of the allowability of questioned costs or activities. Such determination should be based on the Act, regulations grants or other agreements under the Act.

(d) *Informal resolution.* Except as provided in section 164(f) of the Act, the Grant Officer shall not revoke a grant, in whole or in part, nor institute corrective action or sanctions against a grantee without first providing the grantee with an opportunity to informally resolve those matters contained in the Grant Officer's initial determination. If the matters are informally resolved the Grant Officer shall notify the parties in writing of the nature of the resolution, which shall constitute the final determination, and may close the file.

(e) *Final determination.* The Grant Officer shall, not later than 180 days from the time the Inspector General issues the final approved audit report, issue a final determination that:

(1) Indicates that efforts to informally resolve matters contained in the initial determination pursuant to paragraph (a) of the section have been unsuccessful.

(2) Lists those matters upon which the parties continue to disagree.

(3) Lists any modifications to the factual findings and conclusions set forth in the initial determination.

(4) Lists any sanctions, and required corrective actions, including any other alteration or modification of the plan, grant, agreement or program intended by the Grant Officer.

(5) Sets forth any appeal rights.

§ 632.34 Program income.

(a) *General.* The provisions of 41 CFR 29–70.205, program income and interest earned, shall apply to Native American grantee programs.

(b) Income generated under any program may be retained by the recipient to continue to carry out the program, notwithstanding the expiration of DOL financial assistance for that program.

(c) *Special provisions.* Income earned as a result of activities of JTPA participants by an income generating enterprise, which is owned by an Indian tribe, band or group or an Alaskan native entity, and the profits of which are used exclusively for governmental, charitable, educational, civic, social or other similar purposes, may be retained by such enterprise and used in the same manner as other income of such enterprise.

§ 632.35 Native American grantee contracts and subgrants.

(a) Contracts may be entered into between the Native American grantee and any party, public or private, for purposes set forth in the JTPA.

(b) Subgrants may be entered into between the Native American grantee and units of State and local general government, Indian tribal government, public agencies or nonprofit organizations.

(c) The Native American grantee is responsible for the development, approval and operation of all contracts and subgrants and shall require that its contractors and subgrantees adhere to the requirements of the Act, the regulations under the Act, and other applicable law. It shall also require contractors and subgrantees to maintain effective control and accountability over all funds, property and other assets covered by the contract or subgrant.

(d) Each Native American grantee shall take action against its contractors and subgrantees to prevent or eliminate violations of the regulations, and to prevent misuse of JTPA funds.

(e) Subgrantees are entitled to funding for administrative costs. The amount of such funding will be determined during the development of subgrants subject to the overall administrative costs of the grant.

(f) If a contract or subgrant is cancelled in whole or in part, the Native American grantee shall develop procedures for ensuring continuity of service to affected participants to the extent feasible.

(g) The Native American grantee may enter into contracts or subgrants which extend past the expiration date of the CAP but such extension shall not exceed 6 months. In such cases, the grantee shall continue to be responsible for the administration of such contracts and subgrants.

(h) To the extent feasible, Native American Indian grantees shall give preference in the award of contracts

and subgrants to Indian organizations and to Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (25 U.S.C. 1452). Any contract or subgrant made by a Native American grantee shall require that, to the greatest extent feasible, preference and opportunities for training and employment in connection with such contract or subgrant shall be given to qualified Indians regardless of age, religion or sex and that the contractor or subgrantee shall comply with any Indian preference requirements established by the Native American grantee. All grantees, subgrantees and contractors shall include the requirements of this paragraph in all subcontracts and subgrants made by them (sec. 7(b) of the Indian Self-Determination and Education Assistance Act, Public Law 93–638 (25 U.S.C. 450 et seq)).

(i) The Native American grantee shall ensure that contractors and subgrantees maintain and make available for review by the grantee and the Department of Labor all records pertaining to the operations of programs under such contracts and subgrants consistent with the maintenance and retention of record requirements in 41 CFR parts 29–70.

§ 632.36 Procurement standards.

(a) Native American grantees shall comply with the procurement systems and procedures found in 41 CFR 29–70.216, Procurement standards.

(b) Subject to the Indian preference provisions of § 632.35(h), small and minority-owned businesses, including small businesses owned by women, within the service area of the Native American grantee, shall be provided maximum reasonable opportunity to compete for contracts for supplies and services. One means to provide for this is the use of set-asides.

(c) No funds shall be paid by the Native American grantee to any organization for the conduct of programs under the Act unless:

(1) It has submitted an acceptable proposal;

(2) Selection is performed on a merit basis;

(3) It has not been seriously deficient in its conduct of, or participation in, any Department of Labor program in the past, or is not a successor organization to one that was seriously deficient in the past, unless the organization statisfactorily demonstrates that the deficiency has been or will be corrected and performance substantially improved; and

(4) It has the administrative capability to perform effectively.

§ 632.37 Allowable costs.

(a) *General.* To be allowable, a cost must be necessary and reasonable for proper and efficient administration of the grantee's program, be allocable thereto under these principles, and, except as provided herein, not be a general expense required to carry out the overall responsibilities of the grantee. Costs charged to the program shall be consistent with those normally allowed in like circumstances and, with applicable State and local law, rules or regulations as determined by the Native American grantee.

(b) Unless otherwise indicated below, direct and indirect costs shall be charged in accordance with 41 CFR 29–70 and 41 CFR 1–15.7.

(c) Costs associated with repairs, maintenance, and capital improvements of existing facilities used primarily for programs under the Act are allowable. Additionally, the costs of home repair, weatherization and rehabilitation are allowable when the work is performed on low income housing as defined in § 632.4.

(d) Section 401 funds may be used to pay the cost of incorporating a PIC, other planning body or consortium administrative entity for the purpose of carrying out programs under the Act. These costs are chargeable to administration.

(e) Costs which are billed as a single unit charge do not have to be allocated or prorated among the several cost categories but may be charged entirely to training when the agreement:

(1) Is for classroom training;

(2) Is fixed unit price; and

(3) Stipulates that full payment for the full unit price will be made only upon completion of training by a participant and placement of the participant into unsubsidized employment in the occupation trained for and at not

less than the wage specified in the agreement.

§ 632.38 Classification of costs.

Allowable costs shall be charged against the following four cost categories: Administration; training, employment and other (including supportive services).

(a) Costs are allocable to a particular cost category to the extent that benefits are received by such category.

(b) The Native American grantee is required to plan, control and charge expenditures against the aforementioned cost categories.

(c) The Native American grantee is responsible for ensuring that, at a minimum, subgrant or subcontract recipients plan, control, and charge expenditures against the aforementioned cost categories.

(d) Administrative costs consist of all direct and indirect costs associated with the management of the grantee's program. These costs include but are not limited to: the salaries and fringe benefits of personnel engaged in executive, fiscal, data collection, personnel, legal, audit, procurement, data processing, communications, maintenance, and similar functions; and related materials, supplies, equipment, office space costs, and staff training. Also included are salaries and fringe benefits of direct program administrative positions such as supervisors, program analysts, labor market analysts, and project directors. Additionally, all costs of clerical personnel, materials, supplies, equipment, space, utilities, and travel which are identifiable with these program administration positions are charged to administration.

(e) Training costs consist of goods and services which directly affect program participants in a training activity. Training costs include, but are not limited to, the following: the costs associated with on-the-job training, salaries, fringe benefits, equipment and supplies of personnel engaged in providing training; books and other teaching aids; equipment and materials used in providing training to participants; classroom space and utility costs; employability assessment; job related counseling for participants; job search assistance and labor market orientation; participant allowances, and tuition and entrance fees which represent instructional costs which have a direct and immediate impact on participants. In addition, 250 hours of youth try-out employment is considered an allowable training cost. Youth try-out employment is that which meets the requirements of § 632.78.

(f) The compensation of individuals who both instruct participants and supervise other instructors must be prorated among the training and administration cost categories on the basis of time records or other equitable means. Similarly, tuition fees, and the costs of supplies used in the course of both participant instruction and other activities should be prorated among the benefitting uses.

(g) Employment costs consist of those costs associated with community service employment and work experience as described in § 632.79.

(h) Other costs include supportive services, services which are necessary to enable an individual to participate in training and assistance under this part, and those described in § 632.80.

(i) Costs which are not readily assignable to the training or employment cost category should be charged to either the administration or other category as appropriate.

(j) Unemployment compensation costs are allowable for administrative staff hired in accordance with the administrative provisions of this part, and for CSE participants. Unemployment compensation costs are allowed for work experience only where required by State law.

(k) *Travel costs.* (1) The cost of participant travel and staff travel necessary for the administration of programs under the Act are allowable costs, chargeable to the proper cost category, and must follow standard Federal travel requirements.

(2) Travel costs of Native American grantee officials, including staff, board members, and advisory council members are allowable if the travel and costs specifically relate to programs under the Act. These costs will be charged to administration. Travel costs for officials of tribes or organizations belonging to a consortium require advance written approval from

the Chief, DINAP, unless they are also officials of the Native American grantee organization.

(3) Travel costs for participants using their personal vehicles in the performance of their jobs are allowable if the employing agency normally reimburses its other employees in this way. These costs shall be charged to supportive services.

(4) Travel costs to enable participants to obtain employment or to participate in programs under the Act are allowable as supportive services.

(l) *Allocation of fixed unit charge.* (1) When contractors or subgrantees bill the Native American grantee with a single unit charge containing costs which are chargeable to more than one cost category, the Native American grantee shall charge these costs to the cost categories in §632.38. For unit charges such as tuition fees for which the necessary detail cannot be provided, a reasonable estimate of the breakdown of the single unit charge among cost categories in §632.38 will be sufficient, including for audit purposes. When such unit charges are normally billed as a single charge and the cumulative amount of such charges to a service provider does not exceed $25,000 within the grant year, proration will not be required. These costs may be charged to the category receiving the most benefit.

(2) The provisions of this section shall not apply to vendors selling or leasing equipment and attendant service at a commercially established rate to Native American grantees or subgrantees.

(3) In the case of multiuse equipment there must be a proration of costs or, if there is a predominant usage relating to one cost category, a charge shall be made to that category.

(4) Any single cost, such as staff salaries or fringe benefits, which is properly chargeable to more than one cost category shall be prorated among the affected categories.

§632.39 Administrative cost plan.

(a) All administrative funds for all programs operated under separate sections of the Act by a Native American grantee may be accounted for separately and be allocated by title and program activity or may be pooled into one fund. Planned expenditures from the fund shall be described in a separate section of the CAP.

(b) The administrative cost plan may be modified during the program year.

§632.40 Administrative staff and personnel standards.

(a) *Staffing.* Members of the population to be served shall be provided maximum employment opportunities at all levels of the JTPA grantee administration. Native American grantees shall establish systems to enhance the recruitment and hiring of qualified Indian and Native Americans and to provide opportunities for their further occupational training and career advancement.

(b) *Compensation.* Compensation for administrative staff shall be at levels consistent with generally accepted business practices in the area. Such administrative wages, salaries, and fringe benefits are allowable administrative costs under JTPA.

(c) *Basic personnel standards.* All grantee employees, including participants, engaged in the administration of programs under the Act shall be subject to the policies and methods of personnel administration as formally established by the Native American grantee.

(d) *Bonding.* Native American grantees shall comply with the bonding requirements at 41 CFR 29–70.202b.

§632.41 Reporting requirements.

Within 45 days of the end of each quarter, a Native American grantee shall submit to the Chief, DINAP by registered mail, financial and program reports. Accuracy of all reports must be verified by the chief executive officer or financial officer. When estimates are used the verification statement will so state. The exact reports to be submitted and reporting instructions as approved by the Office of Management and Budget will be announced to Native American grantees under separate order.

§632.42 Grant closeout procedures.

Grant closeout will conform to the requirements at 41 CFR part 29–70. As

necessary, the Secretary shall issue supplementary closeout requirements.

§ 632.43 Reallocation of funds.

When the DINAP determines that reallocation is appropriate, it shall give the Native American grantee 30-day notice of proposed action to remove funds from the grant. Such notice shall include specific reasons for the action being taken, and shall give the Native American grantee the opportunity to submit comments on the proposed reallocation of funds. These comments shall be submitted to DINAP within 30 days from the date of the notice. DINAP shall notify affected Native American grantees on any decision to reallocate funds. The Grant Officer shall finally reallocate by modifying the CAP.

§ 632.44 Sanctions for violation of the Act.

(a) Pursuant to sections 164 (d), (e), (f), (g), and (h) of the Act, the Secretary may impose appropriate sanctions and corrective actions for violations of the Act, Regulations, or grant terms and conditions. Additionally, sanctions may include the following:

(1) Offsetting debts, arising from misexpenditure of grant funds, against amounts to which the grantee is or may be entitled under the Act, except as provided in section 164(e)(1) of the Act. The debt shall be fully satisfied when the Secretary reduces amounts allotted to the grantee by the amount of the misexpenditure; and

(2) Determining the amount of Federal cash maintained by the grantee or its subgrantee or contract or in excess of reasonable grant needs, establishing a debt for the amount of such excessive cash, and charging interest on that debt.

(b) Except for actions under section 164(f) and 167 of the Act, to establish a debt or violation subject to sanction and/or corrective action, the Secretary shall utilize initial and final determination procedures outlined in part 636.

(c) To impose a sanction or corrective action regarding a violation of section 167 of the Act, the Secretary shall utilize the procedures of 29 CFR part 31.

(d) (1) The Secretary shall hold the grantee responsible for all funds under the grant. The grantee shall hold its subgrantees and contractors responsible for JTPA funds received through the grant.

(2) The Secretary shall determine the liability of the grantee for misexpenditures of grant funds in accordance with section 164(e) of the Act, including the requirement that the grantee shall have taken prompt and appropriate corrective actions for misexpenditures by a subgrantee or contractor.

(3) Prompt, appropriate, and aggressive debt collection action to recover any funds misspent by subgrantees or contractors ordinarily shall be considered a part of the corrective action required by section 164(e)(2)(D) of the Act.

(4) In making the determination required by section 164(e)(2) of the Act, the Secretary may determine, based on a request from the grantee, that the grantee may forego certain collection actions against a subgrantee or contractor where that subgrantee or contractor was not at fault with respect to the liability criteria set forth in section 164(e)(2)(A) through section 164(e)(2)(D) of the Act. The Secretary shall consider such requests in assessing whether the grantee's corrective action was appropriate in light of section 164(e)(2)(D) of the Act.

(5) The grantee shall not be released from liability for misspent funds under the determination required by section 164(e) of the Act until the Secretary determines that further collection action, either by the grantee or subgrantee or contractor, would be inappropriate or would prove futile.

(e) Nothing in this section shall preclude the Secretary from imposing a sanction directly against a subgrantee or contractor as authorized in section 164(e)(3) of the Act. In such a case, the Secretary shall inform the grantee of the Secretary's action.

Subpart E—Program Design and Management

§ 632.70 Waiver of regulations under Parts 632 and 636.

(a) A Native American section 401 grantee may request, and the Assistant Secretary of Labor for Employment and Training may grant, a waiver of specific provisions of 20 CFR Parts 632 and 636, or of any applicable administrative issuance, to the extent that such request is consistent with the provision of the Act.

(b)(1) In requesting a waiver under this section, the Native American section 401 grantee shall demonstrate how it will enhance the provision of services or outcomes to participants, which may include, but are not limited to, the following purposes: improving the targeting of services to the hard-to-serve; increasing the level of basic and occupational skills training provided by the JTPA program; contributing to the provisions of academic enrichment services to youth; promoting coordination of JTPA programs with other human resources programs; or substantially improving the job placement outcomes of the JTPA program.

(2) The request shall describe the regulatory requirements to be waived and demonstrate how such requirements impede the enhancement of the services and outcomes described in paragraph (b)(1) of this section.

(3) The waiver request shall indicate how the grantee will modify its planning documents as a result of the waiver.

(c) A waiver shall not be granted for:

(1) Any statutory requirement;

(2) The formula for allocation of funds;

(3) Eligibility requirements for services as provided in this part;

(4) Requirements for public health or safety, labor standards, civil rights, occupational safety or health, or environmental protection; or

(5) Prohibitions or restrictions relating to construction of buildings or facilities.

(d) Waivers granted shall be effective for no more than four years from the date the waiver is granted.

[60 FR 58229, Nov. 27, 1995]

§ 632.75 General responsibilities of Native American grantees.

This subpart sets out program operation requirements for Native American grantees including program management, linkages, coordination and consultation, allowable activities, participant benefits and duration of participation provisions. It also sets forth the responsibilities of Native American grantees with respect to nondiscrimination and equitable provision of services.

§ 632.76 Program management systems.

(a) All Native American grantees shall establish management information systems to control and assess all programs. Native American grantees must institute and maintain effective systems for the overall management of all programs including:

(1) Eligibility verification systems as described in § 632.77;

(2) Complaint and hearing procedures as described in part 636; and

(3) Mechanisms for taking immediate corrective action where problems have been identified and for restitution of JTPA funds for improper expenditures.

(b) All Native American grantees shall establish and maintain financial management and participant tracking systems in accordance with § 632.32 and § 632.77. The principal objectives of such systems shall be to provide the Native American grantee with systems necessary to effectively manage its program and to provide information necessary to design program activities and delivery mechanisms and complete Federal required reports.

(c) Each Native American grantee shall establish and use procedures for the continuous, systematic assessment of program performance in relation to the performance standards and goals contained in its CAP.

(d) Native American grantees shall establish and use procedures whereby the information collected and assessments conducted shall be considered in subsequent program planning and in the selection of service deliverers.

§ 632.77 Participant eligibility determination.

(a) Each Native American grantee, and any subgrantees or contractors assigned responsibility for the determination of participant eligibility, shall be responsible for developing and maintaining a system which reasonably ensures an accurate determination and subsequent verification of eligibility based on the information presented at the time of application.

(b) The ultimate responsibility for the selection of participants and the maintenance of participant records rests with the Native American grantee. However, the Native American grantee may assign the administration of this responsibility to subgrantees of contractors. The selected agency must provide adequate documentation of each participant's eligibility and retain in the participant's folder the information on which this determination is based.

(c) The eligibility determination shall be based upon a signed, completed, application form which records all information necessary to determine eligibility, which attests that the information on the application is true to the best of the applicant's knowledge and acknowledging that such information is subject to verification and that falsification of the application shall be grounds for the participant's termination and may subject the applicant to prosecution under law. In the case of an applicant who is a minor (except minors who are emancipated or heads of households), the signature of the parent, responsibile adult or guardian is also required.

(d) Native American grantees shall maintain documentation to ensure the credibility of the eligibility determination, which shall at a minimum:

(1) Include a completed application for participation;

(2) Include records of all actions taken to correct deficiencies in the eligibility determination procedures; and

(3) Show compliance with section 504 of the Act.

(e) A participant determined to be ineligible shall immediately be terminated.

(f) A Native American grantee may enter into an agreement with a State employment security agency (SESA) or other independent agency or organization as may be approved by the Department, for the verification of applicant eligibility within 45 days of enrollment. The Native American grantee shall monitor such verification procedures to ensure that erroneous verifications are not made deliberately or with insufficient care.

(g) Participants may be transferred from one JTPA program to another, from one Native American grantee to another, from a Native American grantee to a SDA grant recipient, from a SDA grant recipient to a Native American grantee, or concurrently enrolled in programs sponsored by Native American grantees or SDA grant recipients, provided, except for age requirements, they were eligible for the subsequent or concurrent program when they were first enrolled.

(h) Eligibility determinations for each program shall be made at the time of application. Applicants determined eligible may be enrolled as participants within 45 days of the date of the application without an update of the information on the application provided they did not obtain full-time permanent unsubsidized employment in the interim. This provision does not appy to the title II–B program.

(i) Aliens described in section 167(a)(5) of the Act and who otherwise meet the eligibility requirements for programs under this part, may participate in a program if this is permitted by Indian law or the Native American grantee.

§ 632.78 Training activities.

Native American grantees shall design and operate programs funded under the Act which support growth and development as determined by representatives of the Indian and Native American communities and groups served (sec. 401(a)). Training shall be only for occupations for which there is a demand in the area served or in another area to which the participant is willing to relocate, and consideration in the selection of training programs may be given to training in occupations determined to be in sectors of the economy which have a potential for sustained demand or growth. The CAP

will provide evidence based on local labor market information that occupational demand exists for planned training. The basic types of training activities available to Native American grantees, subgrantees and contractors include, but are not limited, to the following:

(a) *Classroom training.* This program activity is any training of the type normally conducted in an institutional setting, including vocational education, and designed to provide individuals with the technical skills and information required to perform a specific job or group of jobs. It may be coupled with other employment and training activities and may also include training designed to enhance the employability of individuals by upgrading basic skills, through the provision of courses such as remedial education, GED, training in the primary language of persons with limited English-speaking proficiency, or English-as-a-second-language training.

(b) *On-the-job training.* (1) On-the-job training (OJT) is training in the private or public sector given to a participant, who has been hired first by the employer, and which occurs while the participant is engaged in productive work which provides knowledge or skills essential to the full and adequate performance of the job. This does not preclude a participant who has been hired by and received OJT from one employer from being ultimately placed with another employer. Innovative approaches to financing, particularly involving the sharing of training costs by the private sector are to be encouraged.

(2) OJT may be coupled with other JTPA employment and training activities. As needed, OJT participants may receive any of the employment and training services or supportive services through the system, through community resources, or through employer resources.

(3) *Reimbursement.* Payments to employers for OJT which shall not, during the period of such training, average more than 50 percent of the wages excluding fringe benefits paid by the employer to such participants, and payments in such amount shall be deemed to be in compensation for the extraordinary costs associated with the training costs and lower productivity of such participants. No direct wage payments will be made to OJT participants by the Native American Grantee.

(4) *OJT agreements.* Employers will be held responsible with respect to JTPA costs only in accordance with the provisions of their OJT agreements. At a minimum, the OJT agreement shall contain the elements listed below. Native American grantees may place additional provisions in the OJT agreement only after a careful assessment is made of the additional burdens imposed on participating employers. Agreements may be entered into only with employers which have not been seriously deficient in their conduct of or participation in any DOL program. Each OJT agreement shall contain:

(i) A brief training outline, including the length of training and the nature of the training;

(ii) The method and maximum amount of reimbursement for OJT training costs;

(iii) The number of participants to be trained;

(iv) Job descriptions and specification of participant wage rates;

(v) Reporting requirements;

(vi) An assurance that payroll records, time and attendance records, job duties and documentation of classroom training, employment and training services, or supportive services, costs for which the employer is being reimbursed will be subject to review;

(vii) A termination clause for nonperformance; and

(viii) An assurance that the employer will comply with the Act and regulations.

(c) *Tryout employment.* Tryout employment in private-for-profit worksites may be conducted in accordance with section 205(d)(3)(B) of the Act (sec. 141(K)).

(d) *Training assistance.* Such assistance includes:

(1) Orientation to the world of work;

(2) Counseling. This includes employment and training related counseling and testing;

(3) Job development;

(4) Job search assistance. This includes transition services, such as job

seeking skills instruction, individualized job search plan, labor market information, and other special activities for transition to unsubsidized employment;

(5) Job referral and placement; and

(6) Vocational Exploration Program (VEP). A Native American grantee may conduct a VEP program to expose participants to jobs available in the private sector through observation of such jobs, instruction, and, if appropriate, limited practical experience.

(e) *Combined activities.* (1) A participant may be simultaneously or sequentially enrolled in two or more activities.

(2) (i) Reimbursement may be up to 100 percent to employers, including private-for-profit employers, for expenditures for the costs of classroom training, employment and training assistance or supportive services for participants in combined activities including the costs of participants' wages paid by the employer for time spent in these activities during working hours.

(ii) Reimbursement may be made on a cost reimbursement or fixed cost basis and shall be supported by business receipts, payroll, or other records normally kept by the employer.

(iii) Nothing in this paragraph (b)(1) shall allow reimbursement to private-for-profit employers for the costs of OJT to exceed the amounts allowable in § 632.78.

§ 632.79 Employment activities.

(a) *Community service employment (CSE).* Community Service Employment is the type of work normally provided by government and includes, but is not limited to, work (including part-time work) in such fields as environmental quality, child care, health care, education, crime prevention and control, prisoner rehabilitation, transportation, recreation, maintenance of parks, streets and other public facilities, solid waste removal, pollution control, housing and neighborhood improvement, rural development, conservation, beautification, veterans outreach, development of alternative energy technologies, and other fields of human betterment and community improvement. It includes work performed by tribally sponsored or owned income generating enterprises owned by Indian tribes, bands, or groups, or Native Alaskan entities, provided the profits from such enterprises are used exclusively for functions normally performed by the governing body of such entities.

(b) *Work experience.* (1) Work experience is a short-term or part-time work assignment with an employing agency or an organization authorized to employ CSE participants. It is otherwise prohibited in the private-for-profit sector.

(2) Participation in work experience shall be for a reasonable length of time, based on the needs of the participant, and subject to the restrictions set forth in § 632.85.

§ 632.80 Other activities.

(a) *General.* Native American grantees may conduct employment and training activities not described in this subpart. The CAP shall describe the basic design of activities undertaken as ''other activities'' and their objectives. These activities may include, but are not limited to:

(1) Removal of artificial barriers to employment;

(2) Job restructuring;

(3) Revision or establishment of merit systems;

(4) Development and implementation of affirmative action plans, including Indian preference plans and Tribal Employment Rights Office (TERO) programs.

(5) Post termination services in § 632.80 for up to 30 days following termination; and

(6) Employment generating services.

(b) *Supportive services.* Supportive services are those which are necessary to enable an individual eligible under this part, but who cannot afford to pay for such services, participate in the program. Such supportive services may include but are not limited to transportation, health care, special services and materials for the handicapped, child care, meals, temporary shelter, financial counseling, and other reasonable expenses required for participation in the training program and may be provided in-kind or through cash assistance.

§ 632.81 Payments to participants.

(a) *General.* Each participant paid wages for employment activities, allowances for classroom training or reimbursed for OJT or tryout employment will be provided such benefits pursuant to section 142 of the Act.

(b) *Maximum wage rates for CSE.* (1) The wages (including those received from overtime work and leave taken during the period of employment) paid to any CSE participant from funds under the Act shall be limited to a full-time rate of $10,000 per year (or the hourly, weekly, or monthly rate which, if full-time and annualized, would equal a rate of $10,000 per year). Approved rates above $10,000 are fixed at the CETA approved rate as of September 30, 1982, unless adjusted by the Secretary.

(2) Fringe benefits payable from funds under the Act to any CSE participant may not exceed those regularly afforded to similarly employed non-JTPA workers.

(3) *Davis-Bacon wages.* All laborers and mechanics employed by contractors or subcontractors in any construction, alteration, or repair, including painting and decorating, of projects, buildings, and works which are federally assisted under this Act, shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary in accordnace with the Act of March 3, 1931, popularly known as the Davis-Bacon Act, and the implementing regulations in 29 CFR parts 1, 3, 5, and 7.

(c) *Payment of allowances.* (1) A basic hourly allowance for regularly enrolled classroom training or services participants shall not exceed the higher of the State or Federal minimum hourly wage.

(2) Native American grantees are encouraged to submit allowance payment designs which are less than in paragraph (c) (1) of this section. Through innovative reimbursement systems the number of participants should be maximized. The allowance payment system will be described in the Master Plan and as an option may include dependent allowances.

(3) *Repayments.* Native American grantees shall require participants to repay the amount of any overpayment of allowances under this part, except if the overpayment was made in the absence of fault on the part of the participant. Where the Native American grantee requires repayment, any overpayment not repaid may be set off against any future allowance or other payments under the Act to which the participant may become entitled.

(d) *Combined activities.* A primary activity is one in which a participant is enrolled for more than 50 percent of scheduled time. Participants enrolled in a primary activity for which wages are payable and simultaneously in an activity for which allowances are payable may, at the Native American grantee's option, be paid wages for all hours of participation. A participant enrolled in a primary activity for which allowances are payable may, at the Native American grantee's option, be paid allowances for all hours of participation, except when OJT is the non-primary component. However, in the latter case, before placing an individual in such an activity, the Native American grantee shall request a determination from the Internal Revenue Service as to whether income from the non-primary component is taxable.

§ 632.82 Benefits and working conditions for participants.

The provisions of sections 142 and 143 of the Act shall apply to benefits and working conditions.

§ 632.83 FICA.

Expenditures may be made from JTPA funds for taxes under the Federal Insurance Contribution Act (FICA), 26 U.S.C. 3101, et seq.

§ 632.84 Non-Federal status of participants.

Participants shall not be deemed Federal employees and shall not be subject to the provisions of law relating to Federal employment.

§ 632.85 Participant limitations.

(a) Except as provided in paragraph (c) of this section and for participants in programs that have other statutory limits, participation in work experience shall be limited to a maximum of

1,000 hours during any one year beginning with the day of enrollment in either CETA or JTPA.

(b) No participant may receive wages for CSE for more than 78 weeks during a 2-year period from the participant's initial enrollment in either JTPA or in a program supported by the Comprehensive Employment and Training Act.

(c) The limitation on work experience participation in JTPA set forth in paragraph (a) of this section:

(1) Shall not apply to time spent by in-school youth or title II–B participants enrolled in a work experience program under the Act, nor shall such time be included in determining if an individual has reached such limitations; and

(2) May be waived by the Chief, DINAP and the waiver justification described in the Master Plan or CAP.

§ 632.86 Nondiscrimination and nonsectarian activities.

Pursuant to section 167(a) of the Act:

(a) Subject to the restriction that services under section 401 of JTPA are legally available only to Indian and Native American persons, nondiscrimination and equal opportunity requirements and procedures, including complaint processing compliance reviews, will be governed by the provisions of 29 CFR parts 31 and 32 and will be administered by the Office of Civil Rights.

(b) The employment or training of participants in sectarian activities is prohibited.

§ 632.87 Equitable provision of services to the eligible population and significant segments.

Native American grantees shall ensure and provide evidence in the Master Plan that a system is in place to afford all members of the eligible population within the service area for which the grantee was designated are afforded an equitable opportunity for employment and training activities and services.

§ 632.88 General responsibilities of the Department.

The Department of Labor shall be responsible for:

(a) Providing prompt notification to all Native American grantees of allocations of funds, proposed and final rules and program directives and procedures.

(b) The development, after consultation with Native American grantees, of regulations, performance standards and program policies governing Native American programs. Such regulations and program policies shall take into account the special circumstances under which Native American programs operate (sec. 401 (h)(1)).

(c) Providing Native American grantees with technical assistance, as the Secretary deems necessary, related to the administration and operation of JTPA programs (sec. 401(i)).

(d) Taking appropriate action to establish administrative procedures and machinery within the Department, including the retention of personnel having particular competence in the field of Indian and Native American employment and training programs, for the selection, administration, monitoring and evaluation of such programs (sec. 401(e)).

§ 632.89 Performance standards.

The Department of Labor shall establish performance standards for all Native American grantees (section 401(h)(1)). Performance results, as judged against these standards, will not be used for grantee designation purposes for the Program Years 1985–1986. Performance results will be a factor in grantee designations for Program Years 1987–1988, and beyond.

Subpart F—Prevention of Fraud and Program Abuse

§ 632.115 General.

(a) To ensure the integrity of the JTPA programs special efforts by grantees are necessary to prevent fraud and other program abuses. While any violation of the Act or regulations may constitute fraud or program abuse, this subpart F identifies and addresses those specific program problems of most concern to the Department.

(b) This subpart sets forth specific responsibilities of Native American grantees, subgrantees and contractors and of the Secretary to prevent fraud and program abuse in JTPA programs.

§ 632.116 Conflict of interest.

(a) No member of any advisory, planning, private industry council or governing body under the Act shall cast a vote on any matter which has a direct bearing on services to be provided by that member or any organization which such member directly represents or on any matter which would financially benefit such member or any organization such member represents.

(b) Each Native American grantee, subgrantee or contractor shall avoid personal and organizational conflict of interest in awarding financial assistance and in the conduct of procurement activities involving funds under the Act in accordance with the code of conduct requirements set forth in 41 CFR 29–70.216–4.

(c) Neither the Secretary nor any Native American grantee, subgrantee or contractor shall pay funds under the Act to any nongovernmental individual, institution or organization to conduct an evaluation of any program under the Act if such individual, institution or organization is associated with that program as a consultant or technical advisor.

§ 632.117 Kickbacks.

No officer, employee or agent of any Native American grantee, subgrantee of contractor shall solicit or accept gratuities, favors or anything of monetary value from any actual or potential subgrantee, contractor or supplier.

§ 632.118 Nepotism.

(a) No Native American grantee, subgrantee, contractor or employing agency shall permit the hiring of any person in a staff position or as a participant if that person or a member of that person's immediate family is employed in an administrative capacity by the Native American grantee, subgrantee or contractor. The Native American grantee may waive this requirement if adequate justification is documented. The following are examples where the nepotism provision may be waived:

(1) If there are no other persons eligible and available for participation or employment by the Native American grantee;

(2) Where the Native American grantee's total service population is 2,000 or less, or where the geographical situation of an Indian or Native American community is rural and isolated from other communities within the designated service area; or

(3) Where the potential participant has a history of unemployment or dependence on public assistance.

(b) A Native American grantee may develop its own nepotism policy in lieu of the policy in paragraph (a) of this section. The Chief, DINAP, shall review any such policy before its implementation and shall approve or disapprove it. Any such policy shall be described in the Master Plan and have adequate safeguards to prevent persons employed in an administrative capacity for the Native American grantee, its subgrantees or contractors from using such position to secure JTPA services or other benefits for a member of his or her immediate family. A satisfactory policy shall include the following minimum criteria:

(1) All formal personnel procedures shall be followed;

(2) There shall be full written disclosure to the governing body describing all advantages, conflicts and/or disadvantages which may result from the specific personnel action; and

(3) No member of the immediate family of the applicant shall participate in the applicant's selection.

(c) For purposes of this section, the term ''immediate family'' means wife, husband, son, daughter, mother, father, brother, and sister. The term ''staff position'' includes all JTPA staff positions funded under the Act such as instructors, counselors, and other staff involved in administrative, training or service activities. The term ''employed in an administrative capacity'' includes those persons who have overall administrative responsibility for a program including: All elected and appointed officials who have any responsibility for the obtaining of or approval of any grant funded under this part as well as other officials who have any influence or control over the administration of the program, such as the project director, deputy director and unit chiefs; and persons who have selection, hiring, placement or supervisory responsibilities for participants in a Native American employment and

training program. The term excludes officials of entities belonging to a consortium who are not at the same time officials of the consortium. Persons serving on a Native American grantee's advisory councils or PIC shall not be considered to be in an administrative capacity.

§ 632.119 Political patronage.

(a) No Native American grantee, subgrantee or contractor may select, reject, or promote a participant based on that individual's political affiliation or beliefs. The selection or advance of employees as a reward for political services or as a form of political patronage, whether or not the political service or patronage is partisan in nature, is prohibited.

(b) There shall be no selection of subgrantees or contractors based on political affiliation.

§ 632.120 Political activities.

(a) No program under the Act may involve political activities.

(b) No participant may engage in partisan or nonpartisan political activities during hours for which the participant is paid with JTPA funds.

(c) No participant may, at any time, engage in partisan or nonpartisan political activities in which such participant represents himself or herself as a spokesperson for the JTPA program.

§ 632.121 Lobbying activities.

No funds provided under the Act may be used in any way:

(a) To attempt to influence in any manner a member of Congress to favor or oppose any legislative or appropriation by Congress; or

(b) To attempt to influence in any manner State or local legislators to favor or oppose any legislation or appropriation by such legislators.

§ 632.122 Unionization and antiunionization activities; work stoppages.

(a) No funds under the Act shall be used in any way to either promote or oppose unionization (sec. 143(c)(1)).

(b) No participant in work experience or community service employment may be placed into, or remain working in, any position which is affected by labor disputes involving a work stoppage. If such a work stoppage occurs during the grant period, participants in affected positions must:

(1) Be relocated to positions not affected by the dispute; or

(2) Be suspended through administrative leave or other means; or

(3) Where participants belong to the labor union involved in the work stoppage, they shall be treated in the same manner as other members of the union except that they may not remain in the affected positions. The grantee shall make every effort to relocate participants who wish to remain working into suitable positions unaffected by the work stoppage.

(c) No person shall be referred to or placed in an on-the-job training position affected by a labor dispute involving a work stoppage and no payments may be made to employers for the training and employment of participants in on-the-job training during the periods of work stoppage.

§ 632.123 Maintenance of effort.

(a) Funds provided under this Act shall only be used for activities which are in addition to those which would otherwise be available in the area in the absence of such funds.

(b) Funds provided under this Act shall not be used to duplicate facilities or services available in the area (with or without reimbursement) from Federal, State, or local sources, unless the plan establishes that alternative services or facilities would be more effective or more likely to achieve performance goals.

§ 632.124 Theft or embezzlement from employment and training funds; improper inducement; obstruction of investigations and other criminal provisions.

The criminal provision of 18 U.S.C. 665 states:

(a) Whoever, being an officer, director, agent or employee of, or connected in any capacity with, any agency receiving financial assistance under the JTPA knowingly hires an ineligible individual or individuals; embezzles, willfully misapplies, steals, or obtains by fraud any of the money, funds, assets, or property which are the subject of a

grant or contract of assistance pursuant to such Act shall be fined not more than $10,000 or imprisoned for not more than 2 years, or both; but if the amount so embezzled, misapplied, stolen, or obtained by fraud does not exceed $100, such person shall be fined not more than $1,000 or imprisoned not more than 1 year, or both.

(b) Any person whoever willfully obstructs or impedes, or endeavors to obstruct or impede, an investigation or inquiry under the JTPA or the regulations thereunder, shall be punished by a fine of not more than $5,000 or by imprisonment for not more than 1 year, or by both such fine and imprisonment.

(c) In addition to the criminal provisions set forth in paragraphs (a) and (b) of this section, individuals may be held criminally liable under other Federal laws. For example, 18 U.S.C. sections 600 and 601 hold them liable if they:

(1) Directly or indirectly promise any employment position, compensation, contract, appointment, or other benefit, provided for or made possible in whole or in part by funds under the Act, or any special consideration in obtaining any such benefit, to any person as consideration, favor, or regard for any political activity or for the support of, or opposition to, any candidate or any political party in connection with any general or special election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office (18 U.S.C. 600); or

(2) Directly or indirectly knowingly cause or attempt to cause any person to make a contribution of a thing of value (including services) for the benefit of any candidate or any political party, by means of the denial or deprivation, or the threat of the denial or deprivation, of any employment or benefits funded under the Act (18 U.S.C. 601).

§ 632.125 Responsibilities of Native American grantees, subgrantees and contractors for preventing fraud and program abuse and for general program management.

(a) Each Native American grantee shall establish and use internal program management procedures sufficient to prevent fraud and program abuse, including subgrantee and contractor fraud and abuse. The procedures to be used shall be identified in the Native American grantee's Master Plan.

(b) Each Native American grantee, subgrantee and contractor shall ensure that sufficient, auditable, and otherwise adequate records are maintained which support the expenditure of all funds under the Act. Such records shall be sufficient to allow the Secretary to audit and monitor the Native American grantees', subgrantees', and contractors' programs and shall include the maintenance of a management information system in accordance with the requirements of § 632.32.

(c) Any person having knowledge of fraud, criminal activity or other abuse shall report such information directly and immediately to the Secretary. Similarly, all complaints involving such matters should also be reported to the Secretary directly and immediately.

Subpart G—[Reserved]

Subpart H—Job Training Partnership Act Programs Under Title IV, Section 401

§ 632.170 Eligibility for funds.

The Department shall provide funds under section 401 of the Act only to Native American grantees designated in accordance with § 632.10.

§ 632.171 Allocation of funds.

(a) One hundred percent, except as provided in § 632.171(c), of the amount available for section 401 will be distributed by formula as follows:

(1) Twenty-five percent of the available funds shall be allocated on the basis of the relative number of unemployed Indians and other Native Americans within the Native American grantee's geographic service area compared to the total number of unemployed Indians and other Native Americans in the United States.

(2) Seventy-five percent of the available funds shall be allocated on the basis of the relative number of members of Indian and other Native Americans households, whose income is at or

below the poverty level, within the Native American grantee's geographic service area compared to the total number of members of Indians and Native American households in poverty in the United States.

(b) Commencing with Program Year 1985 and after consultation with Indian groups, the Department may reserve up to one percent of section 401 funds. These funds may be used for technical assistance to improve the program's overall performance.

(c) In situations when the Department determines that the formula allocation will result in severe disruption from one year to the next, a hold harmless or other factor to minimize such disruptions may be used.

§ 632.172 Eligibility for participation in title IV, section 401.

(a) An Indian, Native Alaskan, or Native Hawaiian, as determined by the Native American Grantee, who is economically disadvantaged, or unemployed or underemployed is eligible to participate in a program under this subpart. For income eligibility purposes, the NAG may use either 6-months annualized or 12-months actual income.

(b) Indians and other persons of Native American descent who meet the requirements of subsection (a) of this section and who are identified by the Federal or State government as ''landless'' or ''terminated'' or ''non-federally recognized'' are included among those eligible to participate. These terms shall be broadly construed for the specific purpose of including, among others, terminated, State-recognized, or other groups or individuals previously determined to be eligible for Indian services under the Comprehensive Employment and Training Act.

(c) A Native American grantee may enroll Indian and Native American participants in upgrading and retraining programs who are not unemployed, underemployed or economically disadvantaged where such participants meet the following eligibility requirements:

(1) For upgrading, a person must be operating at less than full skill potential, and working for at least the prior 6 months with the same employer in either an entry level, unskilled or semi-skilled position or a paid position with little or no advancement opportunity in a normal promotional line. Priority consideration shall be given to the workers who have been in entry level positions for the longest time.

(2) For retraining a person must have received a bona fide notice of impending layoff and have been determined by the grantee as having little opportunity to be reemployed in the same or equivalent occupation or skill level within the labor market area.

§ 632.173 Allowable program activities.

(a) Native American grantees may undertake programs and activities consistent with the purposes of the Act including, but not limited to, programs and activities described in §§ 632.78 through 632.81.

(b) Native American grantees are encouraged to develop innovative means of addressing the needs of unemployed, underemployed and economically disadvantaged members of their communities and of contributing to the permanent economic self-sufficiency of such communities.

(c) Training and placement in the private sector will be emphasized. CSE and work experience are permitted when consistent over the long term with increasing earnings in unsubsidized employment. Expenditures for CSE are limited to 10 percent or the unemployment rate, based on data collected by an appropriate Federal or State agency including BIA, of a NAG's total section 401 allocation. For non-reservation grantees, the official BLS unemployment rate or State job service rate for the area will be used.

(d) Wages and allowances are to be kept to a minimum to maximize funds to be used for training.

(e) Innovative approaches to the private sector are encouraged.

(f) Other activities described in § 632.80 should use no more than 25 percent of the funds. This limitation may be increased to accommodate the extraordinary costs associated with special training projects where it is clear the benefits support the additional cost. An increase to this limitation shall be approved in instances such as, but not limited to, rural participants needing relocation for training, when

the costs of housing, transportation, etc., for training participants cannot be met within a 25 percent limitation, and for TERO activities.

§ 632.174 Administrative costs.

Administrative costs for this subpart are limited to and shall not exceed 20 percent of the funds available.

Subpart I—Summer Youth Employment and Training Programs

§ 632.250 General.

This subpart contains the policies, rules, and regulations of the Department in implementing and administering a Summer Youth Employment and Training Program for Indians and other Native Americans authorized by title II, part B of the Act.

§ 632.251 Eligibility for funds.

Only Native American grantees described in section 401(c)(1) of the Act are eligible for summer youth program funds.

§ 632.252 Allocation of funds.

(a) For this program the Secretary shall reserve the same percentage of JTPA 3(b) funds as were available in the CETA, IV–C Fiscal Year 1983 program.

(b) Allocations shall be made to eligible Native American grantees on the basis of a formula using the best available data as determined by the Department in consultation with Native American groups and shall be published by the Secretary.

§ 632.253 Special operating provisions.

Native American grantees shall:

(a) Provide services to youths most in need;

(b) Develop outreach and recruitment techniques aimed at all segments of the economically disadvantage youth population, especially school dropouts, youth not likely to return to school without assistance from the summer program, and youth who remain in school but are likely to be confronted with significant employment barriers relating to work attitude, aptitude, social adjustment, and other such factors;

(c) Provide labor market orientation to participants. This orientation may include, as appropriate: vocational exposure, counseling, testing, resume preparation, job interview preparation, providing labor market information, providing information about other training programs available in the area, including apprenticeship programs, and similar activities. It may be provided on a group or individual basis. In providing labor market orientation, skill training and remedial education, each grantee shall make maximum efforts to develop cooperative relationships with other community resources so that these activities are provided in the summer program at no cost, or at minimum cost, to the summer program;

(d) Assure that adequate supervision from skilled supervisors is provided to participants at each worksite;

(e) Make appropriate efforts to encourage educational agencies and postsecondary institutions to award academic credit for the competencies participants gain from their participation in the summer program;

(f) Ensure that appropriate efforts are made to closely monitor the performance of the summer program and measure program results against established goals;

(g) Ensure that enrollee applications are widely available and that jobs are awarded among individuals most severely disadvantaged in an equitable fashion. Enrollment applications shall require the signature of the applicant or (in the case of minors) the parent or guardian attesting to the accuracy of the information, including income data, provided on the application; and

(h) Provide participants with an orientation to the program which shall include, but not be limited to: purposes of the program and the conditions and standards (including such items as hours of work, pay provisions and complaint procedures) for such activities in the program.

§ 632.254 Program startup.

During the planning and design phase of the program and prior to the close of the school year, only those activities outlined in §632.255(b) are permissible.

These activities shall be charged as administrative costs. Individuals may not begin participation in the program before the close of school.

§ 632.255 Program planning.

(a)(1) In developing the summer program, the Native American grantee shall coordinate the summer plan with its title IV program.

(2) Native American grantees shall use the planning process described in § 632.17.

(b) The following planning and design activities shall be allowable beginning October 1 of each year;

(1) Hiring of staff (planners, worksite developers, intake specialists, etc.), provided, prior to the close of school all staff salaries and benefits shall be charged as administrative expenses, except that 45 days prior to the beginning of the summer program and 45 days after the summer program, all staff costs and other program development costs may be charged pursuant to § 632.38;

(2) Development of the summer plan;

(3) Worksite development;

(4) Recruitment, intake and selection of participants;

(5) Arrangements for supportive services;

(6) Dissemination of program information;

(7) Development of coordination between schools and other services;

(8) Staff training; and

(9) Other activities that may be characterized as planning and design but not program operation.

(c) Expenses incurred in such planning and design activities may, pursuant to § 632.38, be paid from administrative funds received under other titles of the Act.

§ 632.256 Submission of applications.

To the extent possible, Native American grantees will be notified of their summer youth allocation at the same time section 401 allocations are announced. The summer plan will be a separate part of the CAP and follow the same format as the CAP.

§ 632.257 Eligibility for participation.

(a) An individual shall be eligible for participation if, at time of application, he or she is an Indian or Native American youth who is:

(1) At the time of application, economically disadvantaged;

(2) At the time of enrollment, age 14 through 21 inclusive; and

(3) For income eligibility purposes, the NAG may use either six months annualized or 12 months actual income.

(b) The nepotism provisions of this part shall not apply to this program,

§ 632.258 Allowable activities.

Allowable activities are those listed in § 632.78–80 except that community service employment is not permitted.

§ 632.259 Vocational exploration program.

A Native American grantee may conduct a vocational exploration program for the purpose of exposing youth to the operation and types of jobs and instruction including, where appropriate, limited and short term practical experience.

§ 632.260 Worksite standards.

(a)(1) Each Native American grantee shall develop a written agreement with worksite employers which complies with sections 142 and 143 of the Act and which assures:

(i) Adequate supervision of each participant;

(ii) Adequate accountability for participant time and attendance; and

(iii) Adherence to the rules and regulations governig the summer program.

(2) Such written agreements may be memoranda of understanding, simple work statements or other documents which indicate an estimate of the number of participants at the worksite and any operational conditions governing the program at the worksite.

(b) Each Native American grantee shall establish procedures for the monitoring and evaluation of each worksite to insure compliance with the worksite agreements and the terms and conditions of subgrants and contracts.

(c) No participant shall be required to work, or be compensated for work with JTPA funds, for more than 40 hours of work per week.

§ 632.261 Reporting requirements.

(a) Each Native American grantee shall submit an end of summer report which will include both financial and characteristics information. The report format will be issued to grantees under separate instructions.

(b) The report in this section is to be submitted to Chief, DINAP by registered mail no later than 45 days after the end of the summer program.

§ 632.262 Termination date for the summer program.

Participants may not be enrolled in the summer program beyond September 30, or beyond the date they resume school full-time, whichever occurs earlier. Allowable activities after September 30 include report and record preparation and submittal, completion of evaluations and assessments of worksite employers and the overall program or other elements of the summer program.

§ 632.263 Administrative costs.

Administrative costs for this subpart are limited to and shall not exceed 20 percent of the funds available.

PART 633—MIGRANT AND SEASONAL FARMWORKER PROGRAMS

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AUTHORITY: Job Training Partnership Act, sec.169 (29 U.S.C. 1501 *et seq.*, Pub. L. 97–300, 96 Stat. 1322), unless otherwise noted.

SOURCE: 48 FR 48771, Oct. 20, 1983, unless otherwise noted.

Subpart A—Introductory Provisions

§ 633.102 Scope and purpose of title IV, section 402 programs.

(a) It is the purpose of title IV, section 402, of the Act to provide job training, employment opportunities, and other services for those individuals who suffer chronic seasonal unemployment and underemployment in the agriculture industry. These conditions have been substantially aggravated by continual advancements in technology and mechanization resulting in displacement and contribute significantly to the Nation's rural employment problem. These factors substantially affect the entire national economy.

(b) Because of farmworker employment and training problems, such programs shall be centrally administered at the national level. Programs and activities supported under this section shall in accordance with section 402(c)(3) of the Act:

(1) Enable farmworkers and their dependents to obtain or retain employment;

(2) Allow participation in other program activities leading to their eventual placement in unsubsidized agricultural or nonagricultural employment;

(3) Allow activities leading to stabilization in agricultural employment; and

(4) Include related assistance and supportive services.

§ 633.103 Format for these regulations.

(a) Regulations promulgated by the Department to implement the provisions of title IV section 402 of the Act are set forth in 20 CFR part 633 and part 636. These parts contain all the regulations under the Act applicable to migrant and other seasonally employed farmworker programs.

(b) Should the regulations at this part conflict with regulations at other parts of this title of the Code of Federal Regulations, the regulations at this part shall prevail with respect to programs and activities governed by this part.

§ 633.104 Definitions.

The following definitions are applicable to section 402 programs.

Accrued expenditures shall mean total costs incurred during the reporting period for: (a) Goods and other tangible property received; (b) services performed by employees, contractors, subgrantees and other payees; and (c) other amounts becoming owed under programs for which no current services or performance is required such as annuities, insurance claims, and other benefit payments.

Act shall mean the Job Training Partnership Act (29 U.S.C. 1501 *et seq.*).

Allocation shall mean the amount of funds calculated in accordance with § 633.105(b)(1) for section 402 programs in each State and distributed in accordance with the requirements of this part.

Chief, DFREP shall mean the Chief of the Division of Farmworker and Rural Employment Programs in the Employment and Training Administration, Department of Labor.

Construction shall mean the erection, installation, assembly, or painting of a new structure or a major addition, expansion, or extension of an existing structure, and the related site preparation, excavation, filling and landscaping or other land improvements.

Department shall mean the United States Department of Labor (DOL), including its agencies and organizational units.

DOL shall mean the United States Department of Labor.

Employment shall mean the situation wherein a person(s) provides work or services for an employer for wages or salary. This includes self-employment. The satisfaction of workfare requirements does not constitute employment.

Entered employment shall mean the act of securing unsubsidized employment for or by a participant. Seasonal agricultural placements will not be considered as unsubsidized employment secured for or by a participant for purposes of this definition unless it can be substantiated that the placement represents an upgraded position within agriculture and will not result in the continued underemployment of the individual.

Entered employment, direct shall mean unsubsidized employment secured for or by a participant after receiving direct placement services not associated with training or subsidized employment.

Entered employment, indirect shall mean unsubsidized employment secured for or by a participant after participation in training or subsidized employment.

Family (a) shall mean one or more persons related by blood, marriage, or adoption. A step-child or a step-parent is considered to be related by marriage.

(b) (1) For purposes of paragraph (a) of this definition, a person claimed as a dependent on another person's Federal Income Tax return for the previous year is presumed to be part of the other person's family.

(2) A handicapped individual may be considered a family of one when applying for programs under the Act.

(3) An individual 18 years of age or older, except as provided in (a) or (b) above, who receives less than 50 percent of support from the family, and who is not the principal earner nor the

spouse of the principal earner, is not considered a member of the family. Such an individual is considered a family of one.

Family income shall mean all income received from all sources for the eligibility determination period by persons who are family members at the time of eligibility determination.

(a) For the purpose of determining eligibility (and not for allocations), family income includes:

(1) Gross wages and salaries (before deductions);

(2) Net self-employment income (gross receipts minus operating expenses); and

(3) Other money income received from sources such as net rents, Old Age and Survivors Insurance, Social Security benefits, pensions, alimony, periodic income from insurance policy annuities, and other sources of income.

(b) Earned family income does not include:

(1) Non-cash income such as food stamps, or compensation received in the form of food or housing;

(2) Rental value of owner-occupied property;

(3) Public assistance payments;

(4) Cash payments received pursuant to a State plan approved under titles I, IV, X or XVI of the Social Security Act, or disability insurance payments received under title II of the Social Security Act;

(5) Federal, State or local unemployment benefits;

(6) Payments made to participants in employment and training programs;

(7) Capital gains and losses;

(8) One-time unearned income, such as, but not limited to:

(i) Payments received for a limited fixed term under income maintenance programs and supplemental (private) unemployment benefits plans;

(ii) One-time or fixed-term scholarship and fellowship grants;

(iii) Accident, health, and casualty insurance proceeds;

(iv) Disability and death payments, including fixed term (but not lifetime) life insurance annuities and death benefits;

(v) One-time awards and gifts;

(vi) Inheritance, including fixed term annuities;

(vii) Fixed-term workers' compensation awards;

(viii) Terminal leave pay;

(ix) Soil bank payments; and

(x) Agriculture crop stabilization payments.

(9) Pay or allowances received by any veteran while he/she was serving on active duty in the Armed Forces;

(10) Educational assistance and compensation payments to veterans and other eligible persons under chapters 11, 13, 31, 34, 35, and 36 of title 38, United States Code;

(11) Payments received under the Trade Act of 1974 as amended;

(12) Black Lung payments received under the Benefits Reform Act of 1977, Pub. L. 95–239, 30 USC 901; and

(13) Child support payments.

Farmwork shall mean, for eligibility purposes, work performed for wages in agricultural production or agricultural services as defined in the most recent edition of the Standard Industrial Classification (SIC) Code definitions included in industries 01—Agricultural Production—Crops; 02—Agricultural Production—Livestock excluding 027—Animal Specialties; 07—Agricultural Services excluding 074—Veterinary Services, 0752—Animal Speciality Services, and 078—Landscape and Horticultural Services.

Grantee shall mean any person, organization or other entity which receives JTPA funds directly from the Department.

JTPA shall mean the Job Training Partnership Act.

Migrant farmworker shall mean a seasonal farmworker who performs or has performed farmwork during the eligibility determination period (any consecutive 12-month period within the 24-month period preceding application for enrollment) which requires travel such that the worker is unable to return to his/her domicile (permanent place of residence) within the same day.

Participant shall mean an individual who is:

(a) Eligible for participation; and

(b) Enrolled within 45 days of eligibility determination; and

(c) Enrolled and receiving employment, training or services (except post-termination services) funded under the Act.

Planning estimates shall mean the preliminary allocations announced for the purpose of providing target funding levels for each State.

Program income shall mean net income earned from grant or agreement supported activities. Such earnings include, but are not limited to: income from service fees, sale of commodities, usage or rental fees, and royalties on patents or copyrights.

Poverty level shall mean the annual income level at, or below which families are considered to live in poverty, as annually determined by HHS.

Seasonal farmworker shall mean a person who during the eligibility determination period (any consecutive 12-month period within the 24-month period preceding application for enrollment) was employed at least 25 days in farmwork or earned at least $400 in farmwork; and who has been primarily employed in farmwork on a seasonal basis, without a constant year round salary.

Section 402 programs shall mean the Migrant and Seasonal Farmworker Program, under section 402 of title IV of the Job Training Partnership Act.

The term *subsidized employment* shall mean employment created in the private or public sector and in private nonprofit agencies financed by the recipient's program funds or by other DOL funded programs, e.g., work experience and tryout employment.

Supplemental funds shall mean any funds allocated in excess of that amount announced as a ''planning estimate.''

Target area shall mean a geographic area to be served by a section 402 grantee. Such an area may be a county, multicounty area, a State, or a multistate area.

Target population shall mean farmworkers and their dependents who meet the requirements of § 633.107.

Underemployed persons shall mean:

(a) Persons who are working part-time but seeking full-time work; or

(b) Persons who are working full-time but whose current annualized wage rate (for a family of one), or whose family's current annualized income, is not in excess of:

(1) The poverty level, or

(2) 70 percent of the lower living standard income level.

Unemployed individuals shall mean individuals who are without jobs and who want and are available for work. The determination of whether individuals are without jobs shall be made in accordance with the criteria used by the Bureau of Labor Statistics of the Department in defining individuals as unemployed.

§ 633.105 Allocation of funds.

(a) *National Account.* (1) Up to 6 percent of the statutory reserves for section 402 activities may be set aside for the National Account to be used for technical assistance and for special projects funded at the discretion of the Department.

(2) Funds from the National Account may be obligated by the Department by means of either contracts or grants to private nonprofit agencies, to private profitmaking organizations, to States and local units of government, or public agencies.

(b) *State allocations (allocable funds).* (1) No less than 94 percent of the funds received for section 402 activities shall be allocated for farmworker programs in individual States in an equitable manner using the best data available as to the farmworker population as determined by the Department. The formula used to determine State allocations will be published in the FEDERAL REGISTER for review and comment, along with the rationale for such formula and proposed allocations, no later than 30 days prior to the publication of the final allocations of available funds in the FEDERAL REGISTER.

(2) *Allocation Exceptions.* (i) The Department reserves the right not to allocate any funds for use in a State whose allocation is less than $120,000.

(ii) Those funds not allocated will be available for technical assistance and special projects funded at the discretion of the Department.

(iii) Current grantees which are unsuccessful applicants for new grant funds shall be given notice that funds will expire and that a reasonable period will be given to phase out their operations. Such notice will not bind the Department to obligate additional funds. The notification of nonselection

shall be the notice of termination of funds and departmental closeout requirements are to be followed.

(3) *Allocation Adjustment.* In situations where the Department determines that the formula allocation will result in severe disruption of funding levels from one year to the next, a hold harmless or other factor to minimize such disruption may be used.

(4) *Funding cycle.* Projects will be funded in accordance with a schedule to be specified by the Department in the FEDERAL REGISTER:

(i) Announcement of State planning estimates and an invitation to submit applications for State(s) or area(s) open for competition as provided in the Solicitation for Grant Application (SGA).

(ii) Deadline for submission of Preapplication for Federal Assistance Forms.

(iii) Deadline for submission of applications.

§ 633.106 Eligibility for allocable funds.

The following organizations and units of government shall be eligible to receive funds under section 402.

(a) A public agency;

(b) A private nonprofit organization authorized by its charter or articles of incorporation to provide employment and training or such other services as are permitted by this subpart.

§ 633.107 Eligibility for participation in section 402 programs.

(a) Eligibility for participation in section 402 programs is limited to those individuals who have, during any consective 12-month period within the 24-month period preceding their application for enrollment:

(1) Been a seasonal farmworker or migrant farmworker as defined in § 633.104; and,

(2) Received at least 50 percent of their total earned income or been employed at least 50 percent of their total work time in farmwork; and,

(3) Been identified as a member of a family which receives public assistance or whose annual family income does not exceed the higher of either the proverty level or 70 percent of the lower living standard income level.

(4) Dependents of the above individuals are also eligible.

(b) The 24-month period preceding application for enrollment shall be extended for persons who have been in the armed forces, incarcerated, hospitalized, or physically or mentally disabled. The extended period of time shall be not more than 24 months plus the amount of time the person was in the armed forces, incarcerated, detained at any Federal or State facility, hospitalized, or physically or mentally disabled. Such conditions shall be positively demonstrated by the applicant. This can be done by producing documentary evidence satisfactory to the grantee.

(c) To be eligible for participation, individuals shall meet the requirements of sections 167(a)(5) and 504 of the Act.

(d) A participant in another program or title under JTPA who met the eligibility criteria for section 402 at the time of enrollment into such other program or title may be transferred into, or enrolled concurrently, in the section 402 program. A section 402 participant who met the eligibility criteria for another program or title under JTPA at the time of enrollment into the section 402 program may also be transferred into or enrolled concurrently in such other program or title.

(e) The grantee shall establish the necessary procedures for identifying and selecting participants and for eligibility determination and verification.

(f) The provisions of section 181(k) of the Act are applicable to section 402 programs.

Subpart B—Grant Planning and Application Procedures

§ 633.201 Grant planning and application procedures in general.

Precondition for grant application: The Department will not consider an application for funding from any applicant in cases where it is established that:

(a) The agency's efforts to recover debts (for which three demand letters have been sent) established by final agency action have been unsuccessful; or

(b) Fraud or criminal activity has been proven to exist within the organization.

§ 633.202 Announcement of State planning estimates and invitation to submit a grant application.

(a) *Announcements.* The Department, through a notice in the FEDERAL REGISTER, will announce State Planning estimates of section 402 funds and will publish an SGA for all areas open to competition. The SGA will contain all information needed by an applicant to apply for funding; i.e., general program description, rating criteria, and dates for submission of applications.

(b) *Intention to apply.* Any eligible applicant intending to apply for funds shall submit a Preapplication for Federal Assistance to DOL by a specified date as announced in the FEDERAL REGISTER.

(c) Applications for statewide programs are encouraged; however, the Department reserves the right to award grant funds to less than statewide areas.

(d) Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' and the implementing regulations at 30 CFR part 46 generally apply to this program. Pursuant to these requirements, in States which have established a consultation process expressly covering this program, applications shall be provided to the State for comment. Since States may also participate as competitors for this program, applications shall be submitted to the State upon the deadline for submission to the Department, instead of the usual 30-day period for review.

§ 633.203 Review of funding request.

The SGA will identify all review standards including:

(a) An understanding of the problems of migrant and seasonal farmworkers;

(b) A familiarity with the area to be served;

(c) A previously demonstrated capability to administer effectively a diversified employability development program for migrant and seasonal farmworkers.

(d) General administrative and financial management capability.

(e) Prior performance with respect to financial management, audit and program outcomes.

§ 633.204 Responsibility review.

(a) Prior to final selection as a potential grantee the Department will conduct a review of the available records to determine whether or not the organization has failed any responsibility test. This review is intended to establish overall responsibility to administer Federal funds. With the exceptions of paragraphs (a)(1) and (a)(3) of this section, the failure to meet any one of the tests would not establish that the organization is irresponsible unless the failure is substantial or persistent. The responsibility tests are as follows:

(1) The agency's efforts to recover debts (for which three demand letters have been sent) established by final agency action have been unsuccessful, or failure to comply with an approved repayment plan.

(2) Serious administrative deficiencies identified in final findings and determinations—such as failure to maintain a financial management system as required by Federal regulations.

(3) Established fraud or criminal activity within the organization.

(4) Wilfull obstruction of the audit process.

(5) Substantial failure to provide services to applicants as agreed to in a current or recent grant or to meet performance standard requirements as provided at § 633.321 of this subpart.

(6) Failure to correct deficiencies brought to the grantees' attention in writing as a result of monitoring activities, reviews, assessments, etc.

(7) Failure to return a grant closeout package or outstanding advances within 90 days of expiration date or receipt of closeout package, whichever is later, unless an extension has been requested and granted; final billings reflecting serious cost category or total budget cost overrun.

(8) Failure to submit required reports.

(9) Failure to properly report and dispose of government property as instructed by DOL.

(10) Failure to have maintained cost controls resulting in excess cash on hand.

(11) Failure to procure or arrange for audit coverage for any two year period when required by DOL.

(12) Failure to audit a subrecipient within the required period when applicable.

(13) Final disallowed costs in excess of five percent of the grant or contract award.

(14) Failure to establish a mechanism to resolve subrecipient's audit within established time frames.

(b) This responsibility review is independent of the competitive process. Applicants failing to meet the requirements of this section will not be selected as potential grantees irrespective of their standing in the competition.

§ 633.205 Notification of selection.

(a) Respondents to the SGA which are selected as potential grantees shall be so notified by the Department. The notification shall invite each potential grantee to negotiate the final terms and conditions of the grant, shall establish a reasonable time and place for the negotiation, and shall indicate the State or area to be covered by the grant. Funds may be awarded for two program years.

(b) In the event that no grant applications are received for a specific State or area or that those received are deemed to be unacceptable, or where a grant agreement is not successfully negotiated, the Department may give the Governor first right to submit an acceptable application pursuant to §633.201. Should the Governor not accept the offer within fifteen days, the Department may then (1) designate another organization or organizations, (2) reopen the area for competitive bidding, or (3) use the funds for national-account activities.

(c) An applicant whose grant application is not selected by the Department to receive section 402 funds shall be notified in writing.

(d) Applicants who submit grant applications which have been rejected may not resubmit a new grant application for the State(s) or area(s) in which they are interested in providing services until the area(s) is announced by the Department as reopened for competition.

(e) Any applicant whose grant application is denied in whole or in part by the Department may request an administrative review as provided in part 636, with respect to whether there is a basis in the record to support the Department's decision. This appeal will not in any way interfere with the Department's designation and funding of another organization to service the area in question during the appeal period. The available remedy under such an appeal will be the right to be designated in the future rather than a retroactive or immediately effective selection status. Therefore, in the event the ALJ rules that the organization should have been selected and the organization continues to meet the requirements of this part, the Department will select and fund the organization within 90 days of the ALJ's decision unless the end of the 90-day period is within 6 months of the end of the funding period. Any organization selected and/or funded prior to the ALJ's decision will be affected in a manner prescribed by the Department. All parties will agree to the provisions of this paragraph as a condition for funding.

Subpart C—Program Design and Administrative Procedures

§ 633.301 General responsibilities.

(a) This subpart sets forth the program operation requirements for grantees under section 402, including program and fiscal management, coordination and consultation, allowable activities, participant benefits, and duration of participation. Unless otherwise indicated, grantees shall follow procedures as prescribed in DOL administrative regulations a 41 CFR part 29–70 and OMB Circular A–122.

(b) *Basic program design responsibilities of grantees.* A grantee shall be responsible for:

(1) Designing training which, to the maximum extent feasible, is consistent with every participant's fullest capabilites and will lead to employment opportunities enabling every participant to become economically self-sufficient.

(2) Designing program activities which will, to the maximum extent feasible, contribute to the occupational development and upward mobility of every participant;

(3) Providing training only to participants who are legally able to accept gainful employment in the occupation for which training is being provided; and

(4) Making maximum efforts to achieve the goals and the performance standards set forth in the grant.

§ 633.302 Training activities and services.

(a) A grantee may provide assistance to eligible individuals to obtain or retain employment, to participate in other program activities leading to their eventual placement in unsubsidized agricultural or nonagricultural employment, and to participate in activities leading to stabilization in agricultural employment through training and supportive services which may include, but are not limited to:

(1) Job search assistance, including job clubs;

(2) Job development;

(3) Training, such as classroom, on-the-job, work experience, and tryout employment, in jobs skills for which demand exceeds supply;

(4) Training related and non-training related supportive services, including commuting assistance and financial and personal counseling;

(5) Relocation assistance; and

(6) Programs conducted in cooperation with employers or labor organizations to provide early intervention in the event of the disruption of employment opportunities.

(b) Public service employment is not an allowable activity under section 402 programs.

(c) Tryout employment shall conform to section 205(d)(3)(B) and section 141(k) of the Act.

(d) A participant's enrollment in work experience shall not exceed 1,000 hours in a one-year period.

§ 633.303 Allowable costs.

(a) *General.* To be allowable, a cost must be necessary and reasonable for proper and efficient administration of the program, be allocable thereto under these principles, and, except as specifically provided herein, not be a general expense required to carry out the overall responsibilities of the recipient.

(b) Unless otherwise indicated below, direct and indirect costs shall be charged in accordance with 41 CFR part 29–70 and OMB Circular A–122.

(c) Funds may be used for construction activities only to:

(1) Provide compensation to participants employed by public or private nonprofit agencies;

(2) Reimburse OJT costs to private-for-profit employers;

(3) Purchase equipment, materials, and supplies for use in the training of such participants; and

(4) Cover costs of a training program in a construction occupation, including costs such as instructors' salaries, training tools, books, and needs-based payments and compensation to participants.

(d) Costs associated with capital improvements (as defined in OMB Circular A–122, attachment B, sections 13 and 22) of existing facilities used primarily for programs under the Act are allowable with prior approval of the Department.

(e) Unemployment compensation costs are allowable for administrative and program staff hired in accordance with the administrative provisions of the regulations, and for participants required by State law to be covered for unemployment compensation purposes.

(f) Costs which are billed as a single unit charge do not have to be allocated or prorated among the several cost categories but may be charged entirely to training when the agreement:

(1) Is for classroom training;

(2) Is fixed unit price; and

(3) Stipulates that full payment for the full unit price will be made only upon completion of training by a participant and placement of the participant into unsubsidized employment in the occupation trained for and at not less than the wage specified in the agreement.

(g) *Travel costs.* (1) The cost of participant and staff travel necessary for the operation or administration of programs under the Act is allowable as provided herein.

(2) Travel costs of section 402 administrative staff or members of governing boards of grantee organizations are allowable without the prior approval of the Department if the travel specifically relates to programs under section 402. All other travel to be charged to JTPA section 402 grants shall require the prior approval of the Department. These costs shall be charged to administration.

(3) Travel costs of other grantee officials of multifunded programs changed with overall grantee responsibilities are allowable only if costs specifically relate to programs under section 402.

(4) Travel costs to enable participants to obtain or retain employment, access other services or to participate in programs under this Act are allowable as direct costs but shall be limited to the grantee's jurisdiction or within daily commuting distance, unless part of an approved component of the grantee's program. These costs shall be charged to training-related supportive services.

(5) Travel costs for participants in administrative or programmatic positions using their personal or other forms of transportation in the performance of their jobs are allowable and shall be charged appropriately.

(6) Travel policies of all grantees, subgrantees and contractors shall be generally consistent with those set forth in the Department's Travel and Transportation Manual.

(h) *Association membership.* Grantees are permitted to use grant funds to join those associations which provide technical and administrative services in support of section 402 program efforts. The activities of such associations must be designed to contribute to the enhancement of professional and technical program knowledge. No financial assistance in the form of membership dues or other membership-related costs can involve political or lobbying activities.

(1) The cost shall be for a section 402 grantee's membership rather than an individual person's membership.

(2) The cost of a membership shall be reasonably related to the value of the services or benefits received and shall not exceed $850 annually.

(3) Association-related costs shall be incorporated in the grantee's section 402 grant budget, charged to the administrative category, and as such, shall be subject to the overall administrative cost ceiling.

(i) *Allowances and reimbursements for board and advisory council members*—(1) *General.* A reasonable allowance to members who attend meetings of any board, council, or committee for section 402 program purposes, and reimbursement of actual expenses connected with those meetings, are allowable costs, and may be paid for attendance at no more than six meeting days per grantee per quarter.

(2) *Allowances and loss of wages.* Any individual or family member who is a member of a private nonprofit grantee or subgrantee policymaking body or of a public agency grantee or subgrantee farmworker advisory council is eligible to be paid and allowance provided:

(i) such individual's family income does not exceed either 70 percent of the lower living standard income level or the poverty level as established by HHS.

(ii) Allowances may not be paid for attendance in excess of ten dollars per meeting, unless approved in advance by the Department.

(3) *Reimbursement for expenses.* (i) All board members shall be eligible for receiving reimbursement for actual expenses of travel, meals, and lodging incurred in attending board meetings, or a per diem in lieu of actual expenses.

(ii) Any individual or family member where family income does not exceed 70 percent of the lower living standard income level and who is a member of a private nonprofit grantee or subgrantee policymaking body or of a public agency grantee or subgrantee farmworker advisory council shall also be eligible for reimbursement of actual wages lost, if supported by a statement from the employer.

(iii) The grantee shall define which expenses may be reimbursed, whether incurred as the result of actual meeting attendances or in performance of other official duties and responsibilities in connection with the program, and shall establish procedures for the reimbursement of such expenses.

§ 633.304 Section 402 cost allocation.

(a) *General.* Allowable costs for section 402 programs shall be charged against the following four cost categories: Administration; training; training-related supportive services; and nontraining-related supportive services.

(1) Costs are allocable to a particular cost category to the extent that benefits are received by such category.

(2) All grantees are required to plan, control, and report expenditures against the aforementioned cost categories.

(3) All grantees are responsible for ensuring that subgrantees and contractors plan, control, and report expenditures against the aforementioned cost categories.

(b) *Limitation on certain costs.* (1) Costs for administration of the grant shall not exceed 20 percent of the total amount of the grant.

(2) Costs for nontraining-related supportive services shall not exceed 15 percent of the total amount of the grant.

(3) Costs for training shall be no less than 50 percent of the total amount of the grant.

(c) *Classification of costs by category.* All grant costs shall be charged to the four cost categories listed above. Within each category costs shall be assigned and accounted for as follows:

(1) *Administration.* Administration costs consist of all direct and indirect costs associated with the management of the program. Administrative costs shall be limited to those necessary to effectively operate the program. These costs include but are not limited to: the salaries and fringe benefits of personnel engaged in executive, fiscal, data collection, personnel, legal, audit, procurement, data processing, communications, maintenance, and similar functions; and related materials, supplies, equipment, office-space costs, and staff training.

(i) Also included are salaries and fringe benefits of direct program administrative positions such as supervisors, program analysts, labor market analysts, and project directors. Additionally, all costs of clerical personnel, materials, supplies, equipment, space, utilities, and travel that are identifiable with these program-administration positions are charged to administration.

(ii) Allowances and reimbursement costs for governing boards and advisory councils shall be prorated wherever applicable as administrative costs among all the grants, from whatever source, administered by the grantee.

(2) *Training.* (i) Instruction and related costs consist of goods and services which affect those program participants who are in either a work environment, or classroom setting (including classroom training in conjunction with Vocational Exploration or Job Readiness or tryout employment) and shall be charged to training, i.e., salaries, fringe benefits, space, utility, travel and equipment. Training costs include, but are not limited to, the following: The costs associated with on-the-job training services; employer outreach necessary to obtain job listings or job-training opportunities, salaries; fringe benefits; equipment and supplies of personnel engaged in providing training, including remedial education; job-related counseling for participants; employability assessment and job development; tuition fees, books and other teaching aids; equipment and materials used in providing training to participants, classroom space and utility costs; job search assistance, labor market orientation, and job referral costs. In addition:

(ii) Wages and fringe benefits for participants in work experience, tryout employment, classroom training, shall be charged to training. Cost-of-living increases are considered wages.

(iii) Allowances shall be charged to training.

(iv) Any single cost which is properly chargeable to training and to one or more other categories shall be prorated among training and other appropriate cost categories.

(3) *Training-related supportive services.* Costs of services which are necessary to enable an eligible individual to participate in training or subsidized employment under section 402 and to obtain subsequent unsubsidized employment shall be charged to training-related supportive services. Such supportive services may include but are not limited to transportation, health care, special services and materials for

the handicapped, child care, meals, temporary shelter, financial counseling, and other reasonable expenses required for participation in the program and may be provided in-kind or through cash assistance. Training-related supportive services costs and related costs shall be charged to this cost category.

(4) *Nontraining-related supportive services.* ''Services only'' are the costs of the goods and services provided to participants who are not engaged in work experience, tryout employment or training activities, including but not limited to such goods and services as: transportation, health care, temporary shelter, meals and other nutritional assistance, legal or paralegal assistance and emergency assistance.

(d) *Cost categories assignable to program activities.* (1) Classroom training. Cost categories are: Training and training-related supportive services.

(2) On-the-job training. Cost categories are: Training and training-related supportive services.

(3) Work Experience: Cost categories are: Training and training-related supportive services.

(4) Tryout employment: Cost categories are: Training and training-related supportive services.

(5) Training assistance: Cost categories are: Training and training-related supportive services.

(6) Services only (no referral to employment): Cost category is: Nontraining-related supportive services.

§ 633.305 General benefits and working conditions for program participants.

(a) Payments for on-the-job training (OJT) shall be made in accordance with sections 141(g) and 142(a)(2) of the Act.

(b) Participants employed in work experience activities shall be paid wages in accordance with section 142(a)(3) of the Act.

(c) Payments to individuals participating in programs under section 402 shall conform to the provisions of section 142(b) of the Act.

(d) Section 402 grantees shall not assist any activity under the Act unless the activity conforms to provisions of sections 142 and 143 of the Act.

(e) A basic hourly allowance for regularly enrolled classroom training participants shall not exceed the higher of the State or Federal minimum hourly wage.

§ 633.306 Retirement benefits.

No funds available under this Act may be used for contributions on behalf of any participant to retirement systems or plans (sec. 143(a)(5)).

§ 633.307 Packages of benefits.

(a) Where non-JTPA, similarly employed employees are covered under a benefits package which includes retirement, JTPA participants shall receive the non-retirement benefits (e.g., health, death, and disability-benefit coverage), at the same level and to the same extent as other employees. JTPA funds may be used to pay for those benefits.

(b) JTPA funds may be used to purchase a package of benefits including retirement, provided the retirement portion of the package can be factored out of the package and adjusted accordingly.

§ 633.308 Non-Federal status of participants.

Except where specifically provided to the contrary, participants in a program under the Act shall not be deemed Federal employees and shall not be subject to the provisions of law relating to Federal employment, including those related to hours of work, rates of compensation, leave, unemployment compensation, and Federal employment benefits.

§ 633.309 Recordkeeping requirements.

(a) Each grantee shall ensure maintenance of systems whose financial management and participant data components provide federally-required records and reports that are accurate, uniform in definition, accessible to authorized Federal staff, and verifiable for monitoring, reporting, and evaluation purposes.

(b) The grantee shall ensure that systems:

(1) Maintain data elements used in required Federal reports in accordance with established program definitions

contained in the Act and these regulations;

(2) Follow consistent rules for aggregation of detailed data to summary levels;

(3) Are able to track data from detailed records to summary reports;

(4) Maintain procedures to ensure that information is current, complete, consistent, and accurate;

(5) Meet generally accepted accounting principles as prescribed in 41 CFR part 29–70;

(6) Provide for adequate control of Federal funds and other assets;

(7) Trace the funds to a level of expenditures adequate to demonstrate that funds have been spent lawfully;

(8) Maintain internal controls to avoid conflict-of-interest situations and prevent irregular transactions or activities;

(9) Support accounting records with source documentation such as cancelled checks, paid bills, contracts, grants, and agreements; and

(10) Establish procedures that will minimize the time elapsing between the receipt of advanced funds and their disbursement.

§ 633.310 Bonding.

The grantee and all subgrantees shall ensure that every officer, director, agent, or employee authorized to act on their behalf in receiving or depositing funds into program accounts or in issuing financial documents, checks, or other instruments of payment for program costs shall be bonded to provide protection against loss. Those costs are chargeable to administration.

§ 633.311 Management information systems.

All grantees shall establish and maintain a program and financial management system which meets Departmental standards and the requirements of § 633.314.

§ 633.312 Grantees contracts and subgrants.

(a) *Grantee responsibility.* (1) The grantee is responsible for development, approval and operation of all contracts and subgrants and shall require that its contractors and subgrantees adhere to the requirements of the Act, regulations promulgated under the Act, and other applicable laws as required by DOL.

(2) The grantee shall require contractors and subgrantees to maintain effective control and accountability over all funds, property and other assets covered by the contract or subgrant.

(3) Each grantee, subgrantee and contractor shall establish and use internal program management procedures sufficient to prevent fraud and abuse.

(4) The grantee shall ensure that contractors and subgrantees maintain and make available for review by the grantee and the Department of Labor all records pertaining to the operations of programs under such contracts and subgrants, consistent with the maintenance and retention of record requirements.

(5) Subgrantees are entitled to funding for administrative costs. The amount of such funding will be determined during the development of subgrants.

(b) In the event an agreement or subgrant is cancelled, in whole or in part, the grantee may be required to develop procedures for ensuring continuity of service to participants.

(c) Grantees are authorized to enter into classroom training or on-the-job training contracts or subgrants which extend past the expiration date of the grant, but such extension shall not exceed six months. In such cases, the grantee shall continue to be responsible for the administration of such contracts and subgrants, unless, should the grant be terminated, such contract or subgrant is transferred to a successor grantee.

§ 633.313 Administrative staff and personnel standards.

The following provisions shall be applicable only to private nonprofit grantees and to private nonprofit subgrantees receiving section 402 funds:

(a) Personnel policies of grantees and subgrantees shall be stated in written form and available to the Department upon request.

(b) Each grantee and subgrantee shall insure that its staff recruiting procedures afford adequate opportunity for the hiring and promotion of persons in the target population.

(c) Grantees and subgrantees shall include the following provisions in their published personnel policies relating to outside employment of their employees in section 402 programs.

(1) Such employment shall not interfere with the efficient performance of the employee's duties in the DOL-assisted programs;

(2) Such employment shall not involve conflict of interest or conflict with the employee's duties in the DOL-assisted program;

(3) Such employment shall not involve the performance of duties which the employee should perform as part of employment in the DOL-assisted program; and

(4) Such employment shall not occur during the employee's regular or assigned working hours in the DOL-assisted program, unless the employee during the entire day on which such employment occurs is on annual leave, compensatory leave, or leave without pay.

(d) *Salaries and wages.* (1) Administrative and staff employees in section 402 programs shall be paid at a rate no lower than the applicable Federal, State, or local minimum wage rate, whichever is highest. The salary for each position shall be justified and documented by the grantee to the satisfaction of the Department.

(2) Notwithstanding paragraph(d)(1) of this section, where a grantee or subgrantee has an established system, it may compensate its section 402 program employees at existing rates in effect for comparable positions under such merit system. However, in order to use this methodology, the section 402 program employees must be filling types of positions in existence before the grantee or subgrantee received financial assistance under the section 402 program, and the salary scale must not have been changed as a result of such financial assistance.

(e) *Prorating salaries.* Where an individual performs functions under several grants, his or her time shall be prorated among the different grants and the portion of the salary charged to the section 402 grant shall not exceed the percentage of time spent performing section 402 functions.

(f) *Employee benefits.* Employee benefits shall be at the same level and to the same extent as those positions in public or private nonprofit agencies in the area where the program is carried out.

(g) *Position responsibilities.* (1) Each grantee and subgrantee shall maintain a written detailed job description identifying job functions and responsibilities for each administrative and staff position under its section 402 program.

(2) Each position shall have specific hiring qualifications. Positions requiring higher salaries or wages shall include higher level of responsibilities commensurate with the salary.

(h) *Personnel procedures.* (1) Each grantee and subgrantee shall maintain a personnel manual containing detailed procedures for hiring new employees, promoting present employees and granting salary increases.

(2) Each grantee and subgrantee shall maintain documentation as to any personnel action (including hiring, promotion, and salary increases) involving its section 402 program employees.

§ 633.314 Reports required.

Grantees shall report pursuant to instructions issued by the Department. Reports shall be submitted quarterly within 45 days after the end of the report period (sec. 165(a)(2)). Accuracy of all reports must be verified by the chief executive officer or financial officer. When estimates are used, the verification statement will so state.

§ 633.315 Replacement, corrective action, termination.

(a) The Department may replace any grantee who during the grant period has been terminated by first offering the Governor the opportunity to submit an acceptable application. When such an offer is made and should the Governor decline, within 15 days, or should the Governor or his agent have been the terminated grantee, the Department may replace the grantee by (1) designating another organization or organizations, or (2) opening the area for competitive bidding.

(b) The Department may also require appropriate corrective action as a condition of continued funding of a grantee whose performance has been found

deficient, but not sufficient to warrant termination for cause or emergency treatment. Such appropriate corrective actions may include but are not limited to termination of subrecipient agreements, development of and compliance with corrective action plans, etc.

(c) In cases where deficiencies are identified and efforts at corrective action have failed, the Department may apply sanctions, e.g., suspension of Letter of Credit, incremental funding, etc.

(d) Termination for cause can occur whenever there is a violation of the governing rules and regulations, failure to comply with the grant terms and conditions and in such cases as:

(1) Inability to meet Federal standards related to such debt collection requirements as:

(i) Failure to respond to demand letters from DOL for repayment of debts within the stated timeframe;

(ii) Failure to comply with approved repayment agreement;

(2) Nonperformance related to such requirements as:

(i) Failure to submit required quarterly financial reports for two successive periods within 30 days after they are due;

(ii) Failure to submit required quarterly performance report for two successive periods within 30 days after they are due;

(iii) Failure to develop a plan of action to correct deficiencies identified in a final audit finding and determination or by an onsite monitoring review;

(3) Nonperformance related to such requirements as:

(i) Failure to comply with formal corrective action after due notice;

(ii) Failure to comply with the requirements of the Act related to a grievance procedure and other requirements;

(e) In addition, the Department, by written notice, may terminate a grant in whole or in part in the event of reduction in the funds available for JTPA title IV, section 402 programs by reason of congressional action, whether by authorization, appropriation, deferral, rescission or otherwise, or by reason of other legislative action, such as changes in service deliverers, program content or services to be provided, which makes it impracticable to continue the agreement under its original terms. In the event of a congressional reduction in funds, the reduction shall be apportioned on an equitable basis among section 402 grantees. In the case of termination pursuant to this provision, the Department shall be liable for payment, in accordance with the payment provisions of this agreement, for services rendered and noncancellable obligations properly incurred prior to the effective date of termination.

(f) Notwithstanding the provisions of part 636 the Department may terminate a grantee under emergency termination procedures in accordance with section 164(f) of the Act.

(i) Instances under which emergency termination can occur include but are not limited to: Final audit findings and determinations identifying numerous adverse findings in the area of financial management; information gathered through onsite monitoring which substantiates serious management, fiscal and/or performance problems; documented information from the Inspector General or gained through incident reports of poor performance, serious administrative problems and/or inability to protect and account for Federal funds.

(ii) Within 30 days of written termination notification to a grantee, the Department will secure applicable documents onsite, seize bank accounts relating to the program, arrange for the payment of legitimate bills and debts and arrange, to the degree feasible, for the continued provision of services to program enrollees.

§ 633.316 Closeout procedures.

Grant closeout will conform to the requirements at 41 CFR part 29–70. As necessary, the Department shall issue supplementary closeout requirements.

§ 633.317 Reallocation of funds.

(a) In a limited number of circumstances, the Department may reduce a portion of a grant when it can be reasonably projected that the funds will not be used during the grant performance period or that they will not be used for DOL authorized carryover purposes. Such reduction of funds will

only be undertaken after 30-days advance notice to the grantee.

(b) Funds recaptured as a result of these grant reductions will be available for technical assistance or special projects funded at the discretion of the Department .

§ 633.318 Nondiscrimination and nonsectarian activities.

Pursuant to section 167(a) of the Act:

(a) Nondiscrimination and equal opportunity requirements and procedures, including complaint processing and compliance reviews, will be governed by the provisions of 29 CFR parts 31 and 32 and will be administered by the Office of Civil Rights.

(b) The employment or training of participants in sectarian activities is prohibited.

§ 633.319 Lobbying, political activities and unionization.

No funds provided under the Act may be used in any way:

(a) To attempt to influence in any manner a member of Congress to favor or oppose any legislation or appropriation by Congress.

(b) To attempt to influence in any manner State or local legislators to favor or oppose any legislation or appropriation by such legislators.

(c) Which involves political activities (sec. 141(a)).

(d) Which will assist, promote, or deter union organizing (sec. 143(c)(1)).

§ 633.320 Nepotism.

(a) No grantee, subgrantee, or employing agency may hire a person in an administrative capacity, staff position, or on-the-job training position funded under the Act if a member of that person's immediate family is engaged in an administrative capacity for that grantee, subgrantee, or employing agency.

(b) No subgrantee or employing agency may hire a person in an administrative capacity, staff position or on-the-job training position funded under the Act, if a member of that person's immediate family is engaged in an administrative capacity for the grantee from which that subgrantee or employing agency obtains its funds. To the extent that an applicable State or local legal requirement regarding nepotism is more restrictive than this provision, such State or local requirement shall be followed.

(c) For purposes of this section the term ''immediate family'' means wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, and stepchild.

§ 633.321 Performance standards for section 402 programs.

(a) The Secretary shall issue performance standards for section 402 programs.

(b) To issue performance standards, the Secretary shall:

(1) Select the measures against which the standards will be set.

(2) Prescribe the pre- and post-program measurement periods.

(3) Determine standards for each of the measures, from which specific grantee standards can be determined in accordance with the parameters established by the Secretary.

(c) No grantee shall be penalized for not meeting performance standards for the program years 1984–1986.

§ 633.322 Sanctions for violation of the Act.

(a) Pursuant to sections 164 (d), (e), (f), (g), and (h) of the Act, the Secretary may impose appropriate sanctions and corrective actions for violations of the Act, regulations, or grant terms and conditions. Additionally, sanctions may include the following:

(1) Offsetting debts, arising from misexpenditure of grant funds, against amounts to which the grantee is or may be entitled under the Act, except as provided in section (e)(1) of the Act. The debt shall be fully satisfied when the Secretary reduces amounts allotted to the grantee by the amount of the misexpenditure; and

(2) Determining the amount of Federal cash maintained by the grantee or its subgrantee or contractor in excess of reasonable grant needs, establishing a debt for the amount of such excessive cash, and charging interest on that debt.

(b) Except for actions under section 164(f) and 167 of the Act, to establish a debt or violation subject to sanction and/or corrective action, the Secretary shall utilize initial and final determination procedures outlined in 20 CFR part 636.

(c) To impose a sanction or corrective action regarding a violation of section 167 of the Act, the Secretary shall utilize the procedures of 29 CFR part 31.

(d) (1) The Secretary shall hold the grantee responsible for all funds under the grant. The grantee shall hold its subgrantees and contractors responsible for JTPA funds received through the grant.

(2) The Secretary shall determine the liability of the grantee for misexpenditures of grant funds in accordance with section 164(e) of the Act, including the requirement that the grantee shall have taken prompt and appropriate corrective actions for misexpenditures by a subgrantee or contractor.

(3) Prompt, appropriate, and aggressive debt collection action to recover any funds misspent by subgrantees or contractors ordinarily shall be considered a part of the corrective action required by section 164(e)(2)(D) of the Act.

(4) In making the determination required by section 164(e)(2) of the Act, the Secretary may determine, based on a request from the grantee, that the grantee may forego certain collection actions against a subgrantee or contractor where that subgrantee or contractor was not at fault with respect to the liability criteria set forth in section 164(e)(2)(A) through section 164(e)(2)(D) of the Act. The Secretary shall consider such requests in assessing whether the grantee's corrective action was appropriate in light of section 164(e)(2)(D) of the Act.

(5) The grantee shall not be released from liability for misspent funds under the determination required by section 164(e) of the Act until the Secretary determines that further collection action, either by the grantee or subgrantee or contractor, would be inappropriate or would prove futile.

(e) Nothing in this section shall preclude the Secretary from imposing a sanction directly against a subgrantee or contractor as authorized in section 164(e)(3) of the Act. In such a case, the Secretary shall inform the grantee of the Secretary's action.

PART 634—LABOR MARKET INFORMATION PROGRAMS UNDER TITLE IV, PART E OF THE JOB TRAINING PARTNERSHIP ACT

COMPREHENSIVE LABOR MARKET INFORMATION SYSTEM

Sec.

634.1 General.
634.2 Availability of funds.
634.3 Eligible recipients.
634.4 Statistical standards.
634.5 Federal oversight.

AUTHORITY: Job Training Partnership Act, sec. 169, (29 U.S.C. 1510 *et seq.*, Pub. L. 97–300, 96 Stat. 1322), unless otherwise noted.

SOURCE: 48 FR 48779, Oct. 20, 1983, unless otherwise noted.

COMPREHENSIVE LABOR MARKET INFORMATION SYSTEM

§ 634.1 General.

Pursuant to title IV, part E of the Job Training Partnership Act, the Secretary, in cooperation with the States, shall maintain a comprehensive system of Labor Market Information (LMI). This subpart contains regulations governing the comprehensive LMI system.

§ 634.2 Availability of funds.

(a) The Secretary shall make available, from the amounts appropriated pursuant to section 461(a) of the Act and sections 3(a) and 14 of the Wagner-Peyser Act, funds to support LMI activities and Federal-State cooperative statistical programs.

(b) LMI programs may be funded through reimbursable agreements between the Secretary and the States.

§ 634.3 Eligible recipients.

(a) For funds appropriated pursuant to JTPA title IV, part E, eligible recipients shall be the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, American Samoa, and the Trust Territory of the Pacific Islands.

(b) For funds appropriated pursuant to the Wagner-Peyser Act, as amended, eligible recipients shall be the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

§ 634.4 Statistical standards.

Recipients shall agree to provide required data following the statistical standards prescribed by the Bureau of Labor Statistics for cooperative statistical programs.

§ 634.5 Federal oversight.

The Secretary shall take such action as necessary to ensure satisfactory recipient performance.

PART 636—COMPLAINTS, INVESTIGATIONS AND HEARINGS

Sec.
636.1 Scope and purpose.
636.2 Protection of informants.
636.3 Complaint and hearing procedures at the grantee level.
636.4 Grievance procedures at the employer level.
636.5 Exhaustion of grantee level procedure.
636.6 Complaints and investigations at the Federal level.
636.7 Subpoenas.
636.8 Initial and final determination; request for hearing at the Federal level.
636.9 Opportunity for informal review.
636.10 Hearings before the Office of Administrative Law Judges.
636.11 Final action.

AUTHORITY: 29 U.S.C. 1579(a).

SOURCE: 48 FR 48780, Oct. 20, 1983, unless otherwise noted.

§ 636.1 Scope and purpose.

(a) *General.* This part establishes the procedures to receive, investigate and resolve complaints, and conduct hearings to adjudicate disputes under title IV (except part B) of the Act. It governs grievance procedures at the recipient or subrecipient level, the receipt and investigation of complaints at the Federal level, the procedures for resolving investigative findings, the rules of practice for adjudicative hearings, and the rendering of decisions pursuant to the Act. Judicial review of final action of the Department after opportunity for an administrative hearing has been exclusively established in the United States Courts of Appeals for the Circuits in which the affected parties reside or transact business.

(b) *Initiation of investigations.* JTPA investigations may be initiated upon the request of any person or organization or by the Department on its own initiative.

(c) *Non-JTPA remedies.* Whenever any person, organization or agency believes that a recipient or subrecipient has engaged in conduct that violates the Act and that such conduct also violates a Federal statute other than JTPA, or a State or local law, that person, organization or agency may, with respect to the non-JTPA cause of action, institute a civil action or pursue other remedies authorized under other Federal, State, or local law against the recipient or subrecipient without first exhausting the remedies in this subpart. For example, if a subrecipient believes that a grantee has breached the subgrant agreement between the grantee and itself, the subrecipient may institute a civil action for breach of contract in a State court if so authorized by State law. Nothing in the Act or this paragraph, shall:

(1) Allow any person or organization to join or sue the Secretary with respect to his or her responsibilities under JTPA except after exhausting the remedies in this subpart.

(2) Allow any person or organization to file a suit which alleges a violation of JTPA or these regulations without first exhausting the administrative remedies described in this subpart, or

(3) Be construed to create a private right of action with respect to alleged violations of JTPA or the regulations.

(d) Complaints of discrimination pursuant to section 167(a) of the Act will be handled under 29 CFR parts 31 and 32.

[48 FR 48780, Oct. 20, 1983, as amended at 55 FR 13007, Apr. 6, 1990]

§ 636.2 Protection of informants.

(a) *Informants.* Where possible the identity of any person who has furnished information relating to, or assisted in an investigation of a possible violation of the Act will be held in confidence. Where disclosure of the person's identity is essential to assure a

fair determination of the issues, or where necessary to effectively accomplish responsibilities under the Act, the Department may disclose such identity upon such conditions as will promote the continued receipt of confidential information by the Department and effectuate the protections and policies stated in paragraph (b) of this section. Any such disclosure shall be consistent with the Freedom of Information Act, the Privacy Act and other applicable law.

(b) *Retaliation prohibited.* No person or agency may discharge, or in any other manner discriminate or retaliate against any person, or deny to any person a benefit to which that person is entitled under the provisions of the Act or the regulations because such person has filed any complaint, instituted or caused to be instituted any proceeding under or related to the Act, has testified or is about to testify in any such proceeding or investigation, or has provided information or assisted in an investigation.

§ 636.3 Complaint and hearing procedures at the grantee level.

(a) *Policy.* (1) Each grantee shall establish and maintain a procedure for resolving any complaint alleging a violation of the Act, regulations, grant or other agreements under the Act, including any complaint arising in connection with the JTPA programs operated by the grantee or its subrecipients. Such complaint procedures must meet the requirements of this section. The complaint procedure shall provide for final resolution of complaints within 60 days after filing the complaint. Where existing complaints or grievance procedures include the elements set forth in this section, grantees may adopt such mechanism as, or as part of, their JTPA procedure.

(2) Participants shall be provided, upon enrollment into employment or training, with a written description of the complaint procedures including notification of their right to file a complaint and instructions on how to do so. Grantees should designate an individual to monitor the operation of the complaint procedures, to ensure that complaints and related correspondence are logged and filed, to ensure that assistance is available for properly filling complaints, and to ensure the availability, coordination, and promptness of all elements of the procedures. Upon filing a complaint, and at each stage thereafter, each complaint shall be notified in writing of the next step in the procedure.

(3) Complaints may be brought by any individual or organization including, but not limited to, program participants, subrecipients, contractors, staff of the grantee or subrecipient, applicants for participation or financial assistance, labor unions, and community-based organizations.

(4) With the exception of complaints alleging fraud or criminal activity, the filing of a complaint pursuant to this section must be made within one year of the alleged occurrence.

(5) The grantee may delegate the authority to operate and maintain the complaint and hearing procedure to its subrecipients except for complaints between the grantee and its subrecipients (e.g., audit disallowances), complaints involving more than one of its subrecipients, or complaints directly involving the operations or responsibilities of the grantee. Where the procedure is delegated, the grantee may provide for an appeal to itself from the decision of the subrecipient or the grantee may provide that the subrecipient's decision is the final decision of the grantee. Where the procedure is delegated, the grantee shall ensure that the procedures specified in this section are followed and a decision issued promptly within 60 days after a complaint is filed.

(6) When a participant is an employee of a grantee or subrecipient and alleges that an occurrence constitutes a violation of the Act, regulations, grant, or other agreements under the Act, as well as a violation of the terms and conditions of employment under a State or local law or a collective bargaining agreement, the participant may pursue the complaint and hearing procedures under the State or local law or the collective bargaining agreement, pursuant to § 636.4. A participant who selects the procedures provided in this section is not precluded from filing a complaint under § 636.4, unless otherwise prohibited by State or local law,

or applicable collective bargaining agreement.

(b) *Complaint procedures.* The complaint resolution procedure shall include:

(1) Opportunity to file a complaint. All complaints shall be in writing.

(2) Opportunity for informal resolution of the complaint.

(3) Written notification of an opportunity for a hearing when an informal resolution has not been accomplished. The notice shall state the procedures for requesting a hearing and shall describe the elements in the hearing procedures including those set forth in paragraph (c) of this section.

(4) Opportunity to amend the complaint prior to a hearing.

(5) Opportunity for a hearing pursuant to paragraph (c) of this section within 30 days of filing the complaint.

(6) A final written decision to the complainant which shall be made within 60 days of the filing of the complaint and provided to the parties by certified or registered mail, return receipt requested. The decision shall include:

(i) A statement of facts and reason(s) for the decision.

(ii) A statement that the procedures delineated in this section have been completed.

(iii) A statement of any remedies to be applied.

(iv) Notice of the right to file a complaint with the Grant Officer pursuant to §636.6 where any party disagrees with the decision.

(c) *Hearing procedure.* A hearing shall be provided within 30 days after filing a complaint. The hearing procedure shall include:

(1) Written notice of the date, time and place of the hearing, the manner in which it will be conducted, and the issues to be decided. Other interested parties may apply for notice. Such other interested party is a person or organization potentially affected by the outcome. The notice to other interested parties shall include the same information furnished to the complainant and shall further state whether such interested parties may participate in the hearing and if applicable, the method by which they may request such participation.

(2) Opportunity to withdraw the request for hearing in writing before the hearing.

(3) Opportunity to request rescheduling of the hearing for good cause.

(4) Opportunity to be represented by an attorney or other representative of the complainant's choice.

(5) Opportunity to call witnesses and introduce documentary evidence. Recipients or subrecipients shall cooperate in making available any persons under their control or employ to testify, if such persons are requested to testify by the complainant.

(6) Opportunity to have records or documents relevant to the issues produced by their custodian when such records or documents are kept by or for the grantee or its subrecipient in the ordinary course of business.

(7) Opportunity to question any witnesses or parties.

(8) The right to an impartial hearing officer.

(9) A verbatim record of the proceeding.

(10) A written decision from the hearing officer to the complainant(s) and any other interested parties within 60 days of the filing of the complaint. This period may be extended with the written consent of all of the parties for good cause. The written decision shall include a statement of facts, a statement of reasons for the decision and a statement of any remedies to be applied. Where the hearing officer's decision is the grantee's final decision it shall be provided to the parties by certified or registered mail, return receipt requested.

(11) Where a complaint procedure provides for a grantee's review of the hearing officer's decision, the grantee shall complete its review and provide a final written decision to the complainant(s), and any other parties, by certified or registered mail, return receipt requested, as provided in paragraph (c)(10) of this section within 60 days after the complaint is filed.

(12) Where local law, personnel rules or other applicable requirements specify procedures in addition to those specified above, similarly employed JTPA participants shall be notified of their right to use the same procedures.

§ 636.4 Grievance procedures at the employer level.

(a) *Policy.* (1) Whenever the grantee or subrecipient is an employer, it shall continue to operate or shall establish and maintain for its participants a grievance procedure relating to the terms and conditions of JTPA employment. The employer who does not have a grievance procedure may use the complaint procedure established under § 636.3. Employers shall inform participants of the procedures they are to follow.

(2) A participant who elects the grievance procedure in this section, may also pursue a complaint under § 636.3 where there is an alleged violation of the Act, regulations, grant or other agreement under the Act.

(b) *Equal benefits.* Where local law, personnel rules, or other applicable requirements specify procedures (including procedures for any adverse action or for termination of employment), similarly employed JTPA participants shall be notified of their right to use the same procedures, as well as JTPA procedures.

§ 636.5 Exhaustion of grantee level procedure.

(a) *Exhaustion required.* No complainant may file a complaint with the Department until the grantee level procedures specified in § 636.3 have been exhausted.

(b) *Exhaustion exceptions.* Complainants who have not exhausted the procedures at the grantee level may file the complaint at the Federal level, and the Department may accept such complaint if it determines that:

(1) The grantee or subrecipient has not acted within the time frames specified in § 636.3; or

(2) The grantee's or subrecipient's procedures are not in compliance with § 636.3; or

(3) An emergency situation exists.

§ 636.6 Complaints and investigations at the Federal level.

(a) *General; final determination of reliable and probative evidence.* Where local administrative remedies have been exhausted, section 144(c) of the Act requires that a final determination of the complaint shall be made within 120 days after the Department receives the complaint. The Department's resolution of non-criminal matters pursuant to section 144(c) of the Act consists of the final determination under § 636.8(e) of whether there is reliable and probative evidence to support the allegation or belief that a grantee or subrecipient is failing to comply with the requirements of the Act, regulations, grant or other agreement under the Act.

(b) *Complaints.* (1) Every complaint shall be filed in writing before the commencement of any investigation or corrective action shall be required. Complaints alleging discrimination under section 167, will be filed with the Regional Director, Office of Civil Rights (OCR). All other JTPA complaints will be filed with the appropriate Grant Officer. However, a complaint timely filed with either the Grant Officer or the Regional OCR Director shall be deemed properly filed and shall be referred (as necessary) to the appropriate office. The complaint shall be filed only after the grantee level procedures in § 636.3 have been exhausted and no later than 30 days from the date of receipt of the written decision or notice required by § 636.3. The complaint should contain the following:

(i) The full name, telephone number (if any), and address of the person making the complaint.

(ii) The full name and address of the respondent (the grantee or subrecipient or person against whom the complaint is made).

(iii) A clear and concise statement of the facts, including pertinent dates, constituting the alleged violation.

(iv) Where known, the provisions of the Act, regulations, grant or other agreements under the Act believed to have been violated.

(v) A statement disclosing whether proceedings involving the subject of the complaint have been commenced or concluded before any Federal, State or local authority, and, if so, the date of such commencement or conclusion, the name and address of the authority and the style of the case.

(vi) A copy of the final decision of the recipient or subrecipient issued pursuant to § 636.3.

(2) A complaint will be considered to have been received upon receipt by the appropriate Grant Officer. To be acceptable, the complaint must be a written statement sufficiently precise to both identify those against whom the allegations are made and to fairly afford the respondent an opportunity to prepare a defense. A complaint may be amended to cure defects or omissions, or to clarify and amplify allegations made therein, and such amendments relate back to the original filing date for purposes of timely filing.

(3) A complaint once filed may be withdrawn only with the consent of the Grant Officer. If the complainant fails to cooperate or is unavailable, the complaint may be dismissed upon reasonable notice to the last known address of the complainant.

(c) *Investigation of complaints.* Whenever the Grant Officer receives a complaint filed in accordance with paragraphs (a) and (b) of this section, the complaint shall be investigated if it alleges that any person, grantee or subrecipient has failed to comply with the requirements of the Act, regulations, grant or other agreements under the Act. The Grant Officer shall promptly issue a notice to the grantee or subrecipient which shall include a copy or summary of the complaint and which shall direct the grantee or subrecipient to forward a copy of the complete administrative file, including a copy of the certified verbatim transcript of the hearing, within 15 days of receipt of such notice to the Grant Officer. Such investigation shall be completed and a conclusion made pursuant to §636.8(e) within 120 days of the filing of the complaint, except that the time may be extended with the written consent of all the parties.

(d) *Onsite review and other bases for investigation.* If after an onsite review, monitoring visit, review of reports, data or other information, the Grant Officer has reason to believe that a grantee or subrecipient is failing to comply with the requirements of the Act, regulations, grant or other agreements under the Act, the Grant Officer or other designated authority shall inquire into the matter.

(e) *Utilizing other services.* With the consent and cooperation of State agencies charged with the administration or enforcement of State laws, the Secretary may elect for the purpose of carrying out this part, to utilize the services of State, local and Tribal agencies and their employees, and notwithstanding any other provision of law, may reimburse, in whole or in part, such State and local agencies and their employees for services rendered for such purposes.

(f) *Criminal investigation.* Notwithstanding any other provision of this part, investigation by the Department of any matter concerning a potential Federal criminal violation shall be conducted as the Inspector General shall direct pursuant to the powers granted by the Inspector General Act of 1978, Pub. L. 95–452, 92 Stat. 1101.

§ 636.7 Subpoenas.

(a) *Subpoenas in non-Inspector General investigations.* (1) The Department, through the appropriate Assistant Secretary, may issue a subpoena directing the person named therein to appear before a designated representative at a designated time and place to verify or to produce documentary evidence, or both, relating to any matter arising under the Act being investigated. The Assistant Secretary, Solicitor or the Associate Solicitor for Employment and Training Legal Services, for good cause shown, may extend the time prescribed for compliance with such subpoenas.

(2) Any motion to limit or quash any investigational subpoena shall be filed with the Chief Administrative Law Judge within 10 days after service of the subpoena, or, if the return date is less than 10 days after service of the subpoena, within such other time as may be allowed by the assigned Administrative Law Judge.

(3) The timely filing of a motion to limit or quash an investigational subpoena shall stay the requirement of a return on the portion challenged. If the Administrative Law Judge rules subsequent to the return date, and the ruling denies the motion in whole or in part, the Administrative Law Judge shall specify a new return date.

(4) All motions to limit or quash subpoenas, and the responses thereto, shall be part of the public record of the

Office of the Administrative Law Judges except as otherwise ordered or provided under these regulations.

(b) *Noncompliance.* (1) In cases of failure to comply with compulsory processes, appropriate action may be initiated including actions for enforcement, forfeiture, penalties or criminal actions.

(2) The Solicitor of Labor, with the consent of the Attorney General, may:

(i) Institute in the appropriate district court on behalf of the Department an enforcement proceeding in connection with the failure or refusal of a person, partnership, corporation, recipient or other entity to comply with or to obey a subpoena if the return date or any extension thereof has passed; or

(ii) Request on behalf of the Department the institution of civil actions, as appropriate, if the return date or any extension thereof has passed including seeking civil contempt in cases where a court order enforcing compulsory process has been violated.

§ 636.8 Initial and final determination; request for hearing at the Federal level.

(a) *Initial determination.* Upon the conclusion of a review of the entire administrative record of an investigation conducted pursuant to § 636.6 or after the conclusion of the comment period for audits, the Grant Officer shall make an initial determination of the matter in controversy including the allowability of questioned costs or activities. Such determination shall be based upon the requirements of the Act, regulations, grants or other agreements, under the Act. The determination may conclude either:

(1) That based upon the entire record there is no violation of the Act, regulations, grants or other agreements under the Act; or

(2) That there is evidence to support the allegation, or finding of questioned costs or activities.

(b) *Contents of initial determination.* (1) In the event that the Grant Officer makes a finding that there is evidence to support the allegation of a violation the initial determination shall:

(i) Be in writing;

(ii) State the basis of the determination, including factual findings and conclusions;

(iii) Specify the costs or activities disallowed;

(iv) Specify the corrective actions required and/or that sanctions may be imposed; and

(v) Give notice of an opportunity for informal resolution of the matters as necessary to the appropriate parties, which should include all interested parties specified by the Grant Officer.

(2) In the event that the Grant Officer makes a finding of no violation the initial determination shall:

(i) Be in writing;

(ii) State the bases of the determination (factual findings and conclusions); and

(iii) Give notice of the opportunity to present additional information within 30 days of receipt of the initial determination.

(3) The initial determination shall be mailed by certified mail return receipt requested to the parties and interested parties.

(c) *Allowability of certain questioned costs.* In any case in which the Grant Officer determines that the recipient meets the requirements of section 164(e)(2)(A)–(D) of the Act, the Grant Officer may waive the imposition of sanctions (sec. 164(e)(3)). It is the responsibility of the grantee to request such waiver by the Grant Officer and to submit the evidence to be used to make the finding.

(d) *Informal resolution.* Except as provided by section 164(f) of the Act, the Grant Officer shall not revoke a grant, in whole or in part, nor institute corrective action or sanctions against a grantee without first providing the grantee with an opportunity to informally resolve those matters contained in the Grant Officer's initial determination. If all matters are informally resolved, the Grant Officer shall notify the parties in writing of the nature of the resolution, which shall constitute final agency action, not subject to appeal, and shall close the file.

(e) *Final determination.* (1) If all the parties and the Grant Officer cannot informally resolve any matter pursuant to paragraph (d) of this section, the Grant Officer shall provide each party

with a final written determination by certified mail, return receipt requested. In the case of audits, the final determination shall be issued not later than 180 days after the receipt by the Grant Officer of the final approved audit report.

(2) The final determination shall:

(i) Indicate that efforts to informally resolve matters contained in the initial determination pursuant to paragraph (a) of this section have been unsuccessful;

(ii) List those matters upon which the parties continue to disagree;

(iii) List any modifications to the factual findings and conclusions set in the initial determination;

(iv) List any sanctions, and required corrective actions, including any other alteration or modification of the plan, grant, agreement or program ordered by the Grant Officer; and

(v) Inform the parties of their opportunity to request a hearing pursuant to these regulations.

(3) If it is determined in the final notice that the complaint does not allege and/or the evidence does not indicate that there is reason to believe there may have been a violation of the Act, regulations, grants or other agreements under the Act, the Grant Officer shall dismiss the complaint without an offer of a hearing. Such dismissal shall constitute final agency action.

§ 636.9 Opportunity for informal review.

(a) Parties to a complaint under § 636.10 may choose to waive their rights to an administrative hearing before the Office of Administrative Law Judges (OALJ) by choosing to transfer the settlement of their dispute to an individual acceptable to all parties for the purpose of conducting an informal review of the stipulated facts and rendering a decision in accordance with applicable law. A written decision will be issued within 60 days after the matter is submitted for informal review.

(b) The waiver of the right to request a hearing before the OALJ will automatically be revoked if a settlement has not been reached within the 60 days provided in paragraph (a) of this section.

(c) The decision rendered under this informal review process shall be treated as a final decision of an Administrative Law Judge pursuant to section 166(b) of the Act.

§ 636.10 Hearings before the Office of Administrative Law Judges.

(a) *Jurisdiction*. (1) Within 21 days of receipt of the Grant Officer's final determination, except for determinations under § 636.8(e)(3) dismissing the complaint without an opportunity to request a hearing, or on the expiration of 120 days of the filing of a complaint with the Grant Officer upon which no extensions have been mutually agreed, any affected grantee, subrecipient of complainant may transmit by certified mail, return receipt requested, a request for hearing to the Chief Administrative Law Judge, United States Department of Labor, 800 K Street, NW., suite 400, Washington, DC 20001-8002 with a copy to the Grant Officer.

(2) The request for hearing shall be accompanied by a copy of the Grant Officer's final determination, if issued, and shall specifically state those issues of the determination upon which review is requested. Those provisions of the determination not specified for review, or the entire determination when no hearing has been requested, shall be considered resolved and not subject to further review.

(3) Except as otherwise provided by these regulations, only alleged violations of the Act, regulations, grants or other agreements under the Act fairly raised in grantee level proceedings under § 636.3, alleged violations of recipient level procedures fairly raised before the Grant Officer, or complaints identified in sections 164(f) and 166(a) of the Act are subject to review.

(4) The same procedure set forth in paragraphs (a) (1) through (3) of this section applies in the case of a complainant who has not had a dispute adjudicated by the informal review process of § 636.9 within the 60 days, except that the request for hearing before the OALJ must be filed within 15 days of the conclusion of the 60-day period. In addition to including the determination upon which review is requested, the complainant must include a copy of

any Stipulation of Facts and a brief summary of proceedings.

(5) *Discretionary hearing.* An opportunity for a hearing may also be extended when the appropriate Assistant Secretary determines that fairness and the effective operation of JTPA programs would be furthered.

(b) *Service and filing.* Copies of all papers required to be served on a party or filed with the OALJ shall be filed simultaneously with the OALJ and served upon the parties of record or their representatives, and shall contain proof of such service.

(c) *Rules of Procedure.* The rules of practice and procedure promulgated by the OALJ shall govern the conduct of hearings under this section.

(d) *Prehearing procedures.* In all cases, the OALJ should encourage the use of prehearing procedures to simplify and clarify facts and issues.

(e) *Subpoenas.* Subpoenas necessary to secure the attendance of witnesses and the production of documents or things at hearings shall be obtained from the OALJ and shall be issued pursuant to the authority contained in section 163(b) of the Act, incorporating 15 U.S.C. section 49.

(f) *Timely submission of evidence.* The OALJ shall not permit the introduction at the hearing of documentation relating to the allowability of costs if such documentation has not been made available for review either at the time ordered for any prehearing conference, or, in the absence of such an order, at least three weeks prior to the hearing date.

(g) *Burden of production.* The Department shall have the burden of production to support the Grant Officer's decision. To this end, the Grant Officer shall prepare and file an administrative file in support of the decision. Thereafter, the party or parties seeking to overturn the Grant Officer's decision shall have the burden of persuasion.

(h) *Review.* (1) In all cases proceeding under § 636.6, the Administrative Law Judge shall review the Administrative File and the request for hearing and shall determine whether there has been a full and fair hearing at the grantee level and whether there are no material factual issues unresolved. If the Administrative Law Judge determines that these two conditions are met, the case shall be decided upon the record and upon such briefs as the parties may submit. The Administrative Law Judge shall determine from the record whether there exists reliable and probative evidence to uphold the decision of the Grant Officer and shall, as appropriate, either affirm or remand the decision.

(2) If the Administrative Law Judge determines that either of the two conditions is not met, he or she shall hold a hearing. In such cases, the Office of Administrative Law Judges shall have the full authority of the Secretary under section 164 of the Act, except with respect to the provisions of subsection (e) of that section.

(3) Nothing in this subsection shall be construed to limit the right of the parties to seek a dismissal of the request for hearing or to seek summary judgment.

(i) *Termination of grant.* When the decision terminates the grant in whole or in part after hearing pursuant to this subpart, the decision shall specify the extent of termination and the date upon which such termination becomes effective. Upon receipt of this notice, the grantee shall:

(1) Discontinue further commitments of grant funds to the extent that they relate to the terminated portion of the grant.

(2) Promptly cancel all subgrants, agreements and contracts utilizing funds under this grant to the extent that they relate to the terminated portion of the grant.

(3) Settle, with the approval of the Secretary, all outstanding claims arising from such termination.

(4) Submit, within a reasonable period of time, after the receipt of the notice of termination, a termination settlement proposal which shall include a final statement of all unreimbursed costs related to the terminated portion of the grant.

(j) *Alternative provision of services.* If the final decision specifies suspension or termination of the grant, the Grant Officer shall determine how services shall be maintained in the grantee's area. As part of the determination, the Grant Officer shall determine whether

any funds shall be reallocated to another recipient to serve the area formerly served by the terminated or suspended grant. The Grant Officer may also consider the desirability of providing direct Federal services to the area through appropriate means.

(k) *Timing of decisions.* The Office of Administrative Law Judges should render a written decision not later than 90 days after the closing of the record.

[48 FR 48780, Oct. 20, 1983, as amended at 56 FR 54708, Oct. 22, 1991]

§ 636.11 Final action.

The final decision of the Secretary pursuant to section 166(b) of the Act in cases heard by the Administrative Law Judges or decided by an informal reviewer, or the Grant Officer's final determination where there has been no such hearing, constitutes final agency action within the meaning of the Act and the Administrative Procedure Act, 5 U.S.C. 704.

PART 637—PROGRAMS UNDER TITLE V OF THE JOB TRAINING PARTNERSHIP ACT

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AUTHORITY: 29 U.S.C 1579(a); 29 U.S.C. 1791i(e).

SOURCE: 59 FR 45868, Sept. 2, 1994, unless otherwise noted.

Subpart A—General Provisions

§ 637.100 Scope and purpose.

(a) This part implements Title V of the Act which creates a program to provide incentive bonuses to States for providing certain employable dependent individuals with job training to reduce welfare dependency, to promote self-sufficiency, to increase child support payments, and to increase employment and earnings (section 501).

(b) This part applies to programs operated with funds under Title V of the Job Training Partnership Act.

§ 637.105 Definitions.

In addition to the definitions contained in sections 4, 301, 303(e), and in §626.4 of this chapter, the following definitions apply to the administration of Title V of the Act and this part:

Absent parent means an individual who is continuously absent from the household and who is a non-custodial parent of a dependent child receiving aid to families with dependent children (AFDC) under part A of title IV of the Social Security Act (42 U.S.C. 601, *et seq.*).

Disability assistance means benefits offered pursuant to Title XVI of the Social Security Act, relating to the supplemental security income program.

Federal contribution means the amount of the Federal component of cash payments to individuals within the participating State under welfare and/or disability assistance programs, including Part A of Title IV of the Social Security Act.

Subpart B—Program Planning and Operation

§ 637.200 Allotments to States.

(a) For each program year for which funds are appropriated to carry out programs under this part, the Secretary shall pay to each participating State the amount the State is eligible to receive in accordance with this part.

No payments shall be made for any years for which funds are not appropriated and/or not available (section 502(a)).

(b) If the appropriation is not sufficient to pay to each State the amount it is eligible to receive in accordance with this part, the State shall receive a percentage of the total available funds equal to the percentage of its bonus compared to the national total of bonuses (section 502(b)).

(c) If an additional amount is made available after the application of paragraph (b) of this section, such additional amount shall be allocated among the States by increasing payment in the same manner as was used to reduce payment, except that no State shall be paid an amount which exceeds the amount to which it is eligible (section 502(c)).

§ 637.205 Notice of intent to participate.

(a) Any State seeking to participate in the incentive bonus program shall notify the Secretary of its intent to do so no later than 30 days before the beginning of its first program year of participation (i.e., June 1) (section 505(a)).

(b) Pursuant to instructions issued by the Secretary, the notification referenced in paragraph (a) of this section shall be in the form of a letter from the Governor to the Secretary advising the Secretary of the State's intention to apply for, receive and expend bonuses under this program in a manner consistent with this part (section 505(b)).

(c) After the State's submission of a notice of intent to participate, incentive bonuses may be claimed by a State for any individual who:

(1)(i) Was an absent parent of any child receiving AFDC at the time such individual was determined to be eligible for participation in programs under the Act;

(ii) Has participated in education, training, or other activities (including the Job Corps) funded under the Act; and

(iii) Pays child support for a child specified in paragraph (c)(1) of this section following termination from activities funded under the Act; or

(2)(i) Is blind or disabled;

(ii) Was receiving disability assistance at the time such individual was determined to be eligible for participation in programs under the Act;

(iii) Has participated in education, training, or other activities (including the Job Corps) funded under the Act; and

(iv) Earns from employment a wage or an income (section 506).

(d) A Governor may withdraw the State's participation in the incentive bonus program in any program year by submitting a written notice of withdrawal.

§ 637.210 Incentive bonus program applications.

(a) Any State seeking to receive an incentive bonus under this title shall submit an Incentive Bonus Program application pursuant to instructions issued by the Secretary that will contain the criteria for approval of such application. Each application shall contain, at a minimum, the following information:

(1) A list of eligible individuals who met the requirements of § 637.220 of this part during the program year;

(2) The amount of the incentive bonus attributable to each eligible individual who is claimed by the State; and

(3) A statement certifying the availability of documentation to verify the eligibility of participants and the amount of the incentive bonus claimed by the State (section 505(b)).

(b) The application for any program year shall be submitted by the State to the Secretary no later than August 31 following the end of the program year for which the bonus is being claimed. A copy of such application shall also be submitted at the same time to the appropriate DOL Employment and Training Administration Regional Office.

§ 637.215 Review and approval of applications for incentive bonus payments.

(a) The Secretary shall review all applications for overall compliance with JTPA, the requirements of this part, and the instructions issued by the Secretary.

(b) The Secretary shall inform a State within 30 days after receipt of

the application whether or not its application has been approved.

(c) If the application is not approved, the Department shall issue an initial notice of denial of payment indicating the reasons for such denial. The Governor will then have 30 days to respond to the reasons for the denial before a final decision is made.

(d) If the Department determines that the additional information provided does not adequately respond to the questions raised in the initial review process, a final denial of payment shall be issued. The Governor may then appeal the decision in accordance with the procedures at subpart H of part 627 of this chapter (sections 504(c) and 505(c)).

§ 637.220 Eligibility criteria for individuals to be counted in determining incentive bonuses.

An individual shall be eligible to be counted as part of the State's request for an incentive bonus payment under this part if the individual:

(a)(1) Was an absent parent of any child receiving AFDC at the time such individual was determined to be eligible for participation in programs under the Act;

(2) Has participated in education, training, or other activities (including the Job Corps) funded under the Act; and

(3) Pays child support for a child specified in paragraph (a)(1) of this section following termination from activities funded under the Act; or

(b)(1) Is blind or disabled;

(2) Was receiving disability assistance at the time such individual was determined to be eligible for participation in programs under the Act;

(3) Has participated in education, training, or other activities (including the Job Corps) funded under the Act; and

(4) Earns a wage or an income from employment (section 506).

§ 637.225 Determination of incentive bonus.

The amount of the incentive bonus to be paid to each State shall be the total of the incentive bonuses claimed for each eligible individual within the State. The amount of the incentive bonus to be paid each State shall be determined by the sum of:

(a) An amount equal to the total of the amounts of child support paid by each individual who is eligible under § 637.220(a) of this part, for up to 2 years after such individual's termination from JTPA; and

(b) An amount equal to the total reduction in the Federal contribution to the amounts received under title XVI of the Social Security Act (42 U.S.C. 1381, *et seq.*) by each individual who is eligible under § 637.220(b) of this part, for up to 2 years after such individual's termination from JTPA (section 503).

§ 637.230 Use of incentive bonuses.

(a) During any program year, the Governor may use an amount not to exceed 5 percent of the State's total bonus payment for the administrative costs incurred under this program, including data and information collection and compilation, recordkeeping, or the preparation of applications for incentive bonuses (section 504(a)(1)(A)).

(b) The remainder, not less than 95 percent of the incentive bonuses received, shall be distributed to SDAs and Job Corps Centers within the State in a manner consistent with an agreement between the Governor and these SDA's and centers. This agreement shall reflect an equitable method of distribution which is based on the degree to which the effort of the SDA and/or Center contributed to the State's qualification for incentive bonus funds under title V (section 504(a)(1)(B)).

(c) Not more than 10 percent of the incentive bonus received in any program year by each SDA and/or Job Corps Center may be used for the administrative costs of establishing and maintaining systems necessary for operation of programs under title V, including the costs of providing incentive payments described in paragraph (d) of this section, technical assistance, data and information collection and compilation, management information systems, post-program followup activities, and research and evaluation activities (section 504(a)(2)).

(d) Each SDA and/or Job Corps Center may make incentive payments to

service providers, including participating State and local agencies, and community-based organizations, that demonstrate effectiveness in delivering employment and training services to eligible individuals under this title (section 504(b)).

(e) All remaining funds received by each SDA shall be used for activities described in sections 204 and 264 of JTPA and shall be subject to the regulations governing the operation of programs under titles II–A and II–C of JTPA. All remaining funds received by each Job Corps Center shall be used for activities authorized under part B of title IV (section 504(a)(2).

Subpart C—Additional Title V Administrative Standards and Procedures

§ 637.300 Management systems, reporting and recordkeeping.

(a) The Governor shall ensure that the State's financial management system and recordkeeping system comply with subpart D of part 627 of this chapter.

(b) Notwithstanding the provisions of § 629.455 of this chapter, the Governor shall report to the Secretary pursuant to instructions issued by the Secretary regarding activities funded under this part. Reports shall be required semi-annually and annually. Reports shall be provided to the Secretary within 45 calendar days after the end of the report period.

(c) The Governor shall assure that appropriate and adequate records are maintained for the required time period to support all incentive bonus payment applications. Such records shall include documentation to support individuals' eligibility under this part.

§ 637.305 Federal monitoring and oversight.

The Secretary shall conduct oversight of the programs and activities conducted in accordance with this part.

§ 637.310 Audits.

The Governor shall ensure that the State complies with the audit provisions at § 629.480 of this chapter.

Subpart D—Data Collection [Reserved]

PART 638—JOB CORPS PROGRAM UNDER TITLE IV–B OF THE JOB TRAINING PARTNERSHIP ACT

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Sec.

638.100 General.

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AUTHORITY: 29 U.S.C. 1579(a).

SOURCE: 55 FR 12996, Apr. 6, 1990, unless otherwise noted.

Subpart A—Purpose and Scope

§ 638.100 General.

(a) *Purpose and Scope.* The purpose of this part is to delineate the policies, rules, and regulations that govern the operation of the Job Corps program, authorized under title IV–B of the Job Training Partnership Act (Act). Job Corps is one of the broad range of programs for youth authorized by the Act. Job Corps centers are located in both rural and urban areas and provide training, education, residential and a variety of other support services necessary to prepare students to become more responsible, productive, and employable. (Section 421)

(b) *Job Corps Policy and Requirements Handbook.* The policies and procedures required in this part which are to be established by the Job Corps Director shall be contained in a policy and requirements handbook which shall be incorporated by reference in each contract or agreement to operate a Job Corps center, program, or entity.

(c) *Definitions.* Definitions for terms used in this part are found in section 4 of the Act and in subpart B of this part. Statutory authority for the regulations in this part is found in section 169(a) of the Act (29 U.S.C. 1579(a)). Applicable statutory provisions, including sections of the Act other than section 169(a), are noted parenthetically in this part.

Subpart B—Definitions

§ 638.200 Definitions.

In addition to the definitions contained in section 4 of the Act, the following definitions apply to programs under title IV–B of the Act and under this part:

Absent Without Official Leave (AWOL) means the absence of a student without official leave. For purposes of tort claims, federal employees' compensation, pay status and leave accrual, a

residential student is considered AWOL if AWOL for 24 continuous hours. A non-resident student is considered AWOL if AWOL for one full day of center training.

Act means the Job Training Partnership Act.

Allotment means:

(1) A portion of the readjustment allowance prescribed by this part, which portion is paid monthly during the period of service of a student directly to a spouse of the student, to the child(ren) of the student, or to any other relative of the student who draws substantial support from the student; and

(2) A supplement to the portion allotted by the student, made by the payment of an equal amount by DOL. (Section 429(d))

Allowance means a benefit provided by DOL to students by cash, check, credit, voucher, direct provision, or otherwise for such personal travel, leave, quarters, subsistence, transportation, equipment, clothing, recreational services, and other expenses as the Job Corps Director may deem necessary or appropriate to the students' needs. (Section 429)

Capital improvement means any modification, addition, restoration or other improvement:

(1) Which increases the usefulness, productivity, or serviceable life of an existing site, facility, building, structure, or major item of equipment;

(2) Which is classified for accounting purposes as a ''fixed asset''; and

(3) The cost of which increases the recorded value of the existing building, site, facility, structure, or major item of equipment and is subject to depreciation.

Center means an organizational entity, including all of its subparts, providing Job Corps training and designated as a Job Corps center by the Job Corps Director.

Center Director means a center's chief official or the Center Director's designee.

Center operator means an agency or contractor that runs a center under an agreement or contract with DOL.

Center review board means the group at a center consisting of representatives from staff and students that reviews charges brought against students for infractions of center rules for which the penalty of termination might be imposed.

Civilian Conservation Center (CCC) means a center operated on public land under an agreement between DOL and another federal agency, which shall provide, in addition to other training and assistance, programs of work experience to conserve, develop, or manage public natural resources or public recreational areas or to develop community projects in the public interest.

Contract center means a center administered under a contract between Job Corps and a corporation, partnership, public agency, or similar legal entity.

Contracting officer means a DOL official authorized to enter into contracts or agreements on behalf of DOL.

Deliverer means any individual or organization that receives federal funds directly from DOL to establish, operate, or provide service to any Job Corps program or activity.

Department of Labor (DOL) means the United States Department of Labor, including its agencies and organizational units.

Disruptive home life means a home life characterized by such conditions as:

(1) The youth is living in an orphanage or other protective institution;

(2) The youth is suffering from serious parental or familial neglect or abuse; or

(3) The youth's father, mother, or legal guardian is a chronic invalid, alcoholic, narcotics addict, or has any other serious health condition.

Economically disadvantaged means an individual who:

(1) Receives, or is a member of a family which receives, cash welfare payments under a Federal, State, or local welfare program;

(2) Has, or is a member of a family which has received a total income for the 6-month (annualized) period prior to application to the program which, in relation to family size or for an individual, was not in excess of the higher of:

(i) The poverty level determined in accordance with criteria established by the Department of Health and Human Services; or

(ii) 70 percent of the lower living standard income level;

(3) Is receiving (or has been determined within the 6-month period prior to the application for the program involved to be eligible to receive) food stamps pursuant to the Food Stamp Act of 1977, as administered by the U.S. Department of Agriculture;

(4) Is a foster child on behalf of whom State or local government payments are made; or

(5) Is an individual with handicaps whose own income meets the requirements of paragraphs (1) or (2) of this definition, but who may be a member of a family whose income does not meet such requirements.

Employment and Training Administration (ETA) means the agency within DOL which includes the Job Corps.

Enrollee means a student.

Enrollment means:

(1) For resident students, the period of time from the date the student leaves home to begin government-authorized travel to the assigned center to the date of the scheduled arrival at the official travel destination authorized by the Center Director upon termination from Job Corps; and

(2) For nonresident students, the period of time from the time the student arrives at any center activity or program until he or she physically leaves such activity or program.

Environmental health program means the center program of health, safety, and prevention of environmental hazards for staff and students.

Facility survey means a review of center facilities conducted by professional architects and/or engineers to establish the condition of a facility and determine repairs, alterations, or replacement, if any, necessary to meet health and safety, building code or programmatic requirements.

Family means persons living in a single residence who are related by blood, marriage, or decrees of court and are included in one or more the following categories:

(1) A husband, wife and dependent children,

(2) A parent or guardian and dependent children, and

(3) A husband and wife. A step-child or step-parent is considered to be related by marriage.

Finance center means the agency or contractor which handles the payment of student allowances, allotments, and transportation charges.

Imprest fund means a cash fund of a fixed amount established by an advance of funds, without charge to an appropriation, from an agency finance or disbursing officer to a duly appointed cashier, for disbursement as needed from time to time in making payment in cash for relatively small purchases. Imprest funds occur only at CCCs. (For contract centers, see definition of ''petty cash fund''.)

Income means all income actually received from all sources by an individual or, in the case of a family, by all members of the family for the 6-month (annualized) period prior to application. Family size is the maximum number of family members during the 6-month period prior to application. When computing family income, income of a spouse and other family members is counted for the portion of the 6-month (annualized) period prior to application that the person was actually a member of the family.

(1) For the purpose of determining an individual's eligibility for participation in the Job Corps program, family income includes:

(i) Gross wages, including wages from community service employment (CSE), work experience, and on-the-job training (OJT) paid from Job Training Partnership Act funds, and salaries (before deductions);

(ii) Net self-employment income (gross receipts minus operating expenses); and

(iii) Other money income received from sources such as interest, net rents, OASI (Old Age and Survivors Insurance) social security benefits, pensions, alimony, and periodic income from insurance policy annuities, and other sources of income.

(2) Family income does not include:

(i) Non-cash income such as food stamps or compensation received in the form of food or housing;

(ii) Imputed value of owner-occupied property, *i.e.*, rental value;

(iii) Public assistance payments;

(iv) Cash payments received pursuant to a State plan approved under title I, IV, X, or XVI of the Social Security Act, or disability insurance payments received under title II of the Social Security Act;

(v) Federal, State, or local unemployment benefits;

(vi) Capital gains and losses;

(vii) One-time unearned income, such as, but not limited to:

(A) Payments received for a limited fixed term under income maintenance programs and supplemental (private) unemployment benefits plans;

(B) One-time or fixed-term scholarship or fellowship grants;

(C) Accident, health, and casualty insurance proceeds;

(D) Disability and death payments including fixed-term (but not lifetime) life insurance annuities and death benefits;

(E) One-time award and gifts;

(F) Inheritance, including fixed-term annuities;

(G) Fixed-term workers compensation awards;

(H) Soil bank payments; and

(I) Agricultural crop stabilization payments;

(viii) Pay or allowance which were previously received by any veteran while serving on active duty in the Armed Forces;

(ix) Educational assistance and compensation payments to veterans and other eligible persons under chapters 11, 13, 31, 34, 35, and 36, of title 38, U.S. Code;

(x) Payments made under the Trade Act of 1974;

(xi) Payments received under the Black Lung Benefits Act (30 U.S.C. 901 *et seq.*);

(xii) Any income directly or indirectly derived from, or arising out of, any property held by the United States in trust for any Indian tribe, band, or group or any individual; per capita payments; and services, compensation or funds provided by the United States in accordance with, or generated by, the exercise of any right guaranteed or protected by treaty; and any property distributed or income derived therefrom, or any amounts paid to or for the legatees or next of kin of any member, derived from or arising out of the settlement of an Indian claim; and

(xiii) Child support payments.

Individual means a person who lives alone, or who lives with unrelated individuals, or who lives in a single residence where no family member claims that person as a dependent. An individual with disabilities has an option of applying and being considered as a member of a family or as an individual.

Individual with disabilities means any person within the definition at 29 CFR part 33 or 34 or 41 CFR part 60–741 as applicable. Although the definition employs the plural form ''disabilities,'' and individual with a single impairment is covered within the definition. See §§ 638.539(g) and 638.811(a).

Interagency Agreement means that formal agreement between DOL and another Federal agency administering and operating centers. This agreement establishes procedures for the funding, administration, operation, and review of those centers as well as the resolution of any disputes.

Job Corps means the agency of the Department of Labor established by section 422 of the Job Training Partnership Act (JTPA) (29 U.S.C. 1692) to perform those functions of the Secretary of Labor set forth in title IV–B of JTPA (29 U.S.C. 1691 *et seq.*).

Job Corps Director means the chief official of the Job Corps or the Job Corps Director's designee.

Leisure-time employment means part-time paid employment of students.

Lower living standard income level means the income level (adjusted for regional, metropolitan, urban, and rural differences and family size) determined annually by the Secretary based on the most recent ''lower living family budget'' issued by the Secretary.

Maximum benefits means the apportioning of various segments of Job Corps training so that individual needs of each student are met and the student achieves as much benefit from the Job Corps as his or her abilities allow.

National office means the national office of Job Corps.

National training contractor means a labor union, union-affiliated organization, business organization, or a combination thereof, having contracts with the national office (or in the case of

CCCs, a Federal agency at the national level) to provide vocational training, placement, or other services under a single contract including multi-area operations.

Occupational exploration program means the center program whereby a student is made aware of the vocational training opportunities made available by the center in order for the student to make an informed vocational selection.

Operational support services means activities or services required for the operation of Job Corps, such as outreach and screening services, contracted vocational training and off-center educational training, placement services, certain health services, and miscellaneous logistical services.

Petty cash fund means a cash fund of a fixed amount from a contract center finance or disbursing officer to a contract center's duly appointed cashier, for disbursement as needed from time to time in making payment in cash for relatively small purchases. Petty cash funds occur at contract centers. (For CCCs, see definition of ''imprest fund''.)

Placement means student employment, entry into the Armed Forces, or enrollment in other training or education programs, within six months following termination from Job Corps (or such other period as may be announced by the Job Corps Director by notice in the FEDERAL REGISTER).

Placement agency means an organization acting pursuant to a contract with Job Corps that provides placement services to students.

Poverty level means the annual income level at or below which families are considered to live in poverty, as annually determined by the Department of Health and Human Services.

Readjustment allowance means the money accumulated by and reserved for each student on a monthly basis during tenure in Job Corps that is paid in a lump sum after termination.

Readmission means re-enrollment of a student who has previously been enrolled in Job Corps for less than 24 months and applies for reenrollment to the basic program and can be expected to complete a program within the remaining portion of the youth's 24-month enrollment period.

Regional appeal board means the board designated by the Regional Director in a regional office that considers student appeals of disciplinary discharges.

Regional Director means the chief official of a regional office or the Regional Director's designee.

Regional office means a regional office of Job Corps.

Regional Solicitor means the chief official of a regional office of the DOL Office of the Solicitor or the Regional Solicitor's designee.

Screening agency means an organization acting pursuant to a contract with the Job Corps that performs outreach, screens, and enrolls youth into Job Corps.

Secretary means the Secretary of Labor (the chief official of DOL) or the Secretary's designee.

Site survey means a survey of a potential location for a center that includes a preliminary engineering evaluation of the condition and capacity of existing buildings, pavements, utility systems, installed equipment, and all other real property components as well as a preliminary cost estimate for acquisition of facilities, necessary rehabilitation, modification, and new construction required that would, among other considerations, take into account structural accessibility for persons with handicaps.

State means one of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, American Samoa, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau/Trust Territory.

Student means an individual who is enrolled in Job Corps.

Student handbook means the document developed by the center operator and given to each student during orientation that outlines center services, rules, and regulations and student rights and responsibilities. See §638.501 of this part.

Termination means the act of officially ending a student's enrollment in Job Corps for any reason.

Transfer means the reassignment of a student from one center to another.

Unauthorized goods means firearms and ammunition; explosives and incendiaries; knives with blades longer than 2'' (two inches); homemade weapons; all other weapons and instruments used primarily to inflict personal injury; stolen property; drugs, including alcohol, marijuana, depressants, stimulants, hallucinogens, tranquilizers, and drug paraphernalia except for drugs and/or paraphernalia that are prescribed for medical reasons; and any other goods prohibited by the center operator in the student handbook.

Utilization study means an architectural/engineering report which is developed subsequent to a site survey or assessment after the regional and national offices have agreed, on the basis of the site survey, that the site is potentially favorable for a center. After the utilization study is approved by the Job Corps Director it becomes the basis for scope of work, budget, design, rehabilitation, and construction of facilities for the center.

Vocational skills training (VST) means activities that provide vocational instruction to students through actual construction or improvement of permanent facilities or other approved projects.

Work experience program means a program for assignment of a student to an actual job situation, either on-center or off-center, for the purpose of enhancing a student's employability. Work experience requiring the student to work over 25 hours per week is subject to the provisions of the Fair Labor Standards Act and State and local minimum wage laws for hours worked in excess of 25 hours per week.

[55 FR 12996, Apr. 6, 1990, as amended at 58 FR 69099, Dec. 29, 1993]

Subpart C—Funding, Site Selection, and Facilities Management

§ 638.300 Eligibility for funds and eligible deliverers.

(a) Funds shall be made available by the Secretary to eligible deliverers for the operation of centers and for the provision of Job Corps operational support services.

(b) Eligible deliverers for the operation of centers and for the operational support services necessary to center operation shall be units of Federal, State, and local government, State and local public agencies, private-for-profit and nonprofit organizations, Indian tribes and organizations, and labor unions, union-affiliated, and union/management organizations.

§ 638.301 Funding procedures.

(a) Contracting officers shall request proposals for the operation of all contract centers and for provision of operational support services, pursuant to the Federal Acquisition Regulation (48 CFR chapter 1) and the DOL Acquisition Regulation (48 CFR chapter 29) for work to be done under contract. The requests for proposal for each contract center and for each operational support service contract shall describe specifications and standards unique to the operation of the center and for the provision of operational support services.

(b) Job Corps contract center operators shall be selected and funded on the basis of proposals received, according to criteria established by the Job Corps Director. Such criteria shall be listed in the request for proposals.

(c) The contracting officer shall negotiate with eligible deliverers for operational support services on the basis of the criteria developed for each specific service to be rendered. Such criteria shall be listed in the request for proposals.

(d) The Secretary may enter into interagency agreements with eligible deliverers that are Federal agencies for the funding, establishment, and operation of CCCs. Such interagency agreements shall ensure compliance by such Federal agencies with the regulations under this part.

(e) Job Corps payments to Federal agencies that operate CCCs shall be made by a transfer of obligational authority from DOL to the respective operating agency on a quarterly basis.

(f) The Secretary is authorized to expend funds made available for Job Corps for the purpose of printing, binding, and disseminating data and other information related to Job Corps to

public agencies, private organizations, and the general public. (Section 438(3)(A))

(g) Notwithstanding the limitations of titles II, III, and IV of the Act, funds made available under those titles and transferred to the Job Corps program pursuant to §638.541 of this part may be used for the Job Corps program in accordance with the provisions of this part. (Sections 427(b) and 439)

(h) (1) In accordance with this section and procedures established by the Job Corps Director, the contracting officers shall enter into contracts with public or private (including nonprofit) entities for the provision of outreach and screening services, which shall be performed in accordance with §638.402 of this part and procedures established by the Job Corps Director. (Sections 424 and 425)

(2) In accordance with this section and procedures established by the Job Corps Director, the contracting officers shall enter into contracts with public or private (including nonprofit) entities for the provision of placement services, which shall be performed in accordance with §638.409 of this part and procedures established by the Job Corps Director.

(i) All agreements and contracts pursuant to this section shall be made pursuant to the Federal Property and Administrative Services Act of 1949, as amended; the Federal Grant and Cooperative Agreement Act of 1977; and the Federal Acquisition Regulation (48 CFR chapter 1) and the DOL Acquisition Regulation (48 CFR chapter 29).

(j) All Job Corps contractors shall be provided with an equitable and negotiated management fee of not less than 1 percent of the contract amount.

[55 FR 12996, Apr. 6, 1990, as amended at 58 FR 69100, Dec. 29, 1993]

§638.302 Performance measurement.

The Job Corps Director shall establish a national performance measurement system for centers and other program components which shall include annual performance standards.

[58 FR 69100, Dec. 29, 1993]

§638.303 Site selection and facilities management.

(a) The Job Corps Director shall approve the location and size of all centers.

(b) Contract centers shall be established, relocated or expanded in accordance with procedures established by the Job Corps Director.

(c) For federally-operated centers, either the Job Corps Director or a Federal agency may propose a site on public lands and if discussions between them establish the advisability of such, the Job Corps Director may require that the agency submit a site survey and utilization study. If the Job Corps Director decides to establish a center, facilities engineering and real estate management will be conducted by the Job Corps Director or by the Federal agency pursuant to an interagency agreement and this part.

§638.304 Historical preservation.

The Job Corps Director shall review the ''National Register of Historic Places,'' issued by the National Park Service, to identify sites, buildings, structures, and objects of archeological, architectural, or historic significance which could be destroyed or adversely affected by any proposed project or site selection. Procedures for review are included in the ''National Register of Historic Places'' at 36 CFR part 800.

§638.305 Capital improvements.

Capital improvement projects and new construction on Job Corps Centers shall be requested and performed in accordance with procedures established by the Job Corps Director.

§638.306 Protection and maintenance of contract center facilities owned or leased by Job Corps.

The Job Corps Director shall establish procedures for the protection and maintenance of contract center facilities owned or leased by Job Corps which shall be consistent with Federal Property Management Regulations at 41 CFR chapter 101.

§ 638.307 Facility surveys.

The Job Corps Director shall issue procedures to conduct periodic facility surveys of centers.

Subpart D—Enrollment, Transfers, Terminations, and Placements in the Job Corps

§ 638.400 Eligibility for participation.

To participate in the Job Corps, a young man or woman must be an eligible youth who:

(a) Is at least 16 and not yet 25 years of age at the time of enrollment, with the following exceptions:

(1) In the case of an otherwise eligible individual with disabilities, there is no upper age limit;

(2) Not more than 20 percent of the individuals enrolled by Job Corps may be ages 22 through 24; and

(3) Youths 14 to 15 years of age may be eligible for enrollment upon a specific determination by the Job Corps Director to enroll them;

(b) Is a United States citizen, United States national, a lawfully admitted permanent resident alien, a lawfully admitted refugee or parolee, or other alien who has been permitted to accept permanent employment in the United States by the Attorney General or the Immigration and Naturalization Service;

(c) Requires additional education, training, or intensive counseling and related assistance in order to secure and hold meaningful employment, participate successfully in regular school work, qualify for other suitable training programs, satisfy Armed Forces entry requirements, or qualify for a job where prior skill or training is a prerequisite;

(d) Is economically disadvantaged;

(e) Has sufficient ability to benefit from the program;

(f) Demonstrates an interest in obtaining the maximum benefit from the program, as evidenced by a voluntary desire to enroll and the youth's signature on the application form;

(g) Has a signed consent for enrollment from a responsible parent or guardian if the applicant is unemancipated and under the age of majority (unless the parent or guardian cannot be located), pursuant to applicable laws on age of majority and emancipation of minors;

(h) Has established suitable arrangements for the care of any dependent children for the proposed period of enrollment;

(i) Is not on probation, parole, or under a suspended sentence, or under the supervision of any agency as a result of court action or institutionalization, unless the court or other appropriate agency certifies in writing that release from the supervision of the agency is satisfactory to the agency and does not violate applicable laws and regulations;

(j) To qualify for residential training, is currently living in an environment so characterized by cultural deprivations, a disruptive homelife, or other disorienting conditions as to substantially impair prospects for successful participation in a nonresidential program providing appropriate training, education, or assistance;

(k) Is physically and emotionally able to participate in normal Job Corps duties without costly or extensive medical treatment;

(l) Is free of any behavioral problem that would potentially prevent other enrollees from receiving the benefit of the program, or impede satisfactory relationships between the center to which the enrollee is assigned and surrounding communities; and

(m) Has a background, characteristics, and physical and mental capabilities which provide reasonable expectations of employment after training.

[55 FR 12996, Apr. 6, 1990, as amended at 58 FR 69100, Dec. 29, 1993]

§ 638.401 Outreach and screening of participants.

In accordance with procedures issued by the Job Corps Director:

(a) The Regional Director, as contracting officer, shall contract with screening agencies, which shall perform Job Corps outreach and screening functions.

(b) Screening agencies shall develop outreach and referral sources, actively seek out potential applicants, conduct personal interviews with all applicants, and determine who are interested and

likely Job Corps participants. See also § 638.541 of this part.

(c) Screening agencies shall complete all Job Corps application forms.

(1) Except as provided in paragraph (c)(2) of this section, screening agencies shall determine whether applicants meet the eligibility criteria in § 638.400 of this part for participation in the Job Corps.

(2) The Job Corps Director may provide that determinations with respect to one or more of the eligibility criteria set forth in § 638.400 of this part shall be made by the Regional Director on the basis of information and recommendations supplied by the screening agency.

(3) An applicant for participation in the Job Corps who has been determined ineligible may appeal that determination pursuant to § 638.539 of this part. (Sections 423, 424, 425, and 144(a))

(d) In enrolling individuals who are to be nonresidential participants, priority shall be given to those eligible individuals who are single parents with dependent children.

[55 FR 12996, Apr. 6, 1990, as amended at 58 FR 69100, Dec. 29, 1993]

§ 638.402 Enrollment by readmission.

Procedures for screening and selection of applicants for readmission shall be issued by the Job Corps Director.

§ 638.403 Selective Service.

The Job Corps Director shall develop procedures to ensure that as a condition of enrollment and continued enrollment:

(a) Each male applicant 18 years of age or older has evidence that he has complied with section 3 of the Military Selective Service Act (50 U.S.C. App. 453), by presenting and submitting to registration if required pursuant to such section; and

(b) When a male student turns 18 years of age after enrollment, he submits to the center operator evidence that he has complied with section 3 of the Military Selective Service Act (50 U.S.C. App. 453), by presenting and submitting to registration if required pursuant to such section. (Section 504)

§ 638.404 Transfers.

Transfer of a student from one center of assignment to another center shall be made only in accordance with procedures issued by the Job Corps Director.

§ 638.405 Extensions of enrollment.

The center operator shall see that the total length of enrollment of a student does not exceed two years (section 426(a)) except that an extension of enrollment may be authorized in accordance with procedures issued by the Job Corps Director. Students enrolled in advanced career training programs may be enrolled up to one additional year. (Section 428(d)(1))

§ 638.406 Federal status of students.

Students shall not be deemed Federal employees and shall not be subject to the provisions of law relating to Federal employment, including those relating to hours of work, rates of employment, leave, unemployment compensation, and Federal employee benefits, except as provided by 5 U.S.C. 8143(a) (Federal employees' compensation) and by §§ 638.526 and 638.527 of this part. (Section 436(a))

§ 638.407 Terminations.

The Job Corps Director shall issue procedures for the termination of students.

§ 638.408 Transportation.

The transportation of students to and from centers shall occur in accordance with procedures issued by the Job Corps Director.

§ 638.409 Placement and job development.

The overall objective of all Job Corps activities shall be to enhance each student's employability and to effect the successful placement of each student. Placement efforts shall concentrate on jobs related to a student's vocational training, on military service when this is the student's choice, or on acceptance and placement in other educational and/or training programs. The placement of students shall be performed in accordance with procedures issued by the Job Corps Director.

(a) The Regional Director, as contracting officer, shall contract with placement agencies, which shall perform placement functions.

(b) Placement agencies shall complete all Job Corps placement forms.

Subpart E—Center Operations

§ 638.500 Orientation program.

The center operator shall design and implement a reception and orientation program in accordance with procedures issued by the Job Corps Director.

§ 638.501 Student handbook.

Each center operator shall develop a student handbook which provides essential information to students for distribution to all students in accordance with procedures issued by the Job Corps Director.

§ 638.502 Job Corps basic education program.

The Job Corps Director shall prescribe or provide for basic education curricula to be used at centers. Students are considered to be in-school youths. The Job Corps Director, in coordination with regional offices, shall review and approve the basic education program at each center. Center operators shall provide the following educational programs at a minimum:

(a) Reading and language skills;

(b) Mathematics;

(c) A program to prepare eligible students for the American Council on Education Tests of General Educational Development (GED);

(d) World of work;

(e) Health education;

(f) Driver education; and

(g) English as a second language (ESL) programs for selected center operators (regional offices shall arrange for the assignment of selected applicants needing ESL programs to the centers where such programs are available).

§ 638.503 Vocational training.

(a) Each center shall provide enrollees with competency-based or individualized training in an area which will best contribute to the student's opportunities for permanent long-term employment. Specific vocational training programs offered at individual centers will be subject to the approval of the Job Corps Director in accordance with policies issued by the Job Corps Director.

(b) The Job Corps Director may determine that it is appropriate to contract for vocational training programs at specific centers with national business, union, or union-affiliated organizations in order to facilitate entry of students into the workforce. All agreements with these national training contractors will be contracted at the national level in accordance with policies issued by the Job Corps Director; the Federal Acquisition Regulation (48 CFR chapter 1); the DOL Acquisition Regulation (48 CFR chapter 29); and, if CCCs, interagency agreements.

§ 638.504 Occupational exploration program.

An occupational exploration program shall be provided by all centers in accordance with procedures issued by the Job Corps Director.

§ 638.505 Scheduling of training.

The amount of time for each student's education and vocational training shall be apportioned to the individual needs of each student pursuant to procedures developed by the Job Corps Director.

§ 638.506 Purchase of vocational supplies and equipment.

The Job Corps Director shall develop procedures for the low-cost sale to students of vocational tools, clothing, and other equipment that are prerequisites to employment.

§ 638.507 Work experience.

(a) The center operator shall emphasize and implement programs of work experience for students through center program activities or through arrangement with employers. Work experience shall be under actual working conditions and should enhance the employability, responsibility, and confidence of the students.

(b) The following limitations shall be observed in establishing work experience programs:

(1) Students shall only be assigned to work meeting the safety standards of § 638.803 of this part.

(2) Any work experience arranged for employment not covered by a Federal, State, or local minimum wage law shall have prior regional office approval.

(3) When work experience with pay is arranged, the student, for applicable wage provisions of the Davis-Bacon Act, the Fair Labor Standards Act, the Service Contract Act, and other applicable minimum wage laws, shall be considered a joint employee of the Job Corps and the work experience employer.

(i) The wages paid by Job Corps (including the reasonable cost to Job Corps of room, board, and other facilities, as well as clothing and living allowances) shall be no less than the federal minimum wage rate set forth in section (6)(a)(1) of the Fair Labor Standards Act (FLSA) for up to 25 hours a week. The work experience employer shall pay the student, in cash, any wages above the FLSA minimum whenever such additional amounts are required by the Davis-Bacon Act, the Service Contract Act, the State or local minimum wage law, or other applicable minimum wage law. For any time in excess of 25 hours per week, the work experience employer shall pay the student, in cash, no less than the entire wage at the wage rate required by applicable law.

(ii) In addition to the cash wages required to be paid by work experience employers by paragraph (b)(3)(i) of this section, work experience employers, after the first six weeks of work by a student, shall also pay additional cash wages to the student at an hourly rate of 25 percent of the wage set forth in section 6(a)(1) of the Fair Labor Standards Act.

§ 638.508 Sale of services or objects.

The services rendered or objects produced at the center may be sold at cost to students or center employees, but shall not be sold in the community unless such services or products do not displace workers in the local community or result in the sale of products which compete with local merchants.

§ 638.509 Leisure-time employment.

A center operator may authorize gainful leisure time employment of students as long as such employment does not interfere with required scheduled activities.

§ 638.510 Health care and services.

The center operator shall provide a health program, including basic medical, dental, and mental health services, for all students from admission until termination from the Job Corps. The program shall be developed in accordance with procedures issued by the Job Corps Director.

§ 638.511 Drug use and abuse.

The Job Corps Director shall develop procedures to ensure that each center operator offers students counseling and education programs related to drug and alcohol use and abuse.

§ 638.512 Sexual behavior and harassment.

The Job Corps Director shall develop procedures to ensure that center operators establish rules concerning sexual behavior and harassment. See also §§ 638.539(g) and 638.813(a) of this part.

§ 638.513 Death.

In each case of student death, the center operator shall follow procedures established by the Job Corps Director, including notification of next of kin and for disposition of remains. See also § 638.524(d) of this part.

§ 638.514 Residential support services.

The center operator shall provide for residential support services structured as an integral part of the overall training program. This service shall include a secure, attractive physical and social environment, seven days a week, 24 hours a day, designed to enhance learning and personal development. All students, including nonresidents while they are on-center, shall be provided with the full program of applicable services in accordance with procedures issued by the Job Corps Director.

§ 638.515 Recreation/avocational program.

The center operator shall develop a recreation/avocational program in accordance with procedures issued by the Job Corps Director.

§ 638.516 Laundry, mail, and telephone service.

(a) The center operator shall provide adequate laundry services and supplies at no cost to students. Students shall be encouraged to launder, iron, and repair their personal clothing.

(b) The center operator shall establish a system for prompt delivery of mail received by students in a manner that protects the confidentiality of such mail, and shall arrange for a sufficient number of conveniently located pay telephones for student use.

§ 638.517 Counseling.

The center operator shall establish and conduct an ongoing structured counseling program in accordance with procedures issued by the Job Corps Director.

§ 638.518 Intergroup relations program.

The center operator shall conduct a structured intergroup relations program designed to reduce prejudice, prevent discriminatory behavior by staff and students, and increase understanding among racial/ethnic groups and between men and women. The program shall be developed in accordance with procedures issued by the Job Corps Director.

§ 638.519 Incentives system.

The center operator shall establish and maintain its own incentives system for students in accordance with procedures established by the Job Corps Director.

§ 638.520 Student government and leadership programs.

The center operator shall establish an elected student government and student leadership program in accordance with procedures established by the Job Corps Director.

§ 638.521 Student welfare association.

The center operator shall develop a plan for the organization and operation of a student welfare association, to be run by an elected student government for the benefit of all students and with the help of a center staff advisor. This plan shall be developed in accordance with procedures issued by the Job Corps Director.

(a) Student welfare association revenues may be derived from such sources as snack bars, vending machines, disciplinary fines, *etc.*

(b) Student welfare association activities shall be funded from student welfare association revenues.

§ 638.522 Evaluation of student progress.

The center operator shall implement a system to evaluate the progress of each student in receiving the maximum benefit from the program. The system shall be developed in accordance with procedures issued by the Job Corps Director.

§ 638.523 Food service.

(a) The center operator shall ensure that meals for students are nutritionally well-balanced, of good quality, and sufficient in quantity, in accordance with procedures issued by the Job Corps Director. Food shall be prepared and served in a sanitary manner.

(b) Non-students shall be charged for food provided for them unless prior regional office approval has been obtained. Such charges shall be sufficient to cover the cost of the food and its preparation.

§ 638.524 Allowances and allotments.

(a) The Secretary shall periodically establish rates of allowances and allotments to be paid students pursuant to section 429 (a), (c), and (d) of the Act, and the Job Corps Director shall publish these rates as a notice in the FEDERAL REGISTER.

(b) The Job Corps Director shall ensure that each student receives a readjustment allowance for each paid day of satisfactory participation in Job Corps after termination from the program if he/she terminates after 210 days in pay status or after 180 days if

he/she is a maximum benefits or vocational completer. In the event that a student receives a medical termination, he/she shall be eligible for the accrued readjustment allowance, regardless of length of stay or other considerations. See also paragraph (d) of this section. (Section 429(c)).

(c) The Job Corps Director shall establish procedures to allow students to authorize deductions from their readjustment allowance, which shall be matched by an equal amount from Job Corps funds and sent biweekly as an allotment by the SPAMIS Data Center to the student's spouse, child(ren) or other dependent, if such spouse, child(ren) or other dependent resides in any State in the United States.

(d) In the event of a student's death, any amount due, including the amount of any unpaid readjustment allowance, shall be paid in accordance with provisions of 5 U.S.C. 5582 (designation of beneficiary; order of precedence). (Section 429(c))

[55 FR 12996, Apr. 6, 1990, as amended at 60 FR 18993, Apr. 14, 1995]

§ 638.525 Clothing.

The Job Corps Director shall establish procedures to provide clothing for all students by means of a clothing purchase allowance and by center issue.

§ 638.526 Tort and other claims.

(a) Students shall be considered federal employees for purposes of the Tort Claims Act (28 U.S.C. 2671 *et seq.*). (Section 436(a)(3)). In the event a student is alleged to be involved in the damage, loss, or destruction of the property of others, or of causing personal injury to or the death of other individual(s), claims may be filed with the Center Director by the owner(s) of the property, the injured person(s), or by a duly authorized agent or legal representative of the claimant. The Center Director shall collect all of the facts, including accident and medical reports and the names and addresses of witnesses, and submit the claim for a decision to the DOL Regional Solicitor's Office. All tort claims for $25,000 or more shall be sent to the Associate Solicitor for Employee Benefits, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

(b) Whenever there is loss or damage to persons or property, which is believed to have resulted from operation of a Job Corps center and to be a proper charge against the Federal Government, a claim for such damage may be submitted by the owner(s) of the property, the injured person(s), or by a duly authorized agent or legal representative of the claimant to the Regional Solicitor, who shall determine if the claim is cognizable under the Tort Claims Act. Claims shall be filed no later than two years from the date of such loss or damage. If it is determined not to be cognizable, the Regional Solicitor shall consider the facts and may settle the claim pursuant to section 436(b) of the Act in an amount not to exceed $1,500.

(c) The Job Corps may pay claims to students for lost, damaged, or stolen property, up to a maximum set by the Job Corps Director when such loss is not due to the negligence of the student. Students shall file claims no later than two years from the date of such loss. Students shall be compensated for losses when they are the result of a natural disaster or when the student's property is in the protective custody of the Job Corps, which shall be the case when the student is AWOL. The Job Corps Director shall provide for claims to be filed with regional offices for a determination on the claim. The regional office shall promptly notify the student and the center of its determination.

§ 638.527 Federal employees' compensation.

(a) Students shall be considered federal employees for purposes of Federal employees' compensation (FEC). (Section 436(a)(2))

(b) Resident students shall be considered to be in the ''performance of duty'' as Federal employees from the date they leave their homes and begin authorized travel to their center of assignment until the date of their scheduled arrival at the official travel destination upon the termination from Job Corps. During this period the youths shall be known as students, and this period shall constitute their period

of enrollment. During this period, resident students shall be considered as in performance of duty at all times, during any and all of their activities, 24 hours a day, seven days a week, except as described in paragraph (d) of this section.

(c) Non-resident students shall be considered to be ''in performance of duty'' as Federal employees from the time they arrive at any scheduled center activity or program until they physically leave such activity or program.

(d) No student shall be considered as being in performance of duty status if he/she is absent without official leave (AWOL) or after arrival home on administrative leave without allowances.

(e) In computing compensation benefits for disability or death, the monthly pay of a student shall be deemed that received under the entrance salary for a grade GS–2 Federal employee, and 5 U.S.C. 8113 (a) and (b) shall apply to students.

(f) Compensation for disability shall not begin to accrue until the day following the date on which the injured student completes his or her Job Corps termination.

(g) Whenever a student is injured, develops an occupationally related illness, or dies while in the performance of duty, the Job Corps Director shall ensure that procedures set forth in the DOL Employment Standards Administration regulations at 20 CFR chapter I are followed. The Job Corps Director shall ensure that a thorough investigation of the circumstances and a medical evaluation are completed and that required forms are filed with the DOL Office of Workers' Compensation Programs.

§ 638.528 Social Security.

The Act provides that students are covered by title II of the Social Security Act (42 U.S.C. 401 *et seq.*) and shall pay applicable employment taxes (*e.g.*, the Federal Insurance Contributions Act (FICA) tax) on their living and readjustment allowances. (Section 436(a)(1))

§ 638.529 Income taxes.

The Act provides that students are Federal employees for the purposes of the Internal Revenue Code of 1986 (title 26, U.S. Code). The Job Corps Director may obtain from tax authorities information regarding taxation of student income and provide this to center operators and to the finance center.

§ 638.530 Emergency use of personnel, equipment and facilities.

The Job Corps Director may provide emergency assistance when there is a threat of natural disaster. Students may be asked to volunteer their services to help in such cases. The center operator shall arrange that any expenses consequent to such assistance shall be borne, to the extent possible, by the benefiting organization.

§ 638.531 Limitation on the use of students in emergency projects.

The Job Corps Director shall develop procedures, when necessary, to safeguard the rights and safety of students who volunteer to be used in emergency situations.

§ 638.532 Annual leave.

The Job Corps Director shall issue procedures to administer the accrual and use of student leave. Such procedures shall provide that:

(a) Except for the initial pay period, students shall accrue annual leave at the rate of one calendar day for each pay period provided that the student was not AWOL or on administrative leave without pay during that pay period. For the initial pay period, a student shall accrue one day of annual leave regardless of the date of enrollment provided that the student was not AWOL or on administrative leave without pay from the date of enrollment. Accrual time shall begin on the day the student departs for a center and end on the date of his or her scheduled arrival home or at a place of employment.

(b) Annual leave shall continue to accrue during periods of home, emergency, and administrative leave with pay and shall be suspended only when the student is AWOL or on administrative leave without allowances.

(c) Students shall not be paid at termination for unused accrued leave.

(d) Students may use accrued annual leave at any time subject to approval by the Center Director. Annual leave

with transportation at government expense shall be allowed only after the student has spent 180 days in pay status in Job Corps, and only once per year of enrollment.

(e) Students shall not be charged annual leave for travel time to and from home and center by the most direct route. Saturdays, Sundays, and holidays that are officially recognized at the center shall not be charged as annual leave.

§ 638.533 Other student absences.

The Job Corps Director shall develop procedures for authorized student absences and to account for all absences whether authorized or unauthorized.

§ 638.534 Legal services to students.

(a) The Job Corps Director shall develop procedures to afford students effective and competent legal representation in criminal and certain civil cases. This shall include assisting students in obtaining free or low cost legal assistance or obtaining local attorneys or public defenders to represent students, and paying for such legal services (provided that attorney fees in criminal cases shall not be paid by Job Corps except in accordance with paragraph (b) of this section), in accordance with guidelines issued by the Job Corps Director.

(b) Job Corps shall not pay the expenses of legal counsel or representation in any criminal case or proceeding for a student, unless the Center Director has certified to the Regional Director, and the Regional Director has approved, that a public defender is not available. With such approval of the Regional Director, Job Corps may compensate attorneys obtained pursuant to paragraph (a) of this section in criminal cases for reasonable expenses. Compensation shall be at the rates no higher than those set forth in the Criminal Justice Act of 1964, as amended (18 U.S.C. 3006A(d)).

§ 638.535 Voting rights.

The Job Corps Director shall develop procedures to enable eligible students and staff to vote either locally or by absentee ballot. See also §638.814 (a) through (c) of this part.

§ 638.536 Religious rights.

The right to worship or not worship as he/she chooses shall not be denied to any student. Religious services may not be held on-center unless the center is so isolated as to make transportation to and from community religious facilities impractical. If religious services are held on-center, no federal funds shall be paid to those who conduct such services. Services shall not be confined to one religious denomination. The center operator shall instruct students that students are not obligated by Job Corps to attend such services. See also §§638.539(g) and 638.813 of this part.

§ 638.537 Disclosure of information.

(a) *Requests for information.* The Job Corps Director shall develop administrative procedures to respond to requests for information or records pertaining to students and such other disclosures as may be necessary.

(b) *Freedom of Information Act*—(1) *Disclosure.* Disclosure of Job Corps information shall be in accordance with the Freedom of Information Act and shall be handled according to DOL regulations at 29 CFR part 70.

(2) *Contractors.* Job Corps contractors are not ''agencies'' for Freedom of Information Act purposes. Therefore, their records are not subject to disclosure under the Freedom of Information Act or 29 CFR part 70.

(c) *Privacy Act of 1974.* When DOL maintains a system of records covered by the Privacy Act of 1974, or provides by contract for a contractor, such as a screening agency or a contract center operator, to operate by or on behalf of the Job Corps such a system of records to accomplish a Job Corps function, the requirements of the DOL regulations at 29 CFR part 70a apply to such system or records.

§ 638.538 Disciplinary procedures and appeals.

(a) The center operator shall establish reasonable rules and regulations for student behavior, in accordance with procedures developed by the Job Corps Director. Such rules shall be established to ensure high standards of behavior and conduct.

(b) The center operator shall develop reasonable sanctions for breaking established rules, in accordance with procedures developed by the Job Corps Director.

(c) The center operator shall ensure that all students have the opportunity for due process in disciplinary proceedings, in accordance with procedures developed by the Job Corps Director. Such center procedures, at a minimum, shall include center review boards where the penalty of termination might be imposed, and procedures for appealing, to a regional appeal board designated by the Regional Director, center decisions to terminate a student. See § 638.407 of this part. The decision of the regional appeal board shall be final agency action.

[55 FR 12996, Apr. 6, 1990; 55 FR 23634, June 11, 1990]

§ 638.539 Complaints and disputes.

(a) *Center and other deliverer grievance procedures.* Each center operator or other Job Corps deliverer shall establish and maintain a grievance procedure for complaints about its programs and activities from students and other interested parties. A hearing on each complaint shall be conducted, using the established grievance procedure, within 30 days of filing of the complaint and a decision on the complaint shall be made by the Center Director or with the knowledge of the Center Director not later than 60 days after the filing of the complaint. Except for a complaint alleging fraud or criminal activity, complaints shall be made within one year of the alleged occurrence. (Section 144(a))

(b) *Federal review of student grievances.* Where a student or a person denied enrollment has exhausted the center or other deliverer grievance procedure established pursuant to paragraph (a) of this section, the student may appeal the decision to the regional appeal board. The regional appeal board shall review the appeal and determine within 120 days after receiving the appeal whether to reverse, affirm, or remand the decision. The decision of the regional appeal board shall be final agency action. (Section 144(c))

(c) *Federal review of non-student grievances.* (1) Where the grievance or complaint is made by an interested party other than a student, should the deliverer fail to provide a decision as required in paragraph (a) of this section, the complainant may then request from the Regional Director a determination whether reasonable cause exists to believe that the Act or this part has been violated. The request shall be filed no later than 10 days from the date on which the complainant should have received a decision pursuant to paragraph (a) of this section, and shall describe with specificity the facts and the proceedings (if any) below.

(2) The Regional Director shall act within 90 days of receipt of the request and where there is reasonable cause to believe the Act or this part has been violated shall direct the deliverer to issue a decision adjudicating the dispute pursuant to the deliverer's grievance procedures. The Regional Director's action is not final agency action on the merits of the dispute and therefore is not appealable under the Act. See sections 144(c) and 166(a) of the Act. If the deliverer does not comply with the Regional Director's order within 60 days, the Regional Director may impose a sanction on the deliverer for failing to issue a decision.

(d) *Failures to comply with the Act.* Where DOL has reason to believe that the center operator or other deliverer is failing to comply with the requirements of the Act, the Regional Director shall investigate the allegation or belief and determine within 120 days after receiving the complaint whether such allegation or complaint is true. As the result of such a determination, the Regional Director may:

(1) Direct the deliverer to handle a complaint through the grievance procedures established under paragraph (a) of this section; or

(2) Investigate and determine whether the deliverer is in compliance with the Act and this part. If the Regional Director determines that the deliverer is not in compliance with the Act or this part, the appropriate sanctions set forth in section 164 of the Act shall be applied, subject to paragraph (e) or (f) of this section, as appropriate. (Section 163 (b) and (c))

(e) *Contract disputes.* A dispute between DOL and a Job Corps contractor

shall be handled only pursuant to the Contract Disputes Act and 41 CFR part 29–60.

(f) *Inter-agency disputes.* A dispute between DOL and a federal agency operating a center shall be handled only pursuant to the interagency agreement with that agency for the operation of the center.

(g) *Nondiscrimination.* Nondiscrimination requirements, procedures, complaint processing, and compliance reviews are governed by, as applicable, provisions of the following Department of Labor regulations:

(1) 29 CFR part 34 and subparts B and C and Appendix A of 29 CFR part 32 for programs receiving financial assistance under JTPA.

(2) 29 CFR part 33 for programs conducted by the Department of Labor; and

(3) 41 CFR chapter 60 for entities that have a federal ''government contract'' as that term is defined in the applicable regulations.

See also §638.813(a) of this part, regarding discrimination.

[55 FR 12996, Apr. 6, 1990, as amended at 58 FR 69100, Dec. 29, 1993]

§ 638.540 Cooperation with agencies and institutions.

The Job Corps Director shall develop guidelines for the national office's, the regional offices', and for deliverers' maintenance of cooperative relationships with other agencies and institutions, including law enforcement, educational institutions, communities, and other employment and training agencies.

§ 638.541 Job Corps training opportunities.

The Job Corps Director shall develop policies and requirements which will ensure linkages, where feasible, with other Federal, State and local programs to enhance the provision of services to disadvantaged youth. These shall include, where appropriate: Referrals of enrollees; participant assessment; services accompanying pre-employment and work maturity skills training, work experience, job search skills training, basic skills training, and occupational skills training authorized under the Job Training Partnership Act for youth programs; and services supporting participants in the Job Opportunities and Basic Skills Training Program (JOBS) (section 427(b)). Such services may be provided sequentially or concurrently. Nothing in this part shall be construed to prohibit an individual who has been a participant in Job Corps from concurrently or subsequently participating in programs under title II of JTPA, or to prohibit an individual who has been a participant in programs under title II of JTPA from concurrently or subsequently participating in Job Corps.

[55 FR 12996, Apr. 6, 1990, as amended at 58 FR 69100, Dec. 29, 1993]

§ 638.542 Child care services.

(a) Job Corps centers shall, where practicable, arrange for the provision of child care for students with dependent children.

(b) Center operators may propose and, with the approval of the Job Corps Director, establish child care facilities.

[55 FR 12996, Apr. 6, 1990, as amended at 58 FR 69100, Dec. 29, 1993]

§ 638.543 Community relations program.

Each center operator shall establish a community relations program, which shall include establishment of a community relations council which includes student representation. (Section 431)

Subpart F—Applied Vocational Skills Training (VST)

§ 638.600 Applied vocational skills training (VST) through work projects.

(a)(1) The Job Corps Director shall establish procedures for administering applied vocational skills training (VST) projects; such procedures shall include funding and reporting requirements, criteria to be used for granting approvals, and reviewing requirements.

(2) Each applied VST project shall be submitted to the Regional Director for approval. The annual applied VST plan described in paragraph (c) of this section shall be submitted to the Regional Director for approval.

(b) Applied VST may be provided in an actual working setting for training students in the construction and related trades. This shall involve authorized construction or other projects that result in finished facilities or products. This shall include conservation projects on Federal, State, and public lands, and projects performed for other organizations in accordance with policies established by the Job Corps Director. Centers may also perform applied VST public service projects for nearby communities and capital improvements for other Job Corps centers.

(c) Applied VST shall be the major vehicle for the training of students in the construction and related trades. In each year, each center operator shall develop an annual applied VST plan for the coming year. In order to ensure that maximum training opportunities are available to students, the center vocational instructor (and/or the national training contractor, when applicable) shall participate in the planning and shall approve each project which involves his/her particular trade. Applied VST projects shall be planned in such a manner as to give priority to on-center rehabilitation and construction needs. The Job Corps Director shall establish annual funding levels to support applied VST programs and shall establish specific policies on limitation, documentation, and reporting requirements relating to applied VST programs.

§ 638.601 Applied VST budgeting.

The Job Corps Director shall establish procedures to ensure that center operators maintain applied VST project funds as a separate center budget line item and maintain strict accountability for the use or nonuse of such funds. The approval of the Job Corps national office is necessary to transfer applied VST project funds to any other center budget category or program activity. In the case of civilian conservation centers, the use of VST project funds shall be governed by the interagency agreements.

Subpart G—Experimental, Research, and Demonstration Projects

§ 638.700 Experimental, research, and demonstration projects.

(a) The Job Corps Director, at his or her discretion, may undertake experimental, research, or demonstration projects for the purpose of promoting greater efficiency and effectiveness in the Job Corps program in accordance with section 433 of the Act.

(b) The Job Corps Director may arrange for projects under this section to be undertaken jointly with other Federal or federally assisted programs.

(c) The Secretary may waive any provision of this part that the Secretary finds would prevent the implementation of experimental, research, or demonstration project elements essential to a determination of their feasibility and usefulness.

Subpart H—Administrative Provisions

§ 638.800 Program management.

(a) The Job Corps Director shall establish and use internal program management procedures sufficient to prevent fraud or program abuse. The Job Corps Director shall ensure that sufficient auditable and otherwise adequate records are maintained to support the expenditure of all funds under the Act.

(b) The Job Corps Director shall provide guidelines for center staffing levels and qualifications. The guidelines shall adhere to standard levels of professional education and experience which are accepted generally within the fields of education and counseling.

§ 638.801 Staff training.

The Job Corps Director shall establish guidelines for necessary training for national office, regional office, and deliverer staff.

§ 638.802 Student records management.

The Job Corps Director shall develop guidelines for a system of maintaining

records for each student during enrollment and for the disposition of such records after termination.

§ 638.803 Safety.

(a) The Job Corps Director shall establish procedures to ensure that students are not required or permitted to work, to be trained, to reside, or to receive services in buildings or surroundings or under conditions that are unsanitary, hazardous, or lack proper ventilation. Whenever students are employed or trained for jobs, they shall be assigned to such jobs or training in accordance with appropriate health and safety practices.

(b) The Job Corps Director shall develop a procedure to provide appropriate protective clothing for students in work or training.

(c) The Job Corps Director shall develop procedures to ensure compliance with applicable DOL Occupational Safety and Health Administration regulations.

§ 638.804 Environmental health.

The Job Corps Director shall provide guidelines for proper environmental health conditions.

§ 638.805 Security and law enforcement.

(a) The Job Corps Director shall provide guidelines to protect the security of students, staff, and property on-center on a 24-hours-a-day, 7-days-a-week basis.

(b)(1) All property which would otherwise be under exclusive federal legislative jurisdiction shall be considered under concurrent jurisdiction with the appropriate State and locality with respect to criminal law enforcement as long as a center is operated on such property. This extends to portions of the property (*e.g.*, housing and recreational facilities) in addition to the portions of the property used as the center or training facility.

(2) The Job Corps Director shall ensure that centers on property under concurrent federal-State jurisdiction establish agreements with federal, State and local law enforcement agencies to enforce criminal laws on such property. (Section 435(d))

(c) The Job Corps Director shall develop procedures to ensure that any searches of a student's personal area or belongings for unauthorized goods follow applicable right-to-privacy laws.

§ 638.806 Property management and procurement.

The Job Corps Director shall develop procedures to establish and maintain a system for acquisition, protection, preservation, maintenance, and disposition of Job Corps real and personal property, and services so as to maximize its usefulness and to minimize operating, repair, and replacement costs.

§ 638.807 Imprest and petty cash funds.

Federally operated centers shall establish auditable imprest funds. Contract centers shall establish auditable petty cash funds. The Job Corps Director shall develop procedures to ensure the security of and accountability for imprest and petty cash funds.

§ 638.808 Center financial management and reporting.

The Job Corps Director shall establish procedures to ensure that each center operator and each subcontractor maintain a financial management system that will provide accurate, complete, and current disclosures of the financial results of Job Corps operations, and will provide sufficient data for effective evaluation of program activities. Fiscal accounts shall be maintained in a manner that ensures timely and accurate reporting as required by the Job Corps Director.

§ 638.809 Audit.

(a) The Secretary of Labor, the DOL Office of Inspector General, the Comptroller General of the United States, and any of their duly authorized representatives, shall have access to any books, documents, papers, and records of the Job Corps deliverers and their subcontractors that are pertinent to the Job Corps program for the purpose of making surveys, audits, examinations, excerpts, and transcripts.

(b) The Secretary shall, with reasonable frequency, survey, audit, or examine, or arrange for the survey, audit, or examination of Job Corps deliverers, or

their subcontractors using Federal auditors or independent public accountants. Such surveys, audits, or examinations normally shall be conducted annually but not less than once every two years.

§ 638.810 Reporting requirements.

The Job Corps Director shall establish procedures to ensure timely and complete reporting of such program information as is necessary to maintain accountability for the Job Corps program and funding.

§ 638.811 Review and evaluation.

The Job Corps Director shall establish adequate program management to provide continuous examination of the performance of the components of the program.

§ 638.812 State and local taxation of Job Corps deliverers.

The Act provides that transactions conducted by a private for-profit deliverer or a nonprofit deliverer in connection with the deliverer's operation of a center or other Job Corps program or activity shall not be considered as generating gross receipts. Such deliverer shall not be liable, directly or indirectly, to any State or subdivision thereof (nor to any person acting on behalf thereof) for any gross receipts taxes, business privilege taxes measured by gross receipts, or any similar taxes imposed on, or measured by, gross receipts in connection with any payments made to or by such deliverer for operating a center or other Job Corps program, or activity. Such deliverer shall not be liable to any State or subdivision thereof to collect or pay any sales, excise, use, or similar tax imposed upon the sale to or use by such deliverer of any property, service, or other item in connection with the operation of a center or other Job Corps program or activity. (Section 437(c))

§ 638.813 Nondiscrimination; nonsectarian activities.

(a) *Nondiscrimination.* Center operators and other deliverers, and subcontractors and/or subrecipients of center operators and other deliverers shall comply with the nondiscrimination provisions of section 167 of the Act and its implementing regulations, and with, as applicable, 29 CFR parts 31 and 32, part 33, and 41 CFR chapter 60. For the purposes of section 167 of the Act, students shall be considered as the ultimate beneficiaries of Federal financial assistance. (Section 167)

(b) *Nonsectarian activities.* Students shall not be employed or trained on the construction, operation, or maintenance of so much of any facility as is used or to be used for sectarian instruction or as a place for religious worship. (Section 167(a)(3))

§ 638.814 Lobbying; political activities; unionization.

No funds provided under the Act may be used in any way:

(a) To attempt to influence in any manner a member of Congress to favor or oppose any legislation or appropriation by Congress;

(b) To attempt to influence in any manner a member of a State or local legislature to favor or oppose any legislation or appropriation by such legislature;

(c) For any activity which involves political activities; or

(d) For any activity which will assist, promote, or deter union organizing. (Sections 141(1) and 143(c)(1))

§ 638.815 Charging fees.

No person or organization shall charge an individual a fee for the placement or referral of such individual in or to a training program under the Act. (Section 141(j))

PART 639—WORKER ADJUSTMENT AND RETRAINING NOTIFICATION

Sec.

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AUTHORITY: 29 U.S.C. 2107(a).

SOURCE: 54 FR 16064, Apr. 20, 1989, unless otherwise noted.

§ 639.1 Purpose and scope.

(a) *Purpose of WARN.* The Worker Adjustment and Retraining Notification Act (WARN or the Act) provides protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market. WARN also provides for notice to State dislocated worker units so that dislocated worker assistance can be promptly provided.

(b) *Scope of these regulations.* These regulations establish basic definitions and rules for giving notice, implementing the provisions of WARN. The Department's objective is to establish clear principles and broad guidelines which can be applied in specific circumstances. However, the Department recognizes that Federal rulemaking cannot address the multitude of industry and company-specific situations in which advance notice will be given.

(c) *Notice encouraged where not required.* Section 7 of the Act states:

> It is the sense of Congress that an employer who is not required to comply with the notice requirements of section 3 should, to the extent possible, provide notice to its employees about a proposal to close a plant or permanently reduce its workforce.

(d) *WARN enforcement.* Enforcement of WARN will be through the courts, as provided in section 5 of the statute. Employees, their representatives and units of local government may initiate civil actions against employers believed to be in violation of §3 of the Act. The Department of Labor has no legal standing in any enforcement action and, therefore, will not be in a position to issue advisory opinions of specific cases. The Department will provide assistance in understanding these regulations and may revise them from time to time as may be necessary.

(e) *Notice in ambiguous situations.* It is civically desirable and it would appear to be good business practice for an employer to provide advance notice to its workers or unions, local government and the State when terminating a significant number of employees. In practical terms, there are some questions and ambiguities of interpretation inherent in the application of WARN to business practices in the market economy that cannot be addressed in these regulations. It is therefore prudent for employers to weigh the desirability of advance notice against the possibility of expensive and time-consuming litigation to resolve disputes where notice has not been given. The Department encourages employers to give notice in all circumstances.

(f) *Coordination with job placement and retraining programs.* The Department, through these regulations and through the Trade Adjustment Assistance Program (TAA) and Economic Dislocation and Worker Adjustment Assistance Act (EDWAA) regulations, encourages maximum coordination of the actions and activities of these programs to assure that the negative impact of dislocation on workers is lessened to the extent possible. By providing for notice to the State dislocated worker unit, WARN notice begins the process of assisting workers who will be dislocated.

(g) *WARN not to supersede other laws and contracts.* The provisions of WARN do not supersede any laws or collective bargaining agreements that provide for additional notice or additional rights and remedies. If such law or agreement provides for a longer notice period, WARN notice shall run concurrently with that additional notice period. Collective bargaining agreements may be used to clarify or amplify the terms and conditions of WARN, but may not reduce WARN rights.

§ 639.2 What does WARN require?

WARN requires employers who are planning a plant closing or a mass layoff to give affected employees at least 60 days' notice of such an employment action. While the 60-day period is the minimum for advance notice, this provision is not intended to discourage employers from voluntarily providing longer periods of advance notice. Not all plant closings and layoffs are subject to the Act, and certain employment thresholds must be reached before the Act applies. WARN sets out

specific exemptions, and provides for a reduction in the notification period in particular circumstances. Damages and civil penalties can be assessed against employers who violate the Act.

§ 639.3 Definitions.

(a) *Employer.* (1) The term ''employer'' means any business enterprise that employs—

(i) 100 or more employees, excluding part-time employees; or

(ii) 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week, exclusive of hours of overtime.

Workers on temporary layoff or on leave who have a reasonable expectation of recall are counted as employees. An employee has a ''reasonable expectation of recall'' when he/she understands, through notification or through industry practice, that his/her employment with the employer has been temporarily interrupted and that he/she will be recalled to the same or to a similar job. The term ''employer'' includes non-profit organizations of the requisite size. Regular Federal, State, local and federally recognized Indian tribal governments are not covered. However, the term ''employer'' includes public and quasi-public entities which engage in business (i.e., take part in a commercial or industrial enterprise, supply a service or good on a mercantile basis, or provide independent management of public assets, raising revenue and making desired investments), and which are separately organized from the regular government, which have their own governing bodies and which have independent authority to manage their personnel and assets.

(2) Under existing legal rules, independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as a part of the parent or contracting company depending upon the degree of their independence from the parent. Some of the factors to be considered in making this determination are (i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations.

(3) Workers, other than part-time workers, who are exempt from notice under section 4 of WARN are nonetheless counted as employees for purposes of determining coverage as an employer.

(4) An employer may have one or more sites of employment under common ownership or control. An example would be a major auto maker which has dozens of automobile plants throughout the country. Each plant would be considered a site of employment, but there is only one ''employer'', the auto maker.

(b) *Plant closing.* The term ''plant closing'' means the permanent or temporary shutdown of a ''single site of employment'', or one or more ''facilities or operating units'' within a single site of employment, if the shutdown results in an ''employment loss'' during *any 30-day period* at the single site of employment for *50 or more* employees, excluding any part-time employees. An employment action that results in the effective cessation of production or the work performed by a unit, even if a few employees remain, is a shutdown. A ''temporary shutdown'' triggers the notice requirement only if there are a sufficient number of terminations, layoffs exceeding 6 months, or reductions in hours of work as specified under the definition of ''employment loss.''

(c) *Mass layoff.* (1) The term ''mass layoff'' means a reduction in force which first, is not the result of a plant closing, and second, results in an employment loss at the single site of employment during *any 30-day period* for:

(i) *At least 33 percent* of the active employees, excluding part-time employees, and

(ii) *At least 50 employees,* excluding part-time employees.

Where 500 or more employees (excluding part-time employees) are affected, the 33% requirement does not apply, and notice is required if the other criteria are met. Plant closings involve employment loss which results from the shutdown of one or more distinct units within a single site or the entire site. A mass layoff involves employment loss, regardless of whether one or more units are shut down at the site.

(2) Workers, other than part-time workers, who are exempt from notice under section 4 of WARN are nonetheless counted as employees for purposes of determining coverage as a plant closing or mass layoff. For example, if an employer closes a temporary project on which 10 permanent and 40 temporary workers are employed, a covered plant closing has occurred although only 10 workers are entitled to notice.

(d) *Representative.* The term ''representative'' means an exclusive representative of employees within the meaning of section 9(a) or 8(f) of the National Labor Relations Act or section 2 of the Railway Labor Act.

(e) *Affected employees.* The term ''affected employees'' means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer. This includes individually identifiable employees who will likely lose their jobs because of bumping rights or other factors, to the extent that such individual workers reasonably can be identified at the time notice is required to be given. The term ''affected employees'' includes managerial and supervisory employees, but does not include business partners. Consultant or contract employees who have a separate employment relationship with another employer and are paid by that other employer, or who are self-employed, are not ''affected employees'' of the business to which they are assigned. In addition, for purposes of determining whether coverage thresholds are met, either incumbent workers in jobs being eliminated or, if known 60 days in advance, the actual employees who suffer an employment loss may be counted.

(f) *Employment loss.* (1) The term ''employment loss'' means (i) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (ii) a layoff exceeding 6 months, or (iii) a reduction in hours of work of individual employees of more than 50% during each month of any 6-month period.

(2) Where a termination or a layoff (see paragraphs (f)(1)(i) and (ii) of this section) is involved, an employment loss does not occur when an employee is reassigned or transferred to employer-sponsored programs, such as retraining or job search activities, as long as the reassignment does not constitute a constructive discharge or other involuntary termination.

(3) An employee is not considered to have experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business and, prior to the closing or layoff—

(i) The employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment, or

(ii) The employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

(4) A ''relocation or consolidation'' of part or all of an employer's business, for purposes of paragraph §639.3(h)(4), means that some definable business, whether customer orders, product lines, or operations, is transferred to a different site of employment and that transfer results in a plant closing or mass layoff.

(g) *Unit of local government.* The term ''unit of local government'' means any general purpose political subdivision of a State, which has the power to levy taxes and spend funds and which also has general corporate and police powers. When a covered employment site is located in more than one unit of local government, the employer must give notice to the unit to which it determines it directly paid the highest taxes for the year preceding the year for which the determination is made. All local taxes directly paid to the local government should be aggregated for this purpose.

(h) *Part-time employee.* The term ''part-time'' employee means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required, including workers who work full-time. This term may include workers who would traditionally be understood as ''seasonal''

employees. The period to be used for calculating whether a worker has worked ''an average of fewer than 20 hours per week'' is the shorter of the actual time the worker has been employed or the most recent 90 days.

(i) *Single site of employment.* (1) A single site of employment can refer to either a single location or a group of contiguous locations. Groups of structures which form a campus or industrial park, or separate facilities across the street from one another, may be considered a single site of employment.

(2) There may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within such a building. For example, an office building housing 50 different businesses will contain 50 single sites of employment. The offices of each employer will be its single site of employment.

(3) Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment. An example is an employer who manages a number of warehouses in an area but who regularly shifts or rotates the same employees from one building to another.

(4) Non-contiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site. For example, assembly plants which are located on opposite sides of a town and which are managed by a single employer are separate sites if they employ different workers.

(5) Contiguous buildings owned by the same employer which have separate management, produce different products, and have separate workforces are considered separate single sites of employment.

(6) For workers whose primary duties require travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employer's regular employment sites (e.g., railroad workers, bus drivers, salespersons), the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report will be the single site in which they are covered for WARN purposes.

(7) Foreign sites of employment are not covered under WARN. U.S. workers at such sites are counted to determine whether an employer is covered as an employer under §639.3(a).

(8) The term ''single site of employment'' may also apply to truly unusual organizational situations where the above criteria do not reasonably apply. The application of this definition with the intent to evade the purpose of the Act to provide notice is not acceptable.

(j) *Facility or operating unit.* The term ''facility'' refers to a building or buildings. The term ''operating unit'' refers to an organizationally or operationally distinct product, operation, or specific work function within or across facilities at the single site.

(k) *State dislocated worker unit.* The term ''State dislocated worker unit'' means a unit designated or created in each State by the Governor under title III of the Job Training Partnership Act, as amended by EDWAA.

(l) *State.* For the purpose of WARN, the term ''State'' includes the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.

§639.4 Who must give notice?

Section 3(a) of WARN states that ''an employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order * * *.'' Therefore, an employer who is anticipating carrying out a plant closing or mass layoff is required to give notice to affected employees or their representative(s), the State dislocated worker unit and the chief elected official of a unit of local government. (See definitions in §639.3 of this part.)

(a) It is the responsibility of the employer to decide the most appropriate person within the employer's organization to prepare and deliver the notice to affected employees or their representative(s), the State dislocated worker unit and the chief elected official of a unit of local government. In most instances, this may be the local site plant manager, the local personnel director or a labor relations officer.

(b) An employer who has previously announced and carried out a short-term layoff (6 months or less) which is being extended beyond 6 months due to business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff is required to give notice when it becomes reasonably foreseeable that the extension is required. A layoff extending beyond 6 months from the date the layoff commenced for any other reason shall be treated as an employment loss from the date of its commencement.

(c) In the case of the sale of part or all of a business, section 2(b)(1) of WARN defines who the ''employer'' is. The seller is responsible for providing notice of any plant closing or mass layoff which takes place up to and including the effective date (time) of the sale, and the buyer is responsible for providing notice of any plant closing or mass layoff that takes place thereafter. Affected employees are always entitled to notice; at all times the employer is responsible for providing notice.

(1) If the seller is made aware of any definite plans on the part of the buyer to carry out a plant closing or mass layoff within 60 days of purchase, the seller may give notice to affected employees as an agent of the buyer, if so empowered. If the seller does not give notice, the buyer is, nevertheless, responsible to give notice. If the seller gives notice as the buyer's agent, the responsibility for notice still remains with the buyer.

(2) It may be prudent for the buyer and seller to determine the impacts of the sale on workers, and to arrange between them for advance notice to be given to affected employees or their representative(s), if a mass layoff or plant closing is planned.

§ 639.5 When must notice be given?

(a) *General rule.* (1) With certain exceptions discussed in paragraphs (b), (c) and (d) of this section and in § 639.9 of this part, notice must be given at least 60 calendar days prior to any planned plant closing or mass layoff, as defined in these regulations. When all employees are not terminated on the same date, the date of the first individual termination within the statutory 30-day or 90-day period triggers the 60-day notice requirement. A worker's last day of employment is considered the date of that worker's layoff. The first and each subsequent group of terminees are entitled to a full 60 days' notice. In order for an employer to decide whether issuing notice is required, the employer should—

(i) Look ahead 30 days and behind 30 days to determine whether employment actions both taken and planned will, in the aggregate for any 30-day period, reach the minimum numbers for a plant closing or a mass layoff and thus trigger the notice requirement; and

(ii) Look ahead 90 days and behind 90 days to determine whether employment actions both taken and planned each of which separately is not of sufficient size to trigger WARN coverage will, in the aggregate for any 90-day period, reach the minimum numbers for a plant closing or a mass layoff and thus trigger the notice requirement. An employer is not, however, required under section 3(d) to give notice if the employer demonstrates that the separate employment losses are the result of separate and distinct actions and causes, and are not an attempt to evade the requirements of WARN.

(2) The point in time at which the number of employees is to be measured for the purpose of determining coverage is the date the first notice is required to be given. If this ''snapshot'' of the number of employees employed on that date is clearly unrepresentative of the ordinary or average employment level, then a more representative number can be used to determine coverage. Examples of unrepresentative employment levels include cases when the level is near the peak or trough of an employment cycle or when large upward or downward shifts in the number of employees occur around the time notice is to be given. A more representative number may be an average number of employees over a recent period of time or the number of employees on an alternative date which is more representative of normal employment levels. Alternative methods cannot be used to evade the purpose of WARN, and should only be used in unusual circumstances.

(b) *Transfers.* (1) Notice is not required in certain cases involving transfers, as described under the definition of ''employment loss'' at §639.3(f) of this part.

(2) An offer of reassignment to a different site of employment should not be deemed to be a ''transfer'' if the new job constitutes a constructive discharge.

(3) The meaning of the term ''reasonable commuting distance'' will vary with local and industry conditions. In determining what is a ''reasonable commuting distance'', consideration should be given to the following factors: geographic accessibility of the place of work, the quality of the roads, customarily available transportation, and the usual travel time.

(4) In cases where the transfer is beyond reasonable commuting distance, the employer may become liable for failure to give notice if an offer to transfer is not accepted within 30 days of the offer or of the closing or layoff (whichever is later). Depending upon when the offer of transfer was made by the employer, the normal 60-day notice period may have expired and the plant closing or mass layoff may have occurred. An employer is, therefore, well advised to provide 60-day advance notice as part of the transfer offer.

(c) *Temporary employment.* (1) No notice is required if the closing is of a temporary facility, or if the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking.

(2) Employees must clearly understand at the time of hire that their employment is temporary. When such understandings exist will be determined by reference to employment contracts, collective bargaining agreements, or employment practices of an industry or a locality, but the burden of proof will lie with the employer to show that the temporary nature of the project or facility was clearly communicated should questions arise regarding the temporary employment understandings.

(3) Employers in agriculture and construction frequently hire workers for harvesting, processing, or for work on a particular building or project. Such work may be seasonal but recurring. Such work falls under this exemption if the workers understood at the time they were hired that their work was temporary. In uncertain situations, it may be prudent for employers to clarify temporary work understandings in writing when workers are hired. The same employers may also have permanent employees who work on a variety of jobs and tasks continuously through most of the calendar year. Such employees are not included under this exemption. Giving written notice that a project is temporary will not convert permanent employment into temporary work, making jobs exempt from WARN.

(4) Certain jobs may be related to a specific contract or order. Whether such jobs are temporary depends on whether the contract or order is part of a long-term relationship. For example, an aircraft manufacturer hires workers to produce a standard airplane for the U.S. fleet under a contract with the U.S. Air Force with the expectation that its contract will continue to be renewed during the foreseeable future. The employees of this manufacturer would not be considered temporary.

(d) *Strikes or lockouts.* The statute provides an exemption for strikes and lockouts which are not intended to evade the requirements of the Act. A lockout occurs when, for tactical or defensive reasons during the course of collective bargaining or during a labor dispute, an employer lawfully refuses to utilize some or all of its employees for the performance of available work. A lockout not related to collective bargaining which is intended as a subterfuge to evade the Act does not qualify for this exemption. A plant closing or mass layoff at a site of employment where a strike or lockout is taking place, which occurs for reasons unrelated to a strike or lockout, is not covered by this exemption. An employer need not give notice when permanently replacing a person who is deemed to be an economic striker under the National

Labor Relations Act. Non-striking employees at the same single site of employment who experience a covered employment loss as a result of a strike are entitled to notice; however, situations in which a strike or lockout affects non-striking employees at the same plant may constitute an unforeseeable business circumstance, as discussed in §639.9, and reduced notice may apply. Similarly, the ''faltering company'' exception, also discussed in §639.9 may apply in strike situations. Where a union which is on strike represents more than one bargaining unit at the single site, non-strikers includes the non-striking bargaining unit(s). Notice also is due to those workers who are not a part of the bargaining unit(s) which is involved in the labor negotiations that led to the lockout. Employees at other plants which have not been struck, but at which covered plant closings or mass layoffs occur as a direct or indirect result of a strike or lockout are not covered by the strike/lockout exemption. The unforeseeable business circumstances exception to 60 days' notice also may apply to these closings or layoffs at other plants.

§639.6 Who must receive notice?

Section 3(a) of WARN provides for notice to each representative of the affected employees as of the time notice is required to be given or, if there is no such representative at that time, to each affected employee. Notice also must be served on the State dislocated worker unit and the chief elected official of the unit of local government within which a closing or layoff is to occur. Section 2(b)(1) of the Act states that ''any person who is an employee of the seller (other than a parttime employee) as of the effective date [time] of the sale shall be considered an employee of the purchaser immediately after the effective date [time] of the sale.'' This provision preserves the notice rights of the employees of a business that has been sold, but creates no other employment rights. Although a technical termination of the seller's employees may be deemed to have occurred when a sale becomes effective, WARN notice is only required where the employees, in fact, experience a covered employment loss.

(a) *Representative(s) of affected employees.* Written notice is to be served upon the chief elected officer of the exclusive representative(s) or bargaining agent(s) of affected employees at the time of the notice. If this person is not the same as the officer of the local union(s) representing affected employees, it is recommended that a copy also be given to the local union official(s).

(b) *Affected employees.* Notice is required to be given to employees who may reasonably be expected to experience an employment loss. This includes employees who will likely lose their jobs because of bumping rights or other factors, to the extent that such workers can be identified at the time notice is required to be given. If, at the time notice is required to be given, the employer cannot identify the employee who may reasonably be expected to experience an employment loss due to the elimination of a particular position, the employer must provide notice to the incumbent in that position. While part-time employees are not counted in determining whether plant closing or mass layoff thresholds are reached, such workers are due notice.

(c) *State dislocated worker unit.* Notice is to be served upon the State dislocated worker unit. Since the States are restructuring to implement training under EDWAA, service of notice upon the State Governor constitutes service upon the State dislocated worker unit until such time as the Governor makes public State procedures for serving notice to this unit.

(d) *Chief elected official of the unit of local government.* The identity of the chief elected official will vary according to the local government structure. In the case of elected boards, the notice is to be served upon the board's chairperson.

§639.7 What must the notice contain?

(a) *Notice must be specific.* (1) All notice must be specific.

(2) Where voluntary notice has been given more than 60 days in advance, but does not contain all of the required elements set out in this section, the employer must ensure that all of the information required by this section is provided in writing to the parties listed

in §639.6 at least 60 days in advance of a covered employment action.

(3) Notice may be given conditional upon the occurrence or nonoccurrence of an event, such as the renewal of a major contract, only when the event is definite and the consequences of its occurrence or nonoccurrence will necessarily, in the normal course of business, lead to a covered plant closing or mass layoff less than 60 days after the event. For example, if the non-renewal of a major contract will lead to the closing of the plant that produces the articles supplied under the contract 30 days after the contract expires, the employer may give notice at least 60 days in advance of the projected closing date which states that if the contract is not renewed, the plant closing will occur on the projected date. The notice must contain each of the elements set out in this section.

(4) The information provided in the notice shall be based on the best information available to the employer at the time the notice is served. It is not the intent of the regulations, that errors in the information provided in a notice that occur because events subsequently change or that are minor, inadvertent errors are to be the basis for finding a violation of WARN.

(b) As used in this section, the term ''date'' refers to a specific date or to a 14-day period during which a separation or separations are expected to occur. If separations are planned according to a schedule, the schedule should indicate the specific dates on which or the beginning date of each 14-day period during which any separations are expected to occur. Where a 14-day period is used, notice must be given at least 60 days in advance of the first day of the period.

(c) Notice to each representative of affected employees is to contain:

(1) The name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information;

(2) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

(3) The expected date of the first separation and the anticipated schedule for making separations;

(4) The job titles of positions to be affected and the names of the workers currently holding affected jobs.

The notice may include additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.

(d) Notice to each affected employee who does not have a representative is to be written in language understandable to the employees and is to contain:

(1) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

(2) The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated;

(3) An indication whether or not bumping rights exist;

(4) The name and telephone number of a company official to contact for further information.

The notice may include additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.

(e) The notices separately provided to the State dislocated worker unit and to the chief elected official of the unit of local government are to contain:

(1) The name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information;

(2) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

(3) The expected date of the first separation, and the anticipated schedule for making separations;

(4) The job titles of positions to be affected, and the number of affected employees in each job classification;

(5) An indication as to whether or not bumping rights exist;

(6) The name of each union representing affected employees, and the name and address of the chief elected officer of each union.

The notice may include additional information useful to the employees such as a statement of whether the planned action is expected to be temporary and, if so, its expected duration.

(f) As an alternative to the notices outlined in paragraph (e) above, an employer may give notice to the State dislocated worker unit and to the unit of local government by providing them with a written notice stating the name of address of the employment site where the plant closing or mass layoff will occur; the name and telephone number of a company official to contact for further information; the expected date of the first separation; and the number of affected employees. The employer is required to maintain the other information listed in §639.7(e) on site and readily accessible to the State disclocated worker unit and to the unit of general local government. Should this information not be available when requested, it will be deemed a failure to give required notice.

§639.8 How is the notice served?

Any reasonable method of delivery to the parties listed under §639.6 of this part which is designed to ensure receipt of notice of least 60 days before separation is acceptable (e.g., first class mail, personal delivery with optional signed receipt). In the case of notification directly to affected employees, insertion of notice into pay envelopes is another viable option. A ticketed notice, i.e., preprinted notice regularly included in each employee's pay check or pay envelope, does not meet the requirements of WARN.

§639.9 When may notice be given less than 60 days in advance?

Section 3(b) of WARN sets forth three conditions under which the notification period may be reduced to less than 60 days. The employer bears the burden of proof that conditions for the exceptions have been met. If one of the exceptions is applicable, the employer must give as much notice as is practicable to the union, non-represented employees, the State dislocated worker unit, and the unit of local government and this may, in some circumstances, be notice after the fact. The employer must, at the time notice actually is given, provide a brief statement of the reason for reducing the notice period, in addition to the other elements set out in §639.7.

(a) The exception under section 3(b)(1) of WARN, termed ''faltering company'', applies to plant closings but not to mass layoffs and should be narrowly construed. To qualify for reduced notice under this exception:

(1) An employer must have been actively seeking capital or business at the time that 60-day notice would have been required. That is, the employer must have been seeking financing or refinancing through the arrangement of loans, the issuance of stocks, bonds, or other methods of internally generated financing; or the employer must have been seeking additional money, credit, or business through any other commercially reasonable method. The employer must be able to identify specific actions taken to obtain capital or business.

(2) There must have been a realistic opportunity to obtain the financing or business sought.

(3) The financing or business sought must have been sufficient, if obtained, to have enabled the employer to avoid or postpone the shutdown. The employer must be able to objectively demonstrate that the amount of capital or the volume of new business sought would have enabled the employer to keep the facility, operating unit, or site open for a reasonable period of time.

(4) The employer reasonably and in good faith must have believed that giving the required notice would have precluded the employer from obtaining the needed capital or business. The employer must be able to objectively demonstrate that it reasonably thought that a potential customer or source of financing would have been unwilling to provide the new business or capital if notice were given, that is, if the employees, customers, or the public were aware that the facility, operating unit,

or site might have to close. This condition may be satisfied if the employer can show that the financing or business source would not choose to do business with a troubled company or with a company whose workforce would be looking for other jobs. The actions of an employer relying on the ''faltering company'' exception will be viewed in a company-wide context. Thus, a company with access to capital markets or with cash reserves may not avail itself of this exception by looking solely at the financial condition of the facility, operating unit, or site to be closed.

(b) The ''unforeseeable business circumstances'' exception under section 3(b)(2)(A) of WARN applies to plant closings and mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required.

(1) An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. A principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, and an unanticipated and dramatic major economic downturn might each be considered a business circumstance that is not reasonably foreseeable. A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.

(2) The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately predict general economic conditions that also may affect demand for its products or services.

(c) The ''natural disaster'' exception in section 3(b)(2)(B) of WARN applies to plant closings and mass layoffs due to any form of a natural disaster.

(1) Floods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature are natural disasters under this provision.

(2) To qualify for this exception, an employer must be able to demonstrate that its plant closing or mass layoff is a direct result of a natural disaster.

(3) While a disaster may preclude full or any advance notice, such notice as is practicable, containing as much of the information required in §639.7 as is available in the circumstances of the disaster still must be given, whether in advance or after the fact of an employment loss caused by a natural disaster.

(4) Where a plant closing or mass layoff occurs as an indirect result of a natural disaster, the exception does not apply but the ''unforeseeable business circumstance'' exception described in paragraph (b) of this section may be applicable.

§639.10 When may notice be extended?

Additional notice is required when the date or schedule of dates of a planned plant closing or mass layoff is extended beyond the date or the ending date of any 14-day period announced in the original notice as follows:

(a) If the postponement is for less than 60 days, the additional notice should be given as soon as possible to the parties identified in §639.6 and should include reference to the earlier notice, the date (or 14-day period) to which the planned action is postponed, and the reasons for the postponement. The notice should be given in a manner which will provide the information to all affected employees.

(b) If the postponement is for 60 days or more, the additional notice should be treated as new notice subject to the provisions of §§639.5, 639.6 and 639.7 of this part. Rolling notice, in the sense of routine periodic notice, given whether or not a plant closing or mass layoff is impending, and with the intent to evade the purpose of the Act rather than give specific notice as required by WARN, is not acceptable.

PART 640—STANDARD FOR BENEFIT PAYMENT PROMPTNESS—UNEMPLOYMENT COMPENSATION

Sec.

640.1 Purpose and scope.
640.2 Federal law requirements.

640.3 Interpretation of Federal law requirements.
640.4 Standard for conformity.
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640.7 Benefit payment performance plans.
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640.9 Information, reports and studies.

AUTHORITY: Sec. 1102, Social Security Act (42 U.S.C. 1302); Secretary's order No. 4–75, dated April 16, 1975 (40 FR 18515) (5 U.S.C. 553). Interpret and apply secs. 303(a)(1) and 303(b)(2) of the Social Security Act (42 U.S.C. 503(a)(1), 503(b)(2)).

SOURCE: 43 FR 33225, July 28, 1978, unless otherwise noted.

§ 640.1 Purpose and scope.

(a) *Purpose.* (1) Section 303(a)(1) of the Social Security Act requires, for the purposes of title III of that act, that a State unemployment compensation law include provision for methods of administration of the law that are reasonably calculated to insure the full payment of unemployment compensation when determined under the State law to be due to claimants. The standard in this part is issued to implement section 303(a)(1) in regard to promptness in the payment of unemployment benefits to eligible claimants.

(2) Although the standard applies to the promptness of all benefit payments and the criteria apply directly to the promptness of first benefit payments, it is recognized that adequate performance is contingent upon the prompt determination of eligibility by the State as a condition for the payment or denial of benefits. Accordingly, implicit in prompt performance with respect to benefit payments is the corresponding need for promptness by the State in making determinations of eligibility. However, applicable Federal laws provide no authority for the Secretary of Labor to determine the eligibility of individuals under a State law.

(b) *Scope.* (1) The standard in this part applies to all State laws approved by the Secretary of Labor under the Federal Unemployment Tax Act (section 3304 of the Internal Revenue Code of 1954, 26 U.S.C. 3304), and to the administration of the State laws.

(2) The standard specified in §640.4 applies to all claims for unemployment compensation. The criteria for State compliance in §640.5 apply to first payments of unemployment compensation under the State law to eligible claimants following the filing of initial claims and first compensable claims.

§ 640.2 Federal law requirements.

(a) *Conformity.* Section 303(a)(1) of the Social Security Act, 42 U.S.C. 503(a)(1), requires that a State law include provision for:

> Such methods of administration * * * as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due.

(b) *Compliance.* Section 303(b)(2) of the Social Security Act, 42 U.S.C. 503(b)(2), provides in part that:

> Whenever the Secretary of Labor, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law, finds that in the administration of the law there is:
> (1) * * *
> (2) a failure to comply substantially with any provision specified in subsection (a) of this section;
>
> the Secretary of Labor shall notify such State agency that further payments will not be made to the State until the Secretary of Labor is satisfied that there is no longer any such * * * failure to comply.
>
> Until he is so satisfied, he shall make no further certification to the Secretary of the Treasury with respect to such State * * *.

§ 640.3 Interpretation of Federal law requirements.

(a) *Section 303(a)(1).* The Secretary interprets section 303(a)(1) of the Social Security Act to require that a State law include provision for such methods of administration as will reasonable insure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible.

(b) *Section 303(b)(2).* (1) The Secretary interprets section 303(b)(2) of the Social Security Act to require that, in the administration of a State law, there shall be substantial compliance with the provision required by section 303(a)(1).

(2) The greatest promptness that is administratively feasible will depend upon the circumstances in each State that impacts upon its performance in paying benefits. Factors reasonably beyond a State's control may cause its performance to drop below the level of

adequacy expressed in the table below as criteria for substantial compliance applicable to all States. Where it is demonstrated that failure to meet the criteria of adequacy is attributable to factors reasonably beyond the State's control and, in light of those factors, the State has performed at the highest level administratively feasible, it will be considered that the State is in substantial compliance with the Standard for conformity. Whether or not the State is in substantial compliance, the remedial provisions of §§ 640.7 and 640.8 will be applicable when the pertinent criteria are not met.

§ 640.4 Standard for conformity.

A State law will satisfy the requirement of section 303(a)(1), if it contains a provision requiring, or which is construed to require, such methods of administration as will reasonably insure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible.

§ 640.5 Criteria for compliance.

The criteria in the schedule below shall apply in determining whether, in the administration of a State law, there has been substantial compliance with the provision required by section 303(a)(1) in the issuance of benefit payments to eligible claimants for the first compensable weeks of unemployment in their benefit years:

	Percentage of first payments issued—days following end of first compensable week		
	14 days, waiting week States	21 days, non-waiting week States [1]	35 days, all States
INTRASTATE CLAIMS			
Performance to be achieved for the 12-mo. period ending:			
Mar. 31, 1978	80	80	.....
Mar. 31, 1979	[2] 83	[2] 83	[2] 90
Mar. 31, 1980, and thereafter	87	87	93
INTERSTATE CLAIMS			
Performance to be achieved for the 12-mo. period ending:			
Mar. 31, 1978	60	60	.....
Mar. 31, 1979	[2] 65	[2] 65	[2] 75
Mar. 31, 1980, and thereafter	70	70	78

[1] A nonwaiting week State is any State whose law does not require that a non-compensable period of unemployment be served before the payment of benefits commences.
[2] Beginning with the month following the effective date of this revised regulation.

A State will be deemed to comply substantially, as set out in §§ 640.2(b) and 640.3(b), if its average performance, for the period of review, meets or exceeds the applicable criteria set forth above.

§ 640.6 Review of State compliance.

(a) *Annual reviews.* The administration of each State law shall be reviewed annually for compliance, as set out in §§ 640.2(b) and 640.3(b). Annual reviews shall be for the 12-month period ending on March 31 of each year. An annual review with respect to any State shall be based upon the monthly reports of performance submitted to the Department by the State agency, any special reports of performance submitted to the Department by the State agency, any benefit payment performance plan applicable to the period being reviewed, any study or anylysis of performance relevant to the period being reviewed, and any other audit, study, or analysis as directed by the Department of Labor.

(b) *Periodic review.* The administration of any State law may be reviewed at any other time, when there is reason to believe that there may be failure of compliance as set out in §§ 640.2(b) and 640.3(b). Such a review shall be based upon the same elements as may be required for an annual review.

§ 640.7 Benefit payment performance plans.

(a) *Annual plan.* An annual benefit payment performance plan shall be submitted by a State agency to the Department of Labor when average performance over a 12-month period ending on March 31 of any year does not meet the criteria specified in § 640.5. An annual plan shall be submitted by July 31 following the applicable March 31,

and shall be a plan for the fiscal year that begins on the succeeding October 1. An annual plan shall be subject to continuing appraisal during the period it is in effect, and shall be subject to modification from time to time as may be directed by the Department of Labor after consultation with the State agency.

(b) *Periodic plan.* A periodic benefit payment performance plan shall be submitted by a State agency when directed by the Department of Labor. A periodic plan may be in addition to, or a modification of an annual plan and may be required even though an annual plan covering the same period is not required. A periodic plan shall be subject to continuing appraisal during the period it is in effect, and shall be subject to modification from time to time as may be directed by the Department of Labor.

(c) *Content of plan.* An annual plan or periodic plan shall set forth such corrective actions, performance and evaluation plans, and other matters as the Department of Labor directs, after consultation with the State agency.

(Approved by the Office of Management and Budget under control number 1205–0132)

(Pub. L. No. 96–511)

[43 FR 33225, July 28, 1978, as amended at 49 FR 18295, Apr. 30, 1984]

§ 640.8 Enforcement of the standard.

(a) *Action by the Department of Labor.* When a State agency fails, for an extended period, to meet the standard set forth in § 640.4 or the criteria specified in § 640.5, or fails to show satisfactory improvement after having submitted a benefit payment performance plan of action, the Department of Labor shall pursue any of the following remedial steps that it deems necessary before considering application of the provisions of § 640.2:

(1) Initiate informal discussion with State agency officials pursuant to § 601.5(b) of this chapter.

(2) Conduct an evaluation of the State's benefit payment processes and analyze the reasons for the State's failure to meet the standard.

(3) Recommend specific actions for the State to take to improve its benefit payment performance.

(4) Request the State to submit a plan for complying with the standard by a prescribed date.

(5) Initiate special reporting requirements for a specified period of time.

(6) Consult with the Governor of the State regarding the consequences of the State's noncompliance with the standard.

(7) Propose to the Governor of the State and on an agreed upon basis arrange for the use of expert Federal staff to furnish technical assistance to the State agency with respect to its payment operations.

(b) *Action by the Assistant Secretary.* If, after all remedial steps have been exhausted, a State fails to take appropriate action, or otherwise fails to meet the standard specified in § 640.4, the Assistant Secretary for Employment and Training shall, after taking all factors into consideration, recommend to the Secretary of Labor that appropriate notice be sent to the State agency and that an opportunity for a hearing be extended in accordance with section 303(b) of the Social Security Act.

§ 640.9 Information, reports and studies.

A State shall furnish to the Secretary of Labor such information and reports and make such studies as the Secretary decides are necessary or appropriate to carry out this part.

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AUTHORITY: 42 U.S.C. 3056(b)(2).

SOURCE: 60 FR 26581, May 17, 1995, unless otherwise noted.

Subpart A—Introductory Provisions

§ 641.101 Scope and purpose.

Part 641 contains the regulations of the Department of Labor for the Senior Community Service Employment Program (SCSEP) under title V of the OAA. The dual purposes of a SCSEP project are to provide useful part-time community service assignments for persons with low incomes who are 55 years old or older while promoting transition to unsubsidized employment. This part, and other pertinent regulations expressly incorporated by reference, set forth all regulations applicable to the SCSEP.

§ 641.102 Definitions.

The following definitions apply to this part:

OAA means the Older Americans Act of 1965, as amended (42 U.S.C. 3001 *et seq.*).

Area agency on aging means an area agency on aging designated under section 305(a)(2)(A) of the OAA or a State agency performing the functions of an area agency on aging under section 305(b)(5) of the OAA.

Authorized position means an enrollment opportunity during a program year. The number of authorized positions is derived by dividing the total amount of funds appropriated during a program year by the national average unit cost per enrollee for that program year as determined by the Department. The national average unit cost includes all administration costs, other enrollee costs, and enrollee wage and fringe benefit costs. An allotment of the total dollars for the grantee is divided by the national unit cost to determine the total number of authorized positions for each grant agreement.

Community service means social, health, welfare, and educational services (particularly literacy tutoring); legal assistance, and other counseling services, including tax counseling and assistance and financial counseling; library, recreational, day care and other similar services; conservation, maintenance, or restoration of natural resources; community betterment or

beautification; pollution control and environmental quality efforts; weatherization activities; and includes intergenerational projects; but is not limited to the above. It excludes building and highway construction (except that which normally is performed by the project sponsor) and work which primarily benefits private, profitmaking organizations. [Section 507(2) of the OAA.]

Department and *DOL* mean the United States Department of Labor, including its agencies and organizational units.

Disability means a physical or mental impairment of an individual that substantially limits one or more major life activities; a record of such impairment; or being regarded as having such an impairment. [29 CFR parts 32 and 34.]

Dual eligibility means individuals eligible under title V who are enrolled in a joint program established under a written financial or non-financial agreement to jointly operate programs with JTPA are deemed to satisfy the requirements of all JTPA programs funded under Title II–A of the JTPA.

Eligible individual means a person who is 55 years of age, or older, and who has a low income as defined in this section. [Section 507(1) of the OAA.]

Eligible organization means an organization which is legally capable of receiving and using Federal funds under the OAA and entering into a grant or other agreement with the Department to carry out the provisions of title V of the OAA. [Section 502(b)(1) of the OAA.]

Employment and training program(s) means publicly funded efforts designed to offer employment, training and/or placement services which enhance an individual's employability. The term is used in this part to include, but is not limited to, the JTPA or similar legislation and State or local programs of a similar nature.

Enrollee means an individual who is eligible, receives services, and is paid wages for engaging in community service assignments under a project.

Grantee means an eligible organization which has entered into a grant agreement with the Department under this part.

Greatest economic need means the need resulting from an income level at or below the poverty line based on guidelines provided by the Department.

Greatest social need, as defined at section 102(a)(30) of the OAA, means the need caused by noneconomic factors which include:

(1) Physical and mental disabilities;

(2) Language barriers; and

(3) Cultural, social, or geographical isolation, including isolation caused by racial or ethnic status.

Host agency means a public agency or a private non-profit organization, other than a political party or any facility used or to be used as a place for sectarian religious instruction or worship, exempt from taxation under the provisions of section 501(c)(3) of the Internal Revenue Code of 1986, which provides a work site and supervision for an enrollee.

Individual development plan means a plan for an enrollee which shall include an employment goal, achievement objectives, and appropriate sequence of services for the enrollee based on an assessment conducted by the grantee or subgrantee and jointly agreed upon by the enrollee.

JTPA means the Job Training Partnership Act (29 U.S.C. 1501 *et seq.*).

Low income means an income of the family which, during the preceding six months on an annualized basis or the actual income during the preceding 12 months, whichever is more beneficial to the applicant, is not more than 125 percent of the poverty levels established and periodically updated by the U.S. Department of Health and Human Services. In addition, an individual who receives, or is a member of a family which receives, regular cash welfare payments shall be deemed to have a low income for purposes of this part.

Poor employment prospects means the unlikelihood of an otherwise eligible individual obtaining employment without the assistance of this or other employment and training programs. Persons with poor employment prospects include, but are not limited to, those without a substantial employment history, basic skills, English-language proficiency, or displaced homemakers, school dropouts, disabled veterans, homeless or residing in socially and

economically isolated rural or urban areas where employment opportunities are limited.

Program year means the one-year period covered by a grant agreement beginning July 1 and ending on June 30.

Project means an undertaking by a grantee or subgrantee, pursuant to a grant agreement between the Department and the grantee, which provides for community service opportunities for eligible individuals and the delivery of associated services.

Reallocation means a redistribution of funds by a grantee.

Reallotment means the redistribution of allotted title V funds by the Department from one State to another State(s) or from one grantee to another grantee.

Residence means an individual's declared dwelling place or address. No requirement pertaining to length of residency prior to enrollment shall be imposed.

SCSEP means the Senior Community Service Employment Program as authorized under title V of the OAA.

State agency on aging means the sole agency designated by the State, in accordance with regulations of the Assistant Secretary on Aging, pursuant to section 305(a)(1) of the 0AA.

Subgrantee means the legal entity to which a subgrant is awarded by a grantee and which is accountable to the grantee (or higher tier subgrantee) for the use of the funds provided.

Title V of the OAA means 42 U.S.C. 3056 *et seq.*

Subpart B—Grant Planning and Application Procedures

§ 641.201 Allotment and allocation of title V funds.

(a) *Allotment.* The Secretary shall allot funds for projects in each State in accordance with the distribution requirements contained in section 506(a) of the OAA.

(b) *Within-State apportionment.* The amount allotted for projects within a State shall be apportioned among areas within the State in an equitable manner, taking into consideration:

(1) The proportion which eligible individuals in each such area bears to the total number of such persons, respectively, in that State;

(2) The relative distribution of such individuals residing in rural and urban areas within the State; and

(3) The relative distribution of such individuals who are individuals with the greatest economic need, such individuals who are minority individuals, and such individuals with greatest social need.

(c) *Annual report of funds allocated by state.* The State agency for each State receiving funds or a sponsor designated by the Department shall report at the beginning of each fiscal year on such State's status relative to section 506(c) of the OAA. Each State's report shall include names and geographic locations of all projects receiving title V funds for projects in the State. All grantees and subgrantees operating in a State shall provide information necessary to compile the report. [Section 506(d) of the OAA.]

§ 641.202 Eligibility for title V funds.

Agencies and organizations eligible to receive title V funds shall be those specified in sections 502(b) and 506(a) of the OAA.

§ 641.203 Soliciting applications for title V funds.

The Department may solicit or request organizations to submit applications for funds.

§ 641.204 Grant application requirements.

(a) *Schedules.* The Department shall establish, by administrative directive, schedules for submittal of grant preapplications and applications; the contents of grant applications, including goals and objectives; amounts of grants; and grant budget and narrative formats.

(b) *Intergovernmental reviews.* Grant applicants shall comply with the requirements of the Department's regulation, at 29 CFR part 17, which implements the intergovernmental review of Department programs and activities. A *Preapplication for Federal Assistance* form (SF–424) filed as a result of the intergovernment review system shall contain an attachment which, at a minimum, lists the proposed number of

authorized community service positions in each county, or other appropriate jurisdiction within the affected State. Whenever a national organization or other program grantee or subgrantee proposes to conduct projects within a planning and service area in a State, such organization or program grantee is responsible for sharing their applications with area agencies on aging and other SCSEP sponsors in the area prior to the award of the funds in accord with guidelines issued by the Department.

(c) *Subgrants.* A grant applicant planning to award funds by subgrant shall:

(1) Outline the nature and extent of the planned use of such funds; and

(2) Assure that in the event that a subgrant agreement is canceled in whole or in part, the grantee will provide continuity of services to enrollees.

§ 641.205 Responsibility review.

(a) In order to enter into and continue a grant relationship with DOL, an organization (applicant) shall be responsible. To determine responsibility, DOL conducts a preaward review of all grant applicants. As part of this review, DOL applies 13 basic responsibility tests to each applicant, included in paragraphs (b) and (c) of this section.

(b) If a grant applicant fails either of the following two responsibility tests, it shall not be designated as a grantee:

(1) The Department's efforts to recover debts from the applicant (for which three demand letters have been sent) established by final Department action have been unsuccessful, or the applicant has failed to comply with an approved repayment plan.

(2) Fraud or criminal activity has been determined to exist within the organization.

(c) Eleven additional basic responsibility tests are applied to each grant applicant. Failure to meet any one of these tests does not establish that the applicant is not responsible, unless the failure is substantial or persistent. These tests are as follows:

(1) Serious administrative deficiencies have been identified, such as failure to maintain a financial management system as required by Federal regulations.

(2) Willful obstruction of the monitoring process.

(3) Failure to meet performance requirements.

(4) Failure to correct deficiencies brought to the grantee's attention in writing as a result of monitoring activities, reviews, assessments, *etc.*

(5) Failure to submit correct grant closeout documents within 90 days after expiration of the grant, unless an extension has been requested and granted.

(6) Failure to return outstanding cash advances within 90 days of the expiration date of the grant, unless an extension has been requested and granted, or the funds have been authorized to be retained for use on other grants.

(7) Failure to submit correct required reports by established due dates.

(8) Failure to properly report and dispose of government property as instructed by DOL.

(9) Failure to maintain cost controls resulting in excess cash on hand.

(10) Failure to timely comply with the audit requirements of 29 CFR part 96.

(11) Final disallowed costs in excess of five percent of the grant award.

§ 641.206 Grant application review.

(a) The Department shall review each timely grant application submitted by an eligible organization.

(b) In reviewing and considering an application, the Department shall determine the following:

(1) The availability of funds for the proposed grant;

(2) Whether the application is in accordance with the Department's instructions;

(3) Whether the application complies with the requirements of the OAA and this part;

(4) Whether the application offers the best prospect of serving appropriate geographic areas; and

(5) Whether the application demonstrates the effective use of funds.

§ 641.207 Negotiation.

(a) The Department may negotiate with an eligible organization to arrive at a grant agreement if the application

generally meets requirements set forth in this part.

(b) The subjects of negotiation may include, but are not limited to, the following:

(1) Project components, including community service assignments and geographic locations of authorized positions;

(2) Subproject(s), if any;

(3) Funding level, including all budget line items; and

(4) Performance goals.

§ 641.208 Rejection of grant application or project components.

(a) The Department may question any proposed project component if it believes that the component will not serve the purposes of the OAA; if negotiation does not produce a mutually acceptable conclusion, it may reject this grant application.

(b) If the Department rejects an application, as set forth in paragraph (a) of this section, the Department may solicit applications from other eligible organizations in order to arrive at a grant agreement.

(c) When an application is not approved, the Department shall notify the applicant within a reasonable time in writing and state the reason(s) for rejection.

(d) Rejection of a proposal or application is a final Departmental action which is not subject to further administrative review. Rejection will not affect future consideration of the applicant for other projects as long as the organization meets the eligibility criteria.

§ 641.209 Award of funds.

When the applicant is a unit of State government or a public or private nonprofit organization, the award of funds to a grantee shall be accomplished through the execution of a grant agreement prepared by the Department. When the applicant is a unit of the Federal Government, other than the Department, the award of funds shall be accomplished through an interagency agreement.

Subpart C—Grant Operations

§ 641.301 General.

(a) This subpart establishes basic grant operation standards and procedures to be followed by all organizations receiving title V funds for the purpose of operating SCSEP grant agreements and projects.

(b) The dual purposes of an SCSEP project are to provide useful part-time community service assignments for persons with low incomes who are 55 years old or older while promoting transition to unsubsidized employment. Grantees and subgrantees shall develop appropriate work assignments for eligible individuals which will result in the provision of community services as defined in sections 502(b) and 507(2) of the OAA, and § 641.102 and will promote unsubsidized employment opportunities.

§ 641.302 Grantee responsibilities.

The grantee shall remit to eligible individuals wages, for community service assignments, and provide skill enhancement opportunities, periodic physical examinations, personal and employment-related counseling, assistance in transition to unsubsidized employment where feasible, and other benefits as approved by the Department.

(a) grantees are responsible for:

(1) Following and enforcing the requirements set forth in the OAA and this part;

(2) Implementing and carrying out projects in accordance with the provisions of the grant agreement; and

(3) Assuring that, to the extent feasible, such projects will serve the needs of minority, limited English-speaking, and Indian eligible individuals, and eligible individuals who have the greatest economic need, at least in proportion to their numbers in the State, and take into consideration their rates of poverty and unemployment based on the best available information.

(b) The grantee periodically shall monitor the performance of grant-supported activities to assure that project goals are being achieved and that the requirements of the OAA and this part are being met.

(c) The grantee or subgrantee shall obtain and record the personal information necessary for a proper determination of eligibility for each individual and maintain documentation supporting the eligibility of enrollees.

(d) Each grantee or subgrantee shall make efforts to provide equitable services among substantial segments of the population eligible for participation in SCSEP. Such efforts shall include, but not be limited to: outreach efforts to broaden the composition of the pool of those considered for participation, to include members of both sexes, various race/ethnic groups and individuals with disabilities.

§ 641.303 Cooperative relationships.

(a) Each grantee or subgrantee shall, to the maximum extent feasible, cooperate with other agencies, including agencies conducting programs under the JTPA, to provide services to elderly persons, to persons with low incomes, and with agencies providing employment and training services.

(b) The cooperation described in paragraph (a) of this section shall include, but not be limited to:

(1) Selection of community service assignment occupational categories, work assignments, and host agencies to provide a variety of community service opportunities for enrollees and to produce a variety of federally funded services which respond to the community's total needs and initiatives.

(2) Establishment of cooperative relations with the State agency on aging designated under section 305(a)(1) of the OAA and with area agencies on aging designated under section 305(a)(2) of the OAA for the purpose of obtaining services as authorized under titles III, IV, and VI of the OAA to increase the likelihood of receipt of unsubsidized employment opportunities and supportive services that are available. Existing services provided under the authority of section 321(a) of the OAA shall be used first by grantee or subgrantee.

(3) Establishment of cooperative relations with other employment and training organizations including the State and local JTPA and the Carl D. Perkins Act programs to insure that project enrollees can benefit from such cooperative activities as dual eligibility, shared assessments, training and referral.

(4) Establishment of cooperative relations with State employment security agencies to insure that enrollees are made aware of services available from these agencies.

(c) Whenever a national organization or other program sponsor conducts a project within a planning and service area in a State, such an organization or program sponsor shall conduct such a project in consultation with the area agency on aging of the planning and service area and shall submit to the State agency and the area agency on aging a description of such project to be conducted in the State including the location of the project, 30 days prior to undertaking the project, for review and comment to assure efficient and effective coordination of programs under this part.

§ 641.304 Recruitment and selection of enrollees.

Grantees and subgrantees shall use methods of recruitment and selection (including notifying the State employment security agency when vacancies occur) which will assure that the maximum number of eligible individuals will have an opportunity to participate in the program. Recruitment efforts shall be designed, to the extent feasible, to assure equitable distribution of services to groups described in §641.302(e). [Section 502(b)(1)(H) of the OAA.]

§ 641.305 Enrollment eligibility.

(a) *General.* Eligibility criteria set forth in this section apply to all SCSEP applicants and enrollees, including the following individuals:

(1) Each individual seeking initial enrollment;

(2) Each individual seeking reenrollment after termination from the SCSEP because of loss of unsubsidized employment through no fault of their own, including illness; and

(3) Each enrollee seeking recertification for continued enrollment.

(b) *Eligibility criteria.* To be eligible for initial enrollment, each individual shall meet the following criteria for age, income, and place of residence:

(1) *Age.* Each individual shall be no less than 55 years of age. No person whose age is 55 years or more shall be determined ineligible because of age, and no upper age limit shall be imposed for initial or continued enrollment. [Section 502 of the OAA.]

(2) *Income.* The income of the family of which the individual is a member shall not exceed the low-income standards defined in § 641.102 and issued by the Department. In addition, a disabled person may be treated as a ''family of one'' for income eligibility purposes.

(3) *Residence.* Each individual, upon initial enrollment, shall reside in the State in which the project is authorized.

(c) *No additional eligibility requirement.* Grantees and subgrantees shall not impose any additional condition or requirement for enrollment eligibility unless required by Federal law.

(d) *Dual Eligibility.* Individuals eligible under title V of the OAA who are enrolled in a joint program established under a written financial or non-financial agreement to jointly operate programs with JTPA shall be deemed to satisfy the requirements of JTPA Title II–A.

(e) *Special responsibilities of the grantees and subgrantee(s) relating to eligibility.*

(1) Each grantee or subgrantee shall recertify the income of each enrollee under its grant or subgrant, respectively, once each project year, according to the schedule set forth in the grant agreement and shall maintain documentation to support the recertification. Enrollees found to be ineligible for continued enrollment because of income shall be given, by the grantee or subgrantee, a written notice of termination and shall be terminated 30 days after the notice. No enrollee shall participate in a community service position for more than 12 months without having his or her income recertified.

(2) If, at any time, the grantee or a subgrantee determines that an enrollee was incorrectly declared eligible as a direct result of false information given by that individual, the individual shall be given a written notice explaining the reason or reasons for the determination and shall be terminated immediately.

(3) If, at any time, the grantee or subgrantee determines that an enrollee was incorrectly declared eligible through no fault of the enrollee, the grantee or subgrantee shall give the enrollee immediate written notice explaining the reason or reasons for termination, and the enrollee shall be terminated 30 days after the notice.

(4) When a grantee or subgrantee makes an unfavorable determination on continued eligibility, it shall explain in writing to the enrollee the reason(s) for the determination and shall provide notice of the right of appeal in accordance with the required procedures set forth in § 641.324.

(5) When a grantee or subgrantee terminates an enrollee for cause, it shall inform the enrollee, in writing, of the reason(s) for termination and of the right of appeal in accordance with the required procedures set forth in § 641.324.

(6) When a grantee or subgrantee makes an unfavorable determination of enrollment eligibility pursuant to paragraph (e) (1) or (3) of this section, it should assure that the individual is given a reason for non-enrollment and, when feasible, should refer the individual to other potential sources of assistance.

§ 641.306 Enrollment priorities.

(a) As set forth in sections 502(b)(1)(M) and 507(1) of the OAA, enrollment priorities for filling all positions shall be as follows:

(1) Eligible individuals with the greatest economic need;

(2) Eligible individuals who are 60 years old or older; and

(3) Eligible individuals who seek re-enrollment following termination of an unsubsidized job through no fault of their own or due to illness, provided that re-enrollment is sought within one year of termination.

(b) Within all enrollment priorities, those persons with poor employment prospects shall be given preference.

(c) Enrollment priorities established in this section shall apply to all vacant community service positions, but shall

not be interpreted to require the termination of any eligible enrollee. The priorities do not apply to the experimental private sector projects authorized by section 502(e) of the OAA.

§ 641.307 [Reserved]

§ 641.308 Orientation.

(a) *Enrollee.* The grantee or subgrantee shall provide orientation to eligible individuals who are enrolled as soon as practicable after a determination of eligibility. The orientation shall provide, as appropriate, information related to: project objectives; community service assignments; training; supportive services; responsibilities, rights, and duties of the enrollee; permitted and prohibited political activities; plans for transition to unsubsidized employment and a discussion of safe working conditions at the host agencies.

(b) *Host agency.* The grantee or a subgrantee shall provide to those individuals who will supervise enrollees at the host agencies, an orientation similar to the one described in paragraph (a) of this section. This is to assure that enrollees will receive adequate supervision and opportunities for transitioning to the host agency staff or other unsubsidized employment.

(c) *Supervision.* The grantee or subgrantee shall ensure that host agencies provide adequate supervision, adequate orientation and instruction regarding, among other things, job duties and safe working procedures.

§ 641.309 Assessment and reassessment of enrollees.

(a) *General.* The grantee or subgrantee shall assess each enrollee under the grant or subgrant, respectively, to determine the most suitable community service assignment and to identify appropriate employment, training, and community service objectives for each individual. The assessment shall be made in partnership with the new enrollee and should consider the individual's preference of occupational category, work history, skills, interests, talents, physical capabilities, need for supportive services, aptitudes, potential for performing proposed community service assignment duties, and potential for transition to unsubsidized employment.

(b) *Assessment of physical capabilities.* The assessment of each enrollee shall take into consideration his or her physical capabilities. Assessments of physical ability shall be consistent with section 504 of the Rehabilitation Act of 1973, as amended (section 504), and the Americans with Disabilities Act of 1990 (ADA).

(c) *Assignment.* The grantee or subgrantee shall seek a community service assignment which will permit the most effective use of each enrollee's skills, interests, and aptitudes.

(d) *Individual development plans.* The grantee and subgrantee shall use the assessment or reassessment as a basis for developing or amending an individual development plan (IDP). The IDP shall be developed in partnership with the enrollee to reflect the needs of the enrollee as indicated by the assessment, as well as the expressed interests and desires of the enrollee.

(e) *Review of IDP plan.* The grantee and subgrantee shall review the IDP at least once in a 12 month period for the following purposes: to evaluate the progress of each enrollee in meeting the objectives of the IDP; to determine each enrollee's potential for transition to unsubsidized employment; to determine the appropriateness of each enrollee's current community service assignment; and to review progress made toward meeting their training and employment objectives.

(f) *Alternative assignment.* The sponsor may develop an alternative assignment for an enrollee, when feasible, should there be one of the following determinations:

(1) That a different community service assignment will provide greater opportunity for the use of an enrollee's skills and aptitudes;

(2) That an alternative assignment will provide work experience which will enhance the potential for unsubsidized employment; or

(3) That an alternative assignment will otherwise serve the best interests of the enrollee.

(g) *Minimum requirements.* The assessments and reassessments required by this section shall meet minimum requirements issued by the Department

on assessment, and subsequent determinations are to be recorded in the enrollee's IDP, to become a part of each enrollee's permanent record.

(h) *Recent assessments.* Assessments of an enrollee, prepared by another employment or training program (such as a program under the JTPA or the Carl D. Perkins Vocational and Applied Technology Act) may be substituted for one prepared by the grantee or subgrantee if the training program prepared the assessment within the last year prior to applying for SCSEP. [section 502(b)(1)(M) of the OAA.]

§ 641.310 Community service assignments.

(a) *Assignment to community service.* After the completion of an enrollee's orientation and initial training, if any, the grantee or subgrantee shall refer the enrollee, as soon as possible, to a useful part-time community service assignment, if appropriate, according to the IDP.

(1) Each enrollee shall be placed in a community service assignment which contributes to the general welfare of the community and provides services related to publicly-owned and operated facilities and projects, or projects sponsored by organizations other than political parties, exempt from taxation under the provisions of section 501(c)(3) of the Internal Revenue Code of 1986. Project sponsors may provide enrollees with opportunities to assist in the administration of the SCSEP.

(2) The enrollee shall not be assigned to work involving the construction, operation, or maintenance of any facility used or to be used as a place for sectarian religious instruction or worship, or to work which primarily benefits private, profit-making organizations. [Sections 502(b)(1)(A), (C), and (D) and 507(2) of the OAA.]

(b) *Hours of community service assignments.* (1) Each enrollee's community service assignment shall not exceed 1,300 hours during a 12-month period specified in the grantee's agreement. The 1,300 hours includes paid hours of orientation, training, sick leave, and vacation and hours of enrollment provided by all grantees and subgrantees. No enrollee shall be paid for more than 1,300 hours in any 12-month period. [Section 508(a)(2) of the OAA.]

(2) The grantee or subgrantee shall not require an enrollee to participate more than 20 hours during one week; however, hours may be extended with the consent of the enrollee.

(3) The grantee or subgrantee shall not offer an enrollee an average of fewer than 20 hours of paid participation per week. Shorter periods may be authorized by the grant agreement, in writing by the Department, or by written agreement between an enrollee and a grantee or subgrantee. [Section 508(a)(2) of the OAA.]

(4) The grantee or subgrantee shall, to the extent possible, ensure that the enrollee works during normal business hours, if the enrollee so desires.

(c) *Location.* The enrollee shall be employed at work sites in or near the community where the enrollee resides. [Section 502(b)(1)(B) of the OAA.]

(d) *Working conditions for enrollees.* Enrollees shall not be permitted to work in a building or surroundings or under conditions which are unsanitary, hazardous, or dangerous to the enrollees' health or safety. The grantee or subgrantee shall make periodic visits to the enrollees' work site(s) to assure that the working conditions and treatment of the enrollee are consistent with the OAA and this part. [Section 502(b)(1)(J) of the OAA.]

§ 641.311 Enrollee wages and fringe benefits.

(a) *Wages.* Upon engaging in part-time community service assignments, including orientation and training in preparation for community service assignments, each enrollee shall receive wages at a rate no less than the highest applicable rate:

(1) The minimum wage which would be applicable to the enrollee under the Fair Labor Standards Act of 1938;

(2) The State or local minimum wage for the most nearly comparable covered employment; or

(3) The prevailing rates of pay for persons employed in similar public occupations by the same employer.

(b) *Fringe benefits. (1) The grantee or subgrantee shall ensure that enrollees receive all fringe benefits required by law.*

(2) Within a project or subproject, fringe benefits shall be provided uniformly to all enrollees, unless the Department agrees to waive this provision due to a determination that such a waiver is in the best interests of applicants, enrollees, and the project administration.

(3) *Physical examination.* (i) Each enrollee shall be offered the opportunity to take a physical examination annually. A physical is a fringe benefit, and is not an eligibility criterion. The examining physician shall provide, to the enrollee only, a written report of the results of the examination. The enrollee may, at his or her option, provide the grantee or subgrantee a copy of the report. The results of the physical examination shall not be taken into consideration in determining placement into a community service assignment.

(ii) An enrollee may refuse the physical examination offered. In such a case, the grantee or subgrantee should document this refusal, through a signed waiver or other means, within 60 work days after commencement of the community service assignment. Thereafter, grantees or subgrantees shall document an enrollee's refusal of the annual physical examination.

(c) *Retirement.* Expenditures of grant funds for contributions into a retirement system or plan are prohibited, unless the grantee has documentation on hand showing that:

(1) The costs are allowable under the appropriate cost principles indicated at § 641.403(b); and

(2) Such contributions bear a reasonable relationship to the cost of providing such benefits to enrollees because:

(i) the benefits vest at the time contributions are made on behalf of the enrollees; or

(ii) the charges to SCSEP funds are for contributions on behalf of enrollees to a ''defined benefit'' type of plan which do not exceed the amounts reasonably necessary to provide the specified benefit to enrollees, as determined under a separate actuarial determination.

(d) *Workers' compensation.* Where an enrollee is not covered by the State workers' compensation law, the grantee or subgrantee shall provide the enrollee with workers' compensation benefits equal to that provided by law for covered employment. [Section 504(b) of the OAA.]

(e) *Unemployment compensation.* The grantee is authorized to pay the cost of unemployment insurance for covered enrollees, where required by law. [Section 502(b)(1)(O) of the OAA.]

§ 641.312 Enrollee supportive services.

(a) The grantee or subgrantee shall provide supportive services designed to assist the enrollee in participating successfully in community service assignments and, where appropriate, to prepare and assist the enrollee in obtaining unsubsidized employment. To the extent feasible, the grantee or subgrantee shall utilize supportive services available from other titles of the OAA, particularly those administered by area agencies on aging and other funding sources.

(b) Supportive services may include, but need not be limited to, all or some of the following:

(1) Counseling or instruction designed to assist the enrollee to participate successfully in community service assignments or to obtain unsubsidized employment.

(2) Counseling designed to assist the enrollee personally in areas such as health, nutrition, social security benefits, Medicare benefits, and retirement laws.

(3) Incidentals, including, but not limited to: work shoes, badges, uniforms, safety glasses, eyeglasses, and hand tools, may be provided if necessary for successful participation in community service assignments and if not available from other sources.

(4) Periodic meetings on topics of general interest, including matters related to health, job seeking skills, safety, and consumer affairs.

(5) *Enrollee transportation.* (i) Enrollee transportation may be paid if transportation from other sources at no cost to the project is unavailable and such unavailability is documented. When authorized in the grant agreement, transportation may be provided for enrollees from home to work, to training or to supportive services. [Section 502(b)(1)(L) of the OAA.]

(ii) Grant funds may not be expended to support the transportation costs of host agencies or programs funded by other than title V of the OAA, except where provided by Federal law.

§ 641.313 Training.

(a) The grantee or subgrantee shall provide or arrange for training specific to an enrollee's community service assignment. Training may be provided through lectures, seminars, classroom instruction, individual instruction or other arrangements including, but not limited to, arrangements with employment and training programs. The grantee or the subgrantee is encouraged to obtain such services through locally available resources, including employment and training programs, as defined in § 641.103, and through host agencies, at no cost or reduced cost to the project. [Section 502(b)(1)(I) of the OAA.]

(b) Training shall consist of up to 500 hours per grant year and shall be consistent with the enrollee's IDP. Such training may cover all aspects of training; e.g., skill, job search, etc. Enrollees shall not be enrolled solely for the purpose of receiving job search and job referral services. Waivers for additional hours of training will be considered on an exception basis.

(c) In addition to training in preparation for community service assignments, as described in this section, a grantee or subgrantee is encouraged to arrange for, or directly provide, skills-training opportunities beyond the SCSEP community service training activities which will permit the enrollee to acquire or improve skills, including literacy training, applicable in community service assignment or for unsubsidized employment.

(d) A grantee or subgrantee, to the extent feasible, shall arrange skill-training for the enrollee which is realistic and consistent with his or her IDP. A grantee or subgrantee shall place major emphasis on the training available through on-the-job experience at SCSEP work sites, thereby retaining the community service focus of the SCSEP.

(e) An enrollee engaging in skills-related training, as described in paragraphs (c) and (d) of this section, may be reimbursed for the documented travel costs and room and board necessary to engage in such training. [Section 502(b)(1)(I) of the OAA.]

(f) Whenever possible a grantee or subgrantee shall seek to obtain all training for enrollees reduced or no cost to title V from such sources as the JTPA and the Carl D. Perkins Vocational and Applied Technology Education Act. Where training is not available from other sources, title V funds may be used for training.

(g) Nothing in this section shall be interpreted to prevent or limit an enrollee from engaging in self-development training available from sources other than title V of the OAA during hours other than hours of community service assignment.

(h) Joint programming, including co-enrollment when appropriate, between title V programs and programs authorized by the Job Training Partnership Act, the Community Services Block Grant Act, or the Carl D. Perkins Act is strongly encouraged.

§ 641.314 Placement into unsubsidized employment.

(a) In order to ensure that the maximum number of eligible individuals have an opportunity to participate in community service assignments, the grantee or subgrantee shall employ reasonable means to place each enrollee into unsubsidized employment.

(b) To encourage the placement of the enrollee into an unsubsidized job, the Department has established a goal of placing into unsubsidized employment the number of enrollees which equals at least 20 percent of the project's annual authorized positions. Whenever this goal is not achieved, the grantee shall develop and submit a plan of action for addressing this shortfall.

(c) The grantee or subgrantee may contact private and public employers directly or through the State employment security agencies to develop or identify suitable unsubsidized employment opportunities; and should encourage host agencies to employ enrollees in their regular work forces.

(d) The grantee or subgrantee shall follow-up on each enrollee who is placed into unsubsidized employment

and shall document such follow-up at least once within 3 months of unsubsidized placement.

§ 641.315 Maximum duration of enrollment.

A maximum duration of enrollment may be established by the grantee in the grant agreement, when authorized by the Department. Time limits on enrollment shall be reasonable and IDPs shall provide for transition to unsubsidized employment or other assistance before the maximum enrollment duration has expired.

§ 641.316 Individual development plan-related terminations.

When an enrollee refuses to accept a reasonable number of referrals or job offers to unsubsidized employment consistent with his or her IDP and there are no extenuating circumstances, the enrollee may be terminated from the SCSEP. Such a termination shall be consistent with administrative guidelines issued by the Department and the termination shall be subject to the applicable appeal rights and procedures described in § 641.324.

§ 641.317 Status of enrollees.

Enrollees who are employed in any project funded under the OAA are not deemed to be Federal employees as a result of such employment. [Section 504(a) of the OAA.]

§ 641.318 Over-enrollment.

Should attrition or funding adjustments prevent a portion of project funds from being fully utilized, the grantee may use those funds during the period of the agreement to over-enroll additional eligible individuals. The number over-enrolled may not exceed 20 percent of the total number of authorized positions established under the grant agreement without the written approval of the Department. Payments to or on behalf of enrollees in such positions shall not exceed the amount of the unused funds available. Each individual enrolled in such a position shall be informed in writing that the assignment is temporary in nature and may be terminated. The grantee shall first seek to maintain full enrollment in authorized positions and shall seek to schedule all enrollments and terminations to avoid excessive terminations at the end of the grant period.

§ 6541.319 [Reserved]

§ 641.320 Political patronage.

(a) No grantee may select, reject, promote, or terminate an individual based on that individual's political affiliations or beliefs. The selection or advancement of enrollees as a reward for political services, or as a form of political patronage, is prohibited.

(b) There shall be no selection of subgrantees or host agencies based on political affiliation.

§ 641.321 Political activities.

(a) *General.* No project under title V of the OAA or this part may involve political activities.

(1) No enrollee or staff person may be permitted to engage in partisan or nonpartisan political activities during hours for which they are paid with SCSEP funds.

(2) No enrollee or staff person, at any time, may be permitted to engage in partisan political activities in which such enrollee or staff person represents himself or herself as a spokesperson of the SCSEP program.

(3) No enrollee may be employed or out-stationed in the office of a Member of Congress, a State or local legislator, or on any staff of a legislative committee.

(4) No enrollee may be employed or out-stationed in the immediate office of any elected chief executive officer(s) of a State or unit of general government, except that:

(i) Units of local government may serve as host-agencies for enrollees in such positions, provided that such assignments are nonpolitical; and

(ii) Where assignments are technically in such offices, such assignments actually are program activities not in any way involved in political functions.

(5) No enrollee may be assigned to perform political activities in the offices of other elected officials. However, placement of enrollees in such nonpolitical assignments within the offices of such elected officials is permissible, provided that grantees develop

safeguards to ensure that enrollees placed in these assignments are not involved in political activities. These safeguards shall be described in the grant agreement and shall be subject to review and monitoring by the grantee and the Department.

(b) *Hatch Act.* (1) State and local employees governed by 5 U.S.C. chapter 15 shall comply with the Hatch Act provisions as interpreted and applied by the Office of the Special Counsel.

(2) Each project subject to 5 U.S.C. chapter 15 shall display a notice and shall make available to each person associated with such project a written explanation, clarifying the law with respect to allowable and unallowable political activities under 5 U.S.C. chapter 15 which are applicable to the project and each category of individuals associated with such project. This notice, which shall have the approval of the Department, shall contain the telephone number and address of the DOL Inspector General. [Section 502(b)(1)(P) of the OAA.] Enforcement of the Hatch Act shall be as provided at 5 U.S.C. chapter 15.

§ 641.322 Unionization.

No funds provided under title V of the OAA or this part may be used in any way to assist, promote, or deter union organizing.

§ 641.323 Nepotism.

(a) No grantee or subgrantee may hire, and no host agency may be a work site for a person who works in an administrative capacity, staff position, or community service position funded under title V of the OAA or this part if a member of that person's immediate family is engaged in a decision-making capacity (whether compensated or not) for that project, subproject, grantee, subgrantee or host agency. This provision may be waived by the Department at work sites on Native American reservations and rural areas provided that adequate justification can be documented, such as that no other persons are eligible for participation.

(b) To the extent that an applicable State or local legal requirement regarding nepotism is more restrictive than this provision, that requirement shall be followed.

(c) For purposes of this section:

(1) *Immediate family* means wife, husband, son, daughter, mother, father, brother, sister, son-in-law, daughter-in-law, mother-in-law, father-in-law, brother-in-law, sister-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, and grandchild.

(2) *Engaged in an administrative capacity* includes those persons who, in the administration of projects, or host agencies, have responsibility for, or authority over those with responsibility for, the selection of enrollees from among eligible applicants.

§ 641.324 Enrollee and applicant complaint resolution.

(a) Each grantee shall establish and describe in the grant agreement procedures for resolving complaints, other than those described by paragraph (c) of this section, arising between the grantee and an enrollee.

(b) Allegations of violations of federal law, other than those described in paragraph (c) of this section, which cannot be resolved within 60 days as a result of the grantee's procedures, may be filed with the Chief, Division of Older Worker Programs, Employment and Training Administration, U.S. Department of Labor, Washington, DC 20210.

(c) Grantees that do not receive any funds under the JTPA shall process complaints of discrimination in accordance with 29 CFR parts 31 and 32. Grantees that receive any funds under JTPA shall process complaints of discrimination in accordance with 29 CFR part 34.

(d) Except for complaints described in paragraphs (b) and (c) of this section, the Department shall limit its review to determining whether the grantee's appeal procedures were followed.

§ 641.325 Maintenance of effort.

(a) Employment of an enrollee funded under title V of the OAA or this part shall be only in addition to budgeted employment which would otherwise be funded by the grantee, subgrantee and the host agency(ies) without assistance under the OAA. [Section 502(b)(1)(F) of the OAA.]

(b) Each project funded under title V of the OAA or this part:

(1) Should result in an increase in employment opportunities in addition to those which would otherwise be available;

(2) Shall not result in the displacement of currently employed workers, including partial displacement such as a reduction in hours of non-overtime work, wages, or employment benefits;

(3) Shall not impair existing contracts for service or result in the substitution of Federal funds for other funds in connection with work that would otherwise be performed;

(4) Shall not substitute project jobs for existing federally-assisted jobs; and

(5) Shall not employ or continue to employ any enrollee to perform work which is the same or substantially the same as that performed by any other person who is on layoff. [Section 502(b)(1)(G) of the OAA.]

§ 641.326 Experimental private sector training projects.

(a) The Department may authorize a grantee to develop an experimental job training project(s) designed to provide second career training and the placement of eligible individuals in employment opportunities with private business concerns. [Section 502(e) of the OAA.]

(b) Experimental project agreements for training may be with States, public agencies, non-profit private organizations, and private business concerns.

(c) The geographic location of these projects shall be determined by the Department to insure an equitable distribution of such projects.

(d) To the extent feasible, experimental projects shall emphasize second-career training, and innovative work modes, including those with reduced physical exertion, and placement into growth industries and jobs reflecting new technologies.

(e) The Department shall establish by administrative guidelines the application schedule, content, format, allocation levels and reporting requirements for experimental projects.

(f) Current title V eligibility standards shall be used for experimental projects unless the Department permits, in writing, the use of another approved income index.

(g) Projects funded under section 502(e) of the OAA shall seek to be coordinated with projects carried out under title II–A of the JTPA to the extent feasible.

(h) National grantees shall distribute funds for experimental projects in accordance with the State allocation in their title V grant.

(i) A grantee may exclude a project, permitted under section 502(e) of the OAA, from meeting the non-federal share requirement set forth in § 641.407; however, this exclusion does not relieve the grantee from the matching requirement, under § 641.407, which applies to the entire grant.

Subpart D—Administrative Standards and Procedures for Grantees and Limitations on Federal Funds

§ 641.401 General.

This subpart establishes limitations on title V funds to be used for community service activities and describes, or incorporates by reference, requirements for the administration of grants by the SCSEP grantee.

§ 641.402 Administrative requirements.

(a) Except as otherwise provided in this part, title V funds shall be administered in accordance with, and subject to, the Department's regulations at 29 CFR parts 31, 32, 34, 93, 96, and 98. In addition, projects and activities administered by State, local or Indian tribal governments are also subject to the Department's administrative requirements regulations at 29 CFR part 97; projects and activities administered by institutions of higher education, hospitals, or other non-profit organizations are subject to the Department's administrative requirements regulations at 29 CFR part 95. Grantees of title V funds shall be subject to any revisions of any implementing regulations cited in this paragraph (a) on the effective date of such revisions.

(b) The administration of interagency agreements set forth in subpart E of this part is not subject to paragraph (a) of this section.

§ 641.403 Allowable costs.

(a) *General.* The allowability of costs shall be determined in accordance with the cost principles indicated in paragraph (b) of this section, except as otherwise provided in this part.

(b) *Applicable Cost Principles.* (1) The cost principles set forth in paragraphs (b)(1) through (4) of this section apply to the organization incurring the costs:

(i) OMB Circular A–87—State, local or Indian tribal government;

(ii) OMB Circular A–122—Private, non-profit organization other than:

(A) Institutions of higher education;

(B) Hospitals; or

(C) Other organizations named in OMB Circular A–122 (see sections 4.a. (Definitions) and 5 (Exclusions) of OMB Circular A–122);

(iii) OMB Circular A–21—Educational institution; or

(iv) 48 CFR part 31, subpart 31.2—Commercial organization (for-profit organization, other than a hospital or other organizations named in OMB Circular A–122).

(2) The OMB Circulars are available by writing to the Office of Management and Budget, Office of Administration, Publications Unit, Room G–236, New Executive Office Building, Washington, DC 20503, or by calling 202–395–7332.

(c) *Lobbying costs.* In addition to the prohibition contained in 29 CFR part 93 and in accordance with limitations on the use of appropriated funds in Department of Labor Appropriation Acts, title V funds shall not be used to pay any salaries or expenses related to any activity designed to influence legislation or appropriations pending before the Congress of the United States.

(d) *Building repairs and acquisition costs.* No federal grant funds provided to a grantee or subgrantee under title V of the OAA or this part may be expended directly or indirectly for the purchase, erection, or repair of any building except for the labor involved in:

(1) Minor remodeling of a public building necessary to make it suitable for use by project administrators;

(2) Minor repair and rehabilitation of publicly used facilities for the general benefit of the community; and

(3) Minor repair and rehabilitation by enrollees of housing occupied by persons with low incomes who are declared eligible for such services by authorized local agencies.

(4) *Accessibility and Reasonable Accommodation.* Funds may be used to meet a grantee or subgrantee's obligations to provide physical and programmatic accessibility and reasonable accommodation as required by section 504 of the Rehabilitation Act of 1973, as amended, and the Americans with Disabilities Act of 1990.

(e) *Allowable fringe benefit costs.* The cost of the following fringe benefits are allowable: initial and annual physical assessments, annual leave, sick leave, holidays, health insurance, social security, worker's compensation and any other fringe benefits approved in the grant agreement and permitted by the appropriate Federal cost principles found in OMB Circulars A–87 and A–122, except as limited for retirement costs by § 641.311(c).

§ 641.404 Classification of costs.

All costs must be charged to one of the following three cost categories:

(a) *Administration.* The cost category of Administration shall include, but need not be limited to, the direct and indirect costs of providing:

(1) Administration, management, and direction of a program or project;

(2) Reports on evaluation, management, community benefits, and other aspects of project activity;

(3) Assistance of an advisory council, if any;

(4) Accounting and management information systems;

(5) Training and technical assistance for grantee or subgrantee staff;

(6) Bonding; and

(7) Audits.

(b) *Enrollee wages and fringe benefits.* The cost category of Enrollee Wages and Fringe Benefits shall include wages paid to enrollees for hours of community service assignments, as described in § 641.311, including hours of training related to a community service assignment, and the costs of fringe benefits provided in accordance with § 641.311.

(c) *Other enrollee costs.* The cost category of Other enrollee costs shall include all costs of functions, services, and benefits not categorized as administration or enrollee wages and fringe

benefits. Other enrollee costs shall include, but shall not be limited to, the direct and indirect costs of providing:

(1) Recruitment and selection of eligible enrollees as provided in §§ 641.304 and 641.305;

(2) Orientation of enrollees and host agencies as provided in § 641.308;

(3) Assessment of enrollees for participation in community service assignments and evaluation of enrollees for continued participation or transition to unsubsidized employment as provided in § 641.309;

(4) Development of appropriate community service assignments as provided in § 641.310;

(5) Supportive services for enrollees, including transportation, as provided in § 641.312;

(6) Training for enrollees, including tuition; and

(7) Development of unsubsidized employment opportunities for enrollees as provided in § 641.314.

(d) *Cost reductions.* Grantees may lower administration costs or other enrollee costs by assigning enrollees to activities which normally would be charged to either of these cost categories. In such instances, the costs of enrollees' wages and fringe benefits shall be charged to the cost category of enrollee wages and fringe benefits. [Section 502(b)(1)(A) of the OAA.]

§ 641.405 Limitations on federal funds.

(a) The limitations on federal funds set forth in this section shall apply to SCSEP funds allotted to grantees for community service activities. Cost categories, limitations, and periods during which different limitations shall apply are set forth in paragraph (b) of this section.

(b) The cost categories and the limitations which apply to them shall be:

(1) *Administration.* The amount of federal funds expended for the cost of administration during the program year shall be no more than 13.5 percent of the grant. The Department may increase the amount available for the cost of administration to no more than 15 percent of the project in accordance with section 502(c)(3) of the OAA.

(2) *Enrollee wages and fringe benefits.* The amount of federal funds budgeted for enrollee wages and fringe benefits shall be no less than 75 percent of the grant.

§ 641.406 Administrative cost waiver.

(a) Based upon information submitted by a public or private nonprofit agency or organization with which the Department has or proposes to have an agreement, as set forth under section 502(b) of the OAA, the Department may waive § 641.405(b)(1) and increase the amount available for paying the costs of administration to an amount not to exceed 15 percent of the proposed federal costs of the grant. Each waiver shall be in writing. The Department shall administer this section in accordance with section 502(c)(3) (A) and (B) of the OAA.

(b) The waiver may be provided to grantees that demonstrate and document reasonable and necessary:

(1) Major administrative cost increases;

(2) Operational requirements imposed by the Department;

(3) Increased costs associated with unsubsidized placement;

(4) Increased costs of providing specialized services to minority groups; and

(5) The minimum amount necessary to administer the grant relative to the available funds.

§ 641.407 Non-federal share of project costs.

The non-federal share of costs may be in cash or in-kind, or a combination of the two, and shall be calculated in accordance with 29 CFR 97.24 or 29 CFR 95.23, as appropriate. The Department shall pay not more than 90 percent of the cost of any project which is the subject of an agreement entered into under the OAA, except that the Department is authorized to pay all of the costs of any such project which is:

(a) An emergency or disaster project;

(b) A project located in an economically depressed area as determined by the Secretary of Labor in consultation with the Secretary of Commerce and the Director of the Office of Community Services of the Department of Health and Human Services;

(c) A project which is exempted by law; or

(d) A project serving an Indian reservation that can demonstrate it cannot provide adequate non-federal resources. [Sections 502(c) and 502(e) of the OAA.]

§ 641.408 Budget changes.

As an exception to 29 CFR 97.30(c)(1), Budget changes, 29 CFR 95.25, Revision of budget and program plans, the movement of Enrollee wages and fringe benefits to any other budget category shall not be permitted without prior written approval of the awarding agency. The Department shall not approve any budget change which would result in non-compliance with § 641.405(b)(2).

§ 641.409 Grantee fiscal and performance reporting requirements.

(a) In accordance with 29 CFR 97.40 or 29 CFR 95.51, as appropriate, each grantee shall submit a Senior Community Service Employment Program *Quarterly Progress Report* (QPR). This report shall be prepared to coincide with the ending dates for Federal fiscal year quarters and shall be submitted to the Department no later than 30 days after the end of the quarterly reporting period unless a waiver is provided. If the grant period ends on a date other than the last day of a federal fiscal year quarter, the last quarterly report covering the entire grant period shall be submitted no later than 30 days after the ending date unless a waiver is provided. The Department shall provide instructions for the preparation of this report.

(b) In accordance with 29 CFR 97.41 or 29 CFR 95.52, as appropriate, the following financial reporting requirements apply to title V grants:

(1) An SF–269, *Financial Status Report* (FSR), shall be submitted to the Department within 30 days after the ending of each quarter of the program year unless a waiver is provided. A final FSR shall be submitted within 90 days after the end of the grant unless a waiver is provided.

(2) All FSR's shall be prepared on an accrual basis.

(c) In accordance with Departmental instructions, an equitable distribution report of SCSEP positions by all grantees in each State shall be submitted annually by the State agency receiving title V funds or another project sponsor designated by the Department. (Approved under the Office of Management and Budget Control No. 1205–0040)

§ 641.410 Subgrant agreements.

(a) The grantee is responsible for the performance of all activities implemented under subgrant agreements and for compliance by the subgrantee with the OAA and this part.

(b) No subgrant or other subagreement may provide for any expenditure of funds beyond the ending date of the grant agreement.

(c) For purposes of this part, procurement, as described in 29 CFR part 97 and 29 CFR 95.40 through 95.48, does not include the award or administration of subgrant agreements.

§ 641.411 Program income accountability.

Any of the methods described at 29 CFR 97.25 or 29 CFR 95.24, as appropriate, may be used to account for program income.

§ 641.412 Equipment.

Equipment purchased by a State grantee with title V funds prior to July 1, 1989, shall be subject to 29 CFR 97.32.

§ 641.413 Audits.

Each grantee is responsible for complying with the Single Audit Act of 1984 (31 U.S.C. 7501 *et seq.*) and 29 CFR part 96, the Department of Labor regulation which implements Office of Management and Budget Circular A–128, ''Audits of State and Local Governments''; or OMB Circular 133, ''Audits of Institutions of Higher Education and Other Nonprofit Institutions'', as appropriate.

§ 641.414 Grant closeout procedures.

Grantees shall follow the grant closeout procedures at 29 CFR 97.50 or 29 CFR 95.71, as appropriate. As necessary, the Department shall issue supplementary closeout instructions for all title V grantees.

§ 641.415 Department of Labor appeals procedures for grantees.

(a) This section sets forth the procedures by which the grantee may appeal a SCSEP final determination by the

Department relating to costs, payments, notices of suspension, and notices of termination other than those resulting from an audit. Appeals of suspensions and terminations for discrimination shall be processed under 29 CFR part 31, 32, or 34, as appropriate.

(b) Appeals from a final disallowance of cost as a result of an audit shall be made pursuant to 29 CFR part 96, subpart 96.6.

(c) Upon a grantee's receipt of the Department's final determination relating to costs (except final disallowance of cost as a result of an audit), payments, suspension or termination, the grantee may appeal the final determination to the Department's Office of Administrative Law Judges, as follows:

(1) Within 21 days of receipt of the Department's final determination, the grantee may transmit by certified mail, return receipt requested, a request for a hearing to the Chief Administrative Law Judge, United States Department of Labor, 800 K Street, NW., room 400 N, Washington, DC 20001 with a copy to the Department official who signed the final determination. The Chief Administrative Law Judge shall designate an administrative law judge to hear the appeal.

(2) The request for hearing shall be accompanied by a copy of the final determination, if issued, and shall state specifically those issues of the determination upon which review is requested. Those provisions of the determination not specified for review, or the entire determination when no hearing has been requested, shall be considered resolved and not subject to further review.

(3) The Rules of Practice and Procedures for Administrative Hearings Before the Office of Administrative Law Judges, set forth at 29 CFR part 18, shall govern the conduct of hearings under this section, except that:

(i) The appeal shall not be considered a complaint; and

(ii) Technical rules of evidence, such as the Federal Rules of Evidence and subpart B of 29 CFR part 18, shall not apply to any hearing conducted pursuant to this section. However, rules designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the administrative law judge conducting the hearing. The certified copy of the administrative file transmitted to the administrative law judge by the official issuing the final determination shall be part of the evidentiary record of the case and need not be moved into evidence.

(4) The administrative law judge should render a written decision no later than 90 days after the closing of the record.

(5) The decision of the administrative law judge shall constitute final action by the Secretary of Labor unless, within 21 days after receipt of the decision of the administrative law judge, a party dissatisfied with the decision, or any part thereof, has filed exceptions with the Secretary of Labor specifically identifying the procedures, fact, law, or policy to which exception is taken. Any exception not specifically urged shall be deemed to have been waived. Thereafter, the decision of the administrative law judge shall become the decision of the Secretary unless the Secretary of Labor, within 30 days of such filing, has notified the parties that the case has been accepted for review.

(6) Any case accepted for review by the Secretary of Labor shall be decided within 180 days of such acceptance. If not so decided, the decision of the administrative law judge shall become the final decision of the Secretary of Labor.

Subpart E—Interagency Agreements

§ 641.501 Administration.

(a) Federal establishments other than the Department of Labor which receive and use funds under title V of the OAA or this part shall submit to DOL project fiscal and progress reports as described in § 641.409.

(b) Non-DOL federal establishments which receive and use funds under title V shall maintain the standard records on individual enrollees and enrollee activities, in accordance with this part.

(c) The Department may provide title V funds to another federal agency by a non-expenditure transfer authorization

or by payments on an advance or reimbursement basis.

(d) In aspects of project administration other than those described in paragraphs (a) and (b) of this section, federal establishments which receive and use funds under title V of the OAA may use their normal administrative procedures.

Subpart F—Assessment and Evaluation

§ 641.601 General.

The Department shall assess each grantee and subgrantee to determine whether it is carrying out the purposes and provisions of title V of the OAA and this part in accordance with the OAA, this part and the grant or other agreements. The Department also shall evaluate the overall program conducted under title V of the OAA or this part to aid in the administration of the SCSEP. The Department and individuals designated by the Department may make site visits and conduct such other monitoring activities as determined by SCSEP needs.

§ 641.602 Limitation.

In arranging for the assessment of a grantee, or the evaluation of a subgrantee, or the evaluation of the overall program under title V of the OAA or this part, the Department shall not use any individual, institution, or organization associated with any project under title V of the OAA.

PART 645—PROVISIONS GOVERNING WELFARE-TO-WORK GRANTS

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AUTHORITY: 42 U.S.C. 606(a)(5)(C)(viii).

SOURCE: 62 FR 61603, Nov. 18, 1997, unless otherwise noted.

Subpart A—Scope and Purpose

§ 645.100 What does this subpart cover?

(a) Subpart A establishes regulatory provisions that apply to the Welfare-to-Work (WtW) programs conducted at the State and at the Service Delivery Area (SDA) levels.

(b) Subpart B provides general program requirements applicable to all WtW formula funds. The provisions of this subpart govern how WtW funds must be spent, who is eligible to participate in the program, allowable activities and their relationship to TANF, Governor's projects for long-term recipients, administrative and fiscal provisions, and program oversight requirements. This subpart also addresses worker protections and the establishment of a State grievance system.

(c) Subpart C sets forth additional administrative standards and procedures for WtW Formula Grants, such as matching requirements and reallotment procedures.

(d) Subpart D sets forth the conditions under which the Governor may request a waiver to designate an alternate administering agency, sets forth the formula elements that must be included in the within-State distribution formula, the submission of a State annual plan, the factors for measuring State performance, and the roles and responsibilities of the States and the Private Industry Councils (PICs).

(e) Subpart E outlines general conditions and requirements for the WtW Competitive Grants.

(f) Regulatory provisions applicable to the Indian and Native American Welfare-to-Work Program (INA WtW) are found at 20 CFR part 646.

§ 645.110 What are the purposes of the Welfare-to-Work Program?

The purposes of the WtW program are:

(a) To facilitate the placement of hard-to-employ welfare recipients into transitional employment opportunities which will lead to lasting unsubsidized employment and self-sufficiency;

(b) To provide a variety of activities, grounded in TANF's ''work first'' philosophy, to prepare individuals for, and to place them in, lasting unsubsidized employment;

(c) To provide for a variety of post-employment and job retention services which will assist the hard-to-employ welfare recipient to secure lasting unsubsidized employment;

(d) To provide targeted WtW funds to high poverty areas with large numbers of hard-to-employ welfare recipients.

§ 645.120 What definitions apply to this part?

The following definitions apply under this part:

Act means Title IV, Part A of the Social Security Act, 42 U.S.C. 601–619.

Adult means an individual who is not a minor child.

Chief Elected Official(s) (CEOs) means:

(1) The chief elected official of the sole unit of general local government in the service delivery area,

(2) The individual or individuals selected by the chief elected officials of all units of general local government in such area as their authorized representative, or

(3) In the case of a service delivery area designated under section 101(a)(4)(A)(iii) of JTPA, the representative of the chief elected official for such area (as defined in section 4(4)(C) of JTPA).

Competitive Grants means those WtW funds awarded by the Department under a competitive application process to local governments, PICs, and private entities (such as community development corporations, community-based and faith-based organizations, disability community organizations, and community action agencies) who apply in conjunction with a PIC or local government.

Department or *DOL* means the U.S. Department of Labor.

Employment activities means the activities enumerated at § 645.220(b).

ETA means the Employment and Training Administration of the U.S. Department of Labor.

Fiscal year (FY) means any 12-month period ending on September 30 of a calendar year.

Formula grants means the WtW funds allotted to each Welfare-to-Work State, based on a formula prescribed by the Act, which equally considers States' shares of the national number of poor individuals and of adult recipients of assistance under TANF. The State is required to distribute not less than 85 percent of the allotted formula grant funds to service delivery areas in the State; and the State may retain not more than 15 percent for projects to help long-term recipients of assistance enter unsubsidized employment. Unless otherwise specified, the term ''formula grant'' refers to the 85 percent and 15 percent funds.

Governor means the Chief Executive Officer of a State.

Job Training Partnership Act or *JTPA* means Public Law (Pub. L.) 97–300, as amended, 29 U.S.C. 1501, *et seq.*

Minor child means an individual who has not attained 18 years of age; or has not attained 19 years of age and is a full-time student in a secondary school (or in the equivalent level of vocational or technical training).

MOE means maintenance of effort. Under TANF, States are required to maintain a certain level of spending on welfare based on ''historic'' FY 1994 expenditure levels (Section 409 (a)(7) of the Act).

PIC means a Private Industry Council established under Section 102 of the Job Training Partnership Act, which performs the functions authorized at Section 103 of the JTPA.

PRWORA means the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law (Pub. L.) 104–193, which established the TANF program.

SDA means a service delivery area designated by the Governor pursuant to section 101(a)(4) of the Job Training Partnership Act.

Secretary means the Secretary of Labor.

Separate State program means a program operated outside of TANF in which the expenditures of State funds may count for TANF MOE purposes.

State means the 50 States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the US Virgin Islands, Guam, and American Samoa, unless otherwise specified.

State TANF Program means those funds expended under the State Family Assistance Grant (SFAG), the basic block grant allocated to the States under Section 403(a)(1) of the Act.

TANF means Temporary Assistance for Needy Families Program established under PRWORA.

TANF MOE means the expenditure of State funds that must be made in order to meet the Temporary Assistance for Needy Families Maintenance of Effort requirement.

WtW means Welfare-to-Work.

WtW State means those States that the Secretary of Labor determines have met the five conditions established at Section 403(a)(5)(A)(ii) of the Act. Only States that are determined to be WtW States can receive WtW grant funds.

WtW statute means those provisions of the Balanced Budget Act of 1997 containing certain amendments to PRWORA and establishing the new Welfare-to-Work program, amending Title IV of the Social Security Act, (codified at 42 U.S.C. 601–619).

Subpart B—General Program and Administrative Requirements

§ 645.200 What does this subpart cover?

This subpart provides general program and administrative requirements for WtW formula funds, including Governors' funds for long-term recipients of assistance, and for competitive grant funding (section 403(a)(5) of the Act).

§ 645.210 What is meant by the terms "entity" and "project" in the statutory phrase "an entity that operates a project" with Welfare-to-Work funds?

The terms *entity* and *project*, in the statutory phrase ''an entity that operates a project'', means:

(a) For WtW substate formula funds:

(1) *Entity*; means the PIC (or the alternate agency designated by the Governor and approved by the Secretary pursuant to §645.400 of this part) which administers the WtW substate formula funds in a service delivery area(s). This entity is referred to in §§645.211 through 645.225 of this part as the ''operating entity.''

(2) *Project* means all activities, administrative and programmatic, supported by the total amount of the WtW substate formula funds allotted to the entity described in paragraph (a)(1) of this section.

(b) For WtW Governors' funds for long-term recipients of assistance:

(1) *Entity* means the agency, group, or organization to which the Governor has distributed any of the funds for long-term recipients of assistance, as described in §645.410 (b) and (c) of this part. This entity is referred to in §§645.211 through 645.225 of this part as the ''operating entity.''

(2) *Project* means all activities, administrative and programmatic, supported by the total amount of one discrete award of WtW Governors' funds for long-term recipients of assistance awarded to the entity described in paragraph (b)(1) of this section.

(c) For competitive WtW funds:

(1) *Entity* means an eligible applicant, as described in §645.500 of this part, which is awarded a competitive WtW grant. This entity is referred to in §§645.211 through 645.225 of this part as the ''operating entity.''

(2) *Project* means all of the activities, administrative and programmatic, supported by the total amount of one discrete WtW competitive grant awarded to the entity described in paragraph (c)(1) of this section (section 403(a)(5)(C) of the Act).

§ 645.211 How must Welfare-to-Work funds be spent by the operating entity?

(a) At least 70 percent of the WtW funds allotted to or awarded to an operating entity, as described in §645.210 of this part, must be spent to benefit hard-to-employ individuals, as described in §645.212 of this part.

(b) Not more than 30 percent of the WtW funds allotted to or awarded to an operating entity, as described in §645.210 of this part, may be spent to assist individuals with long-term welfare dependence characteristics, as described in §645.213 of this part. If less than 30 percent of the funds is spent to assist individuals with long-term welfare dependence characteristics, the remaining funds shall be spent to benefit hard-to-employ individuals pursuant to paragraph (a) of this section (section 403(a)(5)(C)of the Act).

§ 645.212 Who may be served as a hard-to-employ individual under the 70 percent provision?

(a) An individual is eligible to be served under the 70 percent provision if (s)he meets all three of the criteria listed in paragraphs (a)(1), (2), and (3) of this section:

(1) The individual is receiving TANF assistance; and

(2) Barriers to employment—at least two of the three following barriers to employment must apply to the individual:

(i) Has not completed secondary school or obtained a certificate of general equivalency, and has low skills in

reading or mathematics. At least 90 percent of individuals determined to have low skills in reading or mathematics must be proficient at the 8.9 grade level or below.

(ii) Requires substance abuse treatment for employment.

(iii) Has a poor work history. At least 90 percent of individuals determined to have a poor work history must have worked no more than 3 consecutive months in the past 12 calendar months; and

(3) Length of receipt of TANF assistance—the individual must be a long-term recipient, meeting one of the following two criteria:

(i) Has received assistance under a State TANF program, and/or its predecessor program, for at least 30 months. The months do not have to be consecutive; or

(ii) Will become ineligible for assistance within 12 months due to either Federal or State-imposed durational time limits on receipt of TANF assistance. This includes individuals who have been exempted from the durational limits due to hardship pursuant to section 408(a)(7)(C) of the Act, but would face termination within 12 months without the exemption.

(b) A noncustodial parent of a minor is eligible to participate under the 70 percent provision if the custodial parent meets the eligibility requirements of paragraph (a) of this section.

(c) An individual who has barriers to employment, as specified in paragraph (a)(2) of this section, and who would be otherwise eligible to receive TANF assistance but is no longer receiving TANF assistance because (s)he has reached either the Federal five-year lifetime limit on receipt of assistance, or a State-imposed lifetime limit, is eligible to participate under the 70 percent provision (section 403(a)(5)(C) of the Act).

§ 645.213 Who may be served as an individual with long-term welfare dependence characteristics under the 30 percent provision?

(a) An individual is eligible to be served under the 30 percent provision if (s)he meets both criteria listed in paragraphs (a)(1) and (2) of this section:

(1) The individual is receiving TANF assistance; and

(2) The individual has characteristics associated with, or predictive of, long-term welfare dependence, such as having dropped out of school, teenage pregnancy, or having a poor work history. States, in consultation with the operating entity, may designate additional characteristics associated with, or predictive of, long-term welfare dependence.

(b) A noncustodial parent of a minor child is eligible to participate under the 30 percent provision if the noncustodial parent has the characteristics specified in paragraph (a)(2) of this section, and the custodial parent is receiving TANF assistance.

(c) An individual who has characteristics associated with, or predictive of, long-term welfare dependence, as specified in paragraph (a)(2) of this section, and who would be otherwise eligible to receive TANF assistance but is no longer receiving TANF assistance because (s)he has reached either the Federal five-year lifetime limit on receipt of assistance, or a State-imposed lifetime limit, is eligible to participate under the 30 percent provision (section 403(a)(5)(C) of the Act).

§ 645.214 How will Welfare-to-Work participant eligibility be determined?

(a) The operating entity, as described in §§ 645.210(a)(1), (b)(1), and (c)(1) of this part, is accountable for ensuring that WtW funds are spent only on individuals eligible for WtW projects.

(b) The operating entity must ensure that there are mechanisms in place to determine WtW eligibility for individuals who are receiving TANF assistance. These mechanisms:

(1) Must include arrangements with the TANF agency to ensure that a WtW eligibility determination is based on information, current at the time of the WtW eligibility determination, about whether an individual is receiving TANF assistance, pursuant to §§ 645.212(a)(1) and 645.213(a)(1) of this part, the length of receipt of TANF assistance, pursuant to § 645.212(a)(3)(i) of this part, and when an individual may

become ineligible for assistance pursuant to § 645.212(a)(3)(ii) of this part (section 403(a)(5)(A)(ii)(dd) of the Act).

(2) May include a determination of WtW eligibility for barriers to employment, pursuant to § 645.212(a)(2) of this part, and for characteristics of long-term welfare dependence, pursuant to § 645.213(a)(2) of this part, based on information collected by the operating entity or the TANF agency up to six months prior to the WtW eligibility determination.

(c) The operating entity must ensure that there are mechanisms in place to determine WtW eligibility for individuals who are not receiving TANF assistance (i.e., noncustodial parents, pursuant to §§ 645.212(b) and 645.213(b) of this part, and individuals who have reached the time limit on receipt of TANF, pursuant to §§ 645.212(c) and 645.213(c) of this part). Mechanisms may include, but are not limited to:

(1) Using staff from the operating entity to determine eligibility;

(2) Entering into agreements with local agencies such as the TANF agency and other appropriate agencies which foster coordination and facilitate the exchange of eligibility information among parties at the local level; and/or

(3) Performing joint eligibility determination with other appropriate agencies, including the TANF agency.

(d) Eligibility for WtW need not be redetermined for an individual after the individual begins to receive WtW services (section 403(a)(5)(C) of the Act).

§ 645.220 What activities are allowable under this part?

Entities operating WtW projects may use WtW funds for the following:

(a) Job readiness activities financed through job vouchers or through contracts with public or private providers.

(b) Employment activities which consist of any of the following:

(1) Community service programs;

(2) Work experience programs;

(3) Job creation through public or private sector employment wage subsidies; and

(4) On-the-job training.

(c) Job placement services financed through job vouchers or through contracts with public or private providers, subject to the payment requirements at § 645.230(a)(3).

(d) Post-employment services financed through job vouchers or through contracts with public or private providers, which are provided after an individual is placed in one of the employment activities listed in paragraph (b) of this section, or in any other subsidized or unsubsidized job. Post-employment services include, but are not limited to, such services as:

(1) Basic educational skills training;

(2) Occupational skills training;

(3) English as a second language training; and

(4) Mentoring.

(e) Job retention services and support services which are provided after an individual is placed in a job readiness activity, as specified in paragraph (a) of this section, in one of the employment activities, as specified in paragraph (b) of this section, or in any other subsidized or unsubsidized job. These services can be provided with WtW funds only if they are not otherwise available to the participant. Job retention and support services include, but are not limited to, such services as:

(1) Transportation assistance;

(2) Substance abuse treatment (except that WtW funds may not be used to provide medical treatment);

(3) Child care assistance;

(4) Emergency or short term housing assistance; and

(5) Other supportive services.

(f) Individual development accounts which are established in accordance with section 404 (h) of the Act.

(g) Intake, assessment, eligibility determination, development of an individualized service strategy, and case management may be incorporated in the design of any of the allowable activities listed in paragraphs (a) through (f) of this section (section 403(a)(5)(C) of the Act).

§ 645.225 How do Welfare-to-Work activities relate to activities provided through TANF and other related programs?

(a) Activities provided through WtW must be coordinated effectively at the State and local levels with activities being provided through TANF (section 403(a)(5)(A)(vii)(II) of the Act).

(b) The operating entity must ensure that there is an assessment of skills, prior work experience, employability, and other relevant information in place for each WtW participant. Where appropriate, the assessment performed by the TANF agency or JTPA should be used for this purpose.

(c) The operating entity must ensure that there is an individualized strategy for transition to unsubsidized employment in place for each participant which takes into account participant assessments, including the TANF assessment and any JTPA assessment. Where appropriate, the TANF individual responsibility plan (IRP) or JTPA individual service strategy should be used for this purpose.

(d) Coordination of resources should include not only those available through WtW and TANF grant funds, and the Child Care and Development Block Grant, but also those available through other related activities and programs such as the JTPA programs, the State employment service, One-Stop systems, private sector employers, labor organizations, business and trade associations, education agencies, housing agencies, community development corporations, transportation agencies, community-based and faith-based organizations, disability community organizations, community action agencies, and colleges and universities which provide some of the assistance needed by the targeted population (section 402(a)(5)(A) of the Act).

§ 645.230 What general fiscal and administrative rules apply to the use of Federal funds?

(a) *Uniform fiscal and administrative requirements.* (1) State, local, and Indian tribal government organizations are required to follow the common rule *Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments* which is codified in the DOL regulations at 29 CFR part 97.

(2) Institutions of higher education, hospitals, and other non-profit organizations are required to follow OMB Circular A–110 which is codified in the DOL regulations at 29 CFR part 95.

(3) In addition to the requirements at 29 CFR 95.48 and 29 CFR 97.36(i), contracts or vouchers for job placement services supported by funds provided for this program must include a provision to require that at least one-half (½) of the payment occur after an eligible individual placed into the workforce has been in the workforce for six (6) months. This provision applies only to placement in unsubsidized jobs (section 403(a)(5)(C)(i) of the Act).

(4) In addition to the requirements at 29 CFR 95.42 and 29 CFR 97.36(b)(3) which address codes of conduct and conflict of interest issues related to employees, it is also required that:

(i) A PIC member shall neither cast a vote on, nor participate in, any decision making capacity on the provision of services by such member (or any organization which that member directly represents), nor on any matter which would provide any direct financial benefit to that member or a member of his immediate family.

(ii) Neither membership on the PIC nor the receipt of WtW funds to provide training and related services shall be construed, by itself, to violate these conflict of interest provisions.

(5) The addition method shall be required for the use of all program income earned under WtW grants. The cost of generating program income shall be subtracted from the amount earned to establish the amount of program income available for use under the grants.

(b) *Audit requirements.* All governmental and non-profit organizations are required to follow the audit requirements of OMB Circular A–133.[1] This requirement is imposed at 29 CFR 97.26 for governmental organizations and at 29 CFR 95.26 for institutions of higher education, hospitals, and other non-profit organizations.

(c) *Allowable costs/cost principles.* The DOL regulations at 29 CFR 95.27 and 29 CFR 97.22 identify the Federal principles for determining allowable costs

[1] OMB Circulars are available from: Executive Office of the President Publications Service, 725 17th Street NW, Suite G–2200, Washington, DC 20503; 202–395–7332.

which each kind of recipient and subrecipient must follow. For those selected items of cost requiring prior approval, the authority to grant or deny approval is delegated to the Governor.

(1) State, local, and Indian tribal government organizations must determine allowability of costs in accordance with the provisions of OMB Circular A–87, ''Cost Principles for State and Local Governments.''

(2) Non-profit organizations must determine allowability of costs in accordance with OMB Circular A–122, ''Cost Principles for Non-Profit Organizations.''

(3) Institutions of higher education must determine allowability of costs in accordance with OMB Circular A–21, ''Cost Principles for Education Institutions.''

(4) Hospitals must determine allowability of costs in accordance with the provisions of appendix E of 45 CFR part 74, ''Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals.''

(5) Commercial organizations and those non-profit organizations listed in Attachment C to OMB Circular A–122 must determine allowability of costs in accordance with the provisions of the Federal Acquisition Regulation (FAR), at 48 CFR part 31.

(d) *Government-wide debarment and suspension, and government-wide drug-free workplace requirements.* All WtW grant recipients and subrecipients are required to comply with the government-wide requirements for debarment and suspension, and the government-wide requirements for a drug-free workplace which are codified in the DOL regulations at 29 CFR part 98.

(e) *Restrictions on lobbying.* All WtW grant recipients and subrecipients are required to comply with the restrictions on lobbying which are codified in the DOL regulations at 29 CFR part 93.

(f) *Nondiscrimination.* All WtW grant recipients and subrecipients are required to comply with the nondiscrimination provisions which are codified in the DOL regulations at 29 CFR parts 31 and 32. In addition, recipients of WtW grants who are also recipients under JTPA are required to comply with 20 CFR part 34. For purposes of this paragraph, the term ''recipient'' has the same meaning as the term is defined in 29 CFR parts 31, 32, and 34. Participant rights related to nondiscrimination may be found at § 645.255 of this part.

(g) *Nepotism.* (1) No individual may be placed in a WtW employment activity if a member of that person's immediate family is engaged in an administrative capacity for the employing agency.

(2) To the extent that an applicable State or local legal requirement regarding nepotism is more restrictive than this provision, such State or local requirement shall be followed.

§ 645.233 What are the time limitations on the expenditure of Welfare-to-Work grant funds?

(a) *Formula grant funds.* The maximum time limit for the expenditure of a given fiscal year allotment is three years from the effective date of the Federal grant award to the State. The maximum time limit will be allowed and will be specified in the Department's formula grant document for each fiscal year of funds provided to the State. Any remaining funds that have not been expended at the end of the expenditure period must be returned to the Department in accordance with the applicable closeout procedures for formula grants.

(b) *Competitive grant funds.* The maximum time limit for the expenditure of these funds is three years from the effective date of award, but will, in all cases, be determined by the grant period and the terms and conditions specified in the Federal grant award agreement (including any applicable grant modification documents). Any remaining funds that have not been expended at the end of the approved grant period must be returned to the Department in accordance with the applicable closeout procedures for competitive grants (section 503(a)(5)(C)(vii) of the Act).

§ 645.235 What types of activities are subject to the administrative cost limit on Welfare-to-Work grants?

(a) *Administrative cost limitation (section 404(b)(1)).* (1) *Formula grants to States.* Expenditures for administrative purposes under WtW formula grants to

States are limited to fifteen percent (15%) of the grant award.

(2) *Competitive grants.* The limitation on expenditures for administrative purposes under WtW competitive grants will be specified in the grant agreement but in no case shall the limitation be more than fifteen percent (15%) of the grant award.

(b) The costs of administration are that allocable portion of necessary and allowable costs associated with the overall management and administration of the WtW program and which are not directly related to the provision of services to participants. These costs can be both personnel and non-personnel and both direct and indirect. Costs of administration shall include:

(1) Except as provided in paragraph (c)(1) of this section, costs of salaries, wages, and related costs of the recipient's, subrecipient's or PIC's staff engaged in:

(i) Overall program management, program coordination, and general administrative functions, including the salaries and related costs of the executive director, WtW director, project director, personnel officer, fiscal officer/bookkeeper, purchasing officer, secretary, payroll/insurance/property clerk and other costs associated with carrying out administrative functions;

(ii) Preparing program plans, budgets, schedules, and amendments thereto;

(iii) Monitoring of programs, projects, subrecipients, and related systems and processes;

(iv) Procurement activities, including the award of specific subgrants, contracts, and purchase orders;

(v) Providing State or local officials and the general public with information about the program (public relations);

(vi) Developing systems and procedures, including management information systems (except as provided in paragraph (c)(3) of this section), for assuring compliance with program requirements;

(vii) Preparing reports and other documents related to the program requirements;

(viii) Coordinating the resolution of audit findings;

(ix) Evaluating program results against stated objectives; and

(x) Performing administrative services, including such services as general legal services, accounting services, audit services; and managing purchasing, property, payroll, and personnel;

(2) Except as provided at paragraph (c)(3) of this section, costs for goods and services required for administration of the program, including such goods and services as rental or purchase of equipment, utilities, office supplies, postage, and rental and maintenance of office space;

(3) The costs of organization-wide management functions; and

(4) Travel costs incurred for official business in carrying out program management or administrative activities.

(5) These Interim Final WtW regulations adopt the description of the term ''Administrative Costs'' found in the JTPA regulations at 29 CFR 627.440 to minimize the burden on PICs. The Secretary reserves the right to change the definition to be consistent with the TANF definition when final TANF regulations are issued.

(c) *Other cost classification guidance.* (1) Personnel and related non-personnel costs of the recipient's or subrecipient's staff, including project directors, who perform both administrative and programmatic services or activities may be allocated to the benefitting cost objectives/categories based on documented distributions of actual time worked or other equitable cost allocation methods.

(2) Indirect or overhead costs normally shall be charged to administration, except that specific costs charged to an overhead or indirect cost pool that can be identified directly with a cost objective/category other than administration may be charged to the cost objective/category directly benefitted. Documentation of such charges shall be maintained.

(3) The costs of information technology—computer hardware and software—needed for tracking or monitoring under a WtW grant shall not be charged to the administration of the grant (section 404(b)(2) of the Act).

Only the costs of information technology that is ''year 2000 compliant''

shall be allowable under WtW grants. To meet this requirement, information technology must be able to accurately process date/time data (including, but not limited to, calculating, comparing and sequencing) from, into and between the twentieth and twenty-first centuries, and the years 1999 and 2000. The information technology must also be able to make leap year calculations. Furthermore, ''year 2000 compliant'' information technology when used in combination with other information technology shall accurately process date/time data if the other information technology properly exchanges date/time data with it.

§ 645.240 What are the reporting requirements for Welfare-to-Work programs?

(a) *General.* All States and other direct grant recipients shall report pursuant to instructions issued by DOL (financial data) and by DHHS (participant data only). Reports shall be submitted no more frequently than quarterly within a time period specified in the reporting instructions. In addition, DOL will establish supplemental reporting requirements for competitive grant recipients through the grant agreements pursuant to § 645.515 of this part.

(b) *Subrecipient reporting.* A State or other direct grant recipient may impose different forms or formats, shorter due dates, and more frequent reporting requirements on subrecipients. However, the recipient is required to meet the reporting requirements imposed by DOL and DHHS.

(c) *Financial reports.* Financial reports shall be submitted to DOL by each grant recipient. Reported expenditures and program income must be on the accrual basis of accounting and cumulative by fiscal year of appropriation. If the recipient's accounting records are not normally kept on the accrual basis of accounting, the recipient shall develop accrual information through an analysis of the documentation on hand.

(d) *Due date.* Financial reports will be due no later than 45 days after the end of each quarter. A final financial report is required 90 days after the expiration of a funding period or the termination of grant support.

(e) Optional SPIR Reporting. DOL may also provide instructions for an optional modified SPIR for internal program management (section 411(a) of the Act).

§ 645.245 Who is responsible for oversight and monitoring of Welfare-to-Work grants?

(a) The Secretary may monitor all recipients and subrecipients of all grants awarded and funds expended under WtW. Federal oversight will be conducted primarily at the State level for formula grants and at the recipient level for competitive grants.

(b) The Governor shall monitor PICs (or other approved administrative entities) funded under the State's formula allocated grants on a periodic basis for compliance with applicable laws and regulations. The Governor shall develop and make available for review a State monitoring plan.

§ 645.250 What procedures apply to the resolution of findings arising from audits, investigations, monitoring and oversight reviews?

(a) *Resolution of subrecipient level findings.* (1) The Governor is responsible for the resolution of findings that arise from the State's monitoring reviews, investigations and audits (including OMB Circular A–133 audits) of subrecipients.

(2) A State shall utilize the audit resolution, debt collection and appeal procedures that it uses for other Federal grant programs.

(3) If a State does not have such procedures, it shall prescribe standards and procedures to be used for this grant program.

(b) *Resolution of State level findings.* (1) The Secretary is responsible for the resolution of findings that arise from federal audits, monitoring reviews, investigations, incident reports, and recipient level OMB Circular A–133 audits.

(2) The Secretary will use the DOL audit resolution process, consistent with the Single Audit Act of 1996 and OMB Circular A–133.

(3) A final determination issued by a grant officer pursuant to this process may be appealed to the DOL Office of

Administrative Law Judges under the procedures at § 645.800.

(c) *Resolution of nondiscrimination findings.* Findings arising from investigations or reviews conducted under nondiscrimination laws shall be resolved in accordance with those laws and the applicable implementing regulations.

§ 645.255 What nondiscrimination protections apply to participants in Welfare-to-Work programs?

(a) All participants in WtW programs under this part shall have such rights as are available under all applicable Federal, State and local laws prohibiting discrimination including:

(1) The Age Discrimination Act of 1975 (42 U.S.C. 6101 *et seq.*);

(2) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794);

(3) The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*); and

(4) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*).

(b) Complaints alleging discrimination in violation of any applicable Federal, State or local law, including those listed in paragraph (a) of this section, shall be processed in accordance with those laws and the implementing regulations.

(c) Questions about or complaints alleging a violation of the nondiscrimination laws in paragraph (a) of this section may be directed or mailed to the Director, Civil Rights Center, U.S. Department of Labor, Room N4123, 200 Constitution Avenue, NW, Washington, DC 20210 for processing.

(d) Participants in job readiness and employment activities operated with WtW funds, as defined in § 645.220 of this part, shall not be discriminated against because of gender. Participants alleging gender discrimination may file a complaint using the State's grievance system procedures as described in § 645.270 of this part (section 403(a)(5)(J)(iii) of the Act).

§ 645.260 What health and safety provisions apply to participants in Welfare-to-Work programs?

(a) Participants in an employment activity operated with WtW funds, as defined in § 645.220 of this part, are subject to the same health and safety standards established under State and Federal law which are applicable to similarly employed employees, of the same employer, who are not participants in programs under WtW.

(b) Participants alleging a violation of these health and safety standards may file a complaint pursuant to the procedures contained in § 645.270 of this part (section 403(a)(5)(J)(ii) of the Act).

§ 645.265 What safeguards are there to ensure that participants in Welfare-to-Work employment activities do not displace other employees?

(a) An adult participating in an employment activity operated with WtW funds, as described in § 645.220 of this part, may fill an established position vacancy subject to the limitations in paragraph (c) of this section.

(b) An employment activity operated with WtW funds, as described in § 645.220 of this part, shall not violate existing contracts for services or collective bargaining agreements. Where such an employment activity would violate a collective bargaining agreement, the appropriate labor organization and employer shall provide written concurrence before the employment activity is undertaken.

(c) An adult participating in an employment activity operated with WtW funds, as described in § 645.220 of this part, shall not be employed or assigned:

(1) When any other individual is on layoff from the same or any substantially equivalent job within the same organizational unit;

(2) If the employer has terminated the employment of any regular, unsubsidized employee or otherwise caused an involuntary reduction in its workforce with the intention of filling the vacancy so created with the WtW participant; and,

(3) If the employer has caused an involuntary reduction to less than full time in hours of any employee in the same or substantially equivalent job within the same organizational unit.

(d) Regular employees and program participants alleging displacement may file a complaint pursuant to § 645.270 of this part (section 403(a)(5)(J)(i) of the Act).

§ 645.270 What procedures are there to ensure that currently employed workers may file grievances regarding displacement and that Welfare-to-Work participants in employment activities may file grievances regarding displacement, health and safety standards and gender discrimination?

(a) The State shall establish and maintain a grievance procedure for resolving complaints from:

(1) Regular employees that the placement of a participant in an employment activity operated with WtW funds, as described in §645.220 of this part, violates any of the prohibitions described in §645.265 of this part; and

(2) Program participants in an employment activity operated with WtW funds, as described in §645.220 of this part, that any employment activity violates any of the prohibitions described in §§645.255(d), 645.260, or 645.265 of this part.

(b) Such grievance procedure should include an opportunity for informal resolution.

(c) If no informal resolution can be reached within the specified time as established by the State as part of its grievance procedure, such procedure shall provide an opportunity for the dissatisfied party to receive a hearing upon request.

(d) The State shall specify the time period and format for the hearing portion of the grievance procedure, as well as the time period by which the complainant will be provided the written decision by the State.

(e) A decision by the State under paragraph (d) of this section may be appealed by any dissatisfied party within 30 days of the receipt of the State's written decision, according to the time period and format for the appeals portion of the grievance procedure as specified by the State.

(f) The State shall designate the State agency which will be responsible for hearing appeals. This agency shall be independent of the State or local agency which is administering, or supervising the administration of the State TANF and WtW programs.

(g) No later than 120 days of receipt of an individual's original grievance, the State agency, as designated in paragraph (f) of this section, shall provide a written final determination of the individual's appeal.

(h) The grievance procedure shall include remedies for violations of §§645.255(d), 645.260, and 645.265 of this part which may continue during the grievance process and which may include:

(1) Suspension or termination of payments from funds provided under this part;

(2) Prohibition of placement of a WtW participant with an employer that has violated §§645.255(d), 645.260, and 645.265 of this part;

(3) Where applicable, reinstatement of an employee, payment of lost wages and benefits, and reestablishment of other relevant terms, conditions, and privileges of employment; and

(4) Where appropriate, other equitable relief (section 403(a)(5)(J)(iv) of the Act).

Subpart C—Additional Formula Grant Administrative Standards and Procedures

§ 645.300 What constitutes an allowable match?

(a) A State is entitled to receive two (2) dollars of Federal funds for every one (1) dollar of State match expenditures, up to the amount available for allotment to the State based on the State's percentage for WtW formula grant for the fiscal year. The State is not required to provide a level of match necessary to support the total amount available to it based on the State's percentage for WtW formula grant. However, if the proposed match is less than the amount required to support the full level of federal funds, the grant amount will be reduced accordingly (section 403(a)(5)(A)(i)(I) of the Act).

(b) States shall follow the match or cost-sharing requirements of the ''Common Rule'' *Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments* (codified for DOL at 29 CFR 97.24). Paragraphs (b)(1) (i) and (ii), (b)(3), (b)(4) and (c)(1) of this section are in addition to the common rule requirements. Also, paragraphs included in the common rule which relate to the use of donated buildings and other real

property as match have been excluded from this provision.

(1) Only costs that would be allowable if paid for with WtW grant funds will be accepted as match.

(i) Because the use of Federal funds is prohibited for construction or purchase of facilities or buildings except where there is explicit statutory authority permitting it, costs incurred for the construction or purchase of facilities or buildings shall not be acceptable as match for a WtW grant.

(ii) Because the costs of construction or purchase of facilities or buildings are unallowable as match, the donation of a building or property as a third party in-kind contribution is also unallowable as a match for a WtW grant.

(2) A match or cost-sharing requirement may be satisfied by either or both of the following:

(i) Allowable costs incurred by the grantee, subgrantee or a cost type contractor under the assistance agreement. This includes allowable cost borne by non-Federal grants or by others and cash donations from non-Federal third parties.

(ii) The value of third party in-kind contributions applicable to the FY period to which the cost-sharing or matching requirement apply.

(3) No more than one-half (½) of the total match expenditures may be in the form of third party in-kind contributions.

(4) Match expenditures must be recorded in the books of account of the entity that incurred the cost or received the contribution. These amounts may be rolled up and reported as aggregate State level match.

(c) *Qualifications and exceptions.* (1) The matching requirements may not be met by the use of an employer's share of participant wage payments (e.g., employer share of OJT wages).

(2) *Costs borne by other Federal grant agreements.* A cost-sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(3) *General revenue sharing.* For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(4) *Cost or contributions counted towards other Federal cost-sharing requirements.* Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost-sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost-sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(5) *Costs financed by program income.* Costs financed by program income, as defined in 29 CFR 97.25, shall not count towards satisfying a cost-sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in § 97.25(g)).

(6) *Services or property financed by income earned by contractors.* Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost-sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(7) *Records.* Costs and third party in-kind contributions counting towards satisfying a cost-sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(8) *Special standards for third party in-kind contributions.* (i) Third party in-kind contributions count towards satisfying a cost-sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that,

if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect costs. Cost sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost-sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost-sharing or matching purposes will conform to the rules in the succeeding sections of this part. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(d) *Valuation of donated services.* (1) *Volunteer services.* Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) *Employees of other organizations.* When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (d)(1) of this section applies.

(e) *Valuation of third party donated supplies and loaned equipment or space.* (1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

§ 645.310 What assurance must a State provide that it will make the required matching expenditures?

In its State plan, a State must provide a written estimate of planned matching expenditures and describe the process by which the funds will be tracked and reported to ensure that the State meets its projected match (section 403(a)(5)(A)(i)(I) of the Act).

§ 645.315 What actions are to be taken if a State fails to make the required matching expenditures?

(a) The Department will implement an annual reconciliation and grant adjustment for WtW grants.

(1) The reconciliation will be based on reported match expenditures through the end of the FY report, which is due 45 days after the end of the fiscal year.

(2) If the end of FY report has not been received by December 1 of that year, then the reconciliation will be based on the most current report received.

(b) If match expenditures do not satisfy the requirement of the FY grant, the subsequent FY grant amount will be reduced by the appropriate corresponding amount (i.e., the grant will reduced by two (2) dollars for each one (1) dollar shortfall in State matching funds).

§ 645.320 When will formula funds be reallotted, and what reallotment procedures will the Secretary use?

(a) No reallotment of funds among States will occur during FY 98;

(b) For subsequent fiscal years, a reconciliation will be made during the first quarter of the fiscal year under §645.315 of this part to determine whether or not a State has satisfied its required level of matching funds for the prior year.

(c) If a State has failed to expend the required level of matching funds, the required reduction in the State grant

will be made during the second quarter of the fiscal year.

(d) Also, any funds which become available as a result of underexpenditures of required match, or failure to obligate 100 percent of the funds by either States or substate entities by the end of the fiscal year of the grant, will be reallotted among qualifying States (i.e., those which have committed a sufficient match to qualify for additional funds). The reallotment will occur during the second quarter of the following fiscal year (section 403(a)(5)(A)(i)(I) of the Act).

Subpart D—State Formula Grants Administration

§ 645.400 Under what conditions may the Governor request a waiver to designate an alternate local administering agency?

(a)(1) The Governor may include in the State's WtW Plan a waiver request to select an agency other than the PIC to administer the program for one or more SDAs in a State; or

(2) When the Governor determines the PIC, or alternative agency, has not coordinated its expenditures with the expenditure of funds provided to the State under TANF, pursuant to section 403(a)(5)(A)(vii)(II) of the Act, the Governor shall request a waiver.

(b) The Governor shall bear the burden of proving that the designated alternative agency, rather than the PIC or other administering agency, would improve the effectiveness or efficiency of the administration of WtW funds in the SDA. The Governor's waiver request shall include information to meet that burden. The Governor shall provide a copy of the waiver request and any supporting information submitted to the Secretary to the PIC and CEO of the SDA for which an alternative administering agency is requested.

(c) The PIC and CEO shall have fifteen (15) days in which to submit his or her written response to the Department. The PIC and CEO shall provide a copy of such response to the Governor.

(d) The Secretary will assess the waiver information submitted by the Governor, including input from the PIC and CEO in reaching the decision whether to permit the use of an alternate administrative agency.

(e) The Secretary shall approve a waiver request if she determines that the Governor has established that the designated alternative administering agency, rather than the PIC or other administering agency, will improve the effectiveness or efficiency of the administration of WtW funds provided for the benefit of the SDA.

(f) Where an alternate administering agency is approved by the Secretary, such administrative entity shall coordinate with the CEO for the applicable SDA(s) regarding the expenditure of WtW grant funds in the SDA(s).

(g) The decision of the Secretary to approve or deny a waiver request will be issued promptly and shall constitute final agency action.

§ 645.410 What elements will the State use in distributing funds within the State?

(a) Of the WtW funds allotted to the State, not less than 85 percent of the State allotment must be distributed to the SDAs in the State.

(1) The State shall prescribe a formula for determining the amount of funds to be distributed to each SDA in the State using no factors other than the three factors described in paragraphs (a)(2) and (3) of this section;

(2) The formula prescribed by the Governor must include as one of the formula factors for distributing funds the provision at section 403(a)(5)(A)(vi)(I)(aa) of the Act. The Governor is to distribute funds to an SDA based on the number by which the population of the area with an income that is less than the poverty line exceeds 7.5 percent of the total population of the area, compared to all such numbers in all such areas in the State. The Governor must assign a weight of not less than 50 percent to this factor;

(3) The Governor shall distribute the remaining funds, if any, to the SDAs utilizing only one or both of the following factors:

(i) The SDA's share of the number of adults receiving assistance under TANF or the predecessor program in the SDA for 30 months or more (whether consecutive or not), relative to the

number of such adults residing in the State;

(ii) The SDA's share of the number of unemployed individuals residing in the SDA, relative to the number of such individuals residing in the State.

(4) If the amount to be distributed to a service delivery area by the Governor's formula is less than $100,000, the funds shall be available to be used by the Governor to fund projects described at paragraph (b) of this section.

(5) States shall use the guidance provided at section 403(a)(5)(D) of the Act in determining the number of individuals with an income that is less than the poverty line.

(6) PICs (or alternate administering agency) shall determine, pursuant to section 403(a)(5)(A)(vii)(I) of the Act, on which individual(s) and on which allowable activities to expend its WtW fund allocation.

(7) The State shall distribute the SDAs' allocations in a timely manner, but not later than 30 days from receipt of the State's fund allotment.

(b) Of the funds allocated to the State, up to 15 percent of the funds may be retained at the State level to fund projects that appear likely to help long-term recipients of assistance enter unsubsidized employment. Any additional funds available as a result of the process described at paragraph (a)(4)of this section, shall also be available to be used to fund projects to help long-term recipients of assistance enter unsubsidized jobs.

(c) The Governors may distribute the funds retained pursuant to paragraph (b) of this section to a variety of workforce organizations, in addition to PICs, and other entities such as One-Stop systems, private sector employers, labor organizations, business and trade associations, education agencies, housing agencies, community development corporations, transportation agencies, community-based and faith-based organizations, disability community organizations, community action agencies, and colleges and universities which provide some of the assistance needed by the targeted population.

§ 645.415 What planning information must a State submit in order to receive a formula grant?

(a) Each State seeking financial assistance under the formula grant portion of the WtW legislation must submit an annual plan meeting the requirements prescribed by the Secretary. This plan shall be in the form of an addendum to the TANF State plan and shall be submitted to the Secretaries of Labor and Health and Human Services.

(b) The Secretary shall review the State plan for compliance with the statutory and regulatory provisions of the WtW program. The Secretary's decision whether to accept a State plan as in compliance with the Act shall constitute final agency action.

(c) If the Governor has requested a waiver to permit the selection of an alternative administering agency in the State plan, the provisions of § 645.400 of this part shall apply (section 403(a)(5)(A)(ii) of the Act).

§ 645.420 What factors will be used in measuring State performance?

(a) State performance will be measured by a formula issued by the Secretary after consultation with DHHS, the National Governors Association (NGA) and the American Public Welfare Association (APWA).

(b) The formula shall be the basis for measuring the success of States in placing individuals in private sector employment or any kind of employment, the duration of such placements, any increase in earnings of such individuals and other additional factors that the Secretary of Labor deems to be appropriate. The formula will provide for adjustments due to general economic conditions on a State-by-State basis.

(c) The formula shall serve as the basis for the award of FY 2000 bonus grants based on successful performance (section 403(a)(5)(E) of the Act).

§ 645.425 What are the roles and responsibilities of the State(s) and PIC(s)?

(a) *State roles and responsibilities.* A State:

(1) Designates State WtW administering agency;

(2) Provides overall administration of WtW funds, consistent with the WtW statute, WtW regulations and the State's WtW Plan;

(3) Develops the State WtW Plan in consultation and coordination with appropriate entities in substate areas, such as One-Stop systems, private sector employers, labor organizations, business and trade associations, education agencies, housing agencies, community development corporations, transportation agencies, community-based and faith-based organizations, disability community organizations, community action agencies, and colleges and universities which provide some of the assistance needed by the targeted population (section 403(a)(5)(A)(ii)(I)(cc) of the Act);

(4) Distributes funds to SDAs, consistent with the provisions described at § 645.410(a) (section 403(a)(5)(A)(ii)(I)(bb));

(5) Conducts oversight and monitoring of WtW activities and fund expenditures at the State and local levels for compliance with applicable laws and regulations, consistent with the provisions at § 645.245 and provides technical assistance as appropriate;

(6) Ensures coordination of PIC fund expenditures with the State TANF expenditures and other programs (section 403(a)(5)(A)(ii)(I)(dd));

(7) Determines whether to request waivers to select an alternate administering agency consistent with the provisions described at § 645.400 of this part (sections 403(a)(5)(A)(ii)(I)(ee) and 403(a)(5)(A)(vii)(III));

(8) Manages and distributes State level WtW funds (15 percent), consistent with the provisions at §§ 645.410(b) and (c) (section 403(a)(5)(A)(vi)(III));

(9) Ensures that the 15 percent administration limitation and the match requirement are met;

(10) Ensures that worker protections provisions are observed and establishes an appropriate grievance process, consistent with §§ 645.255 through 645.270 of this part (section 403(a)(5)(J));

(11) Provides comments on Competitive Grant Application(s) from eligible entities within the State, consistent with § 645.510 of this part (section 403(a)(5)(B)(ii));

(12) Cooperates with the Department of Health and Human Services on the evaluation of WtW programs (section 403(a)(5)(A)(ii)(III));

(13) Provides technical assistance to PICs or alternate administering agencies; and

(14) Establishes internal reporting requirements to ensure Federal reports are accurate, complete and are submitted on a timely basis, consistent with § 645.240 of this part.

(b) *Private Industry Council (or alternate administering agency) roles and responsibilities.* A PIC:

(1) Has sole authority, in coordination with CEOs, to expend formula funds (section 403(a)(5)(A)(vii)(I) of the Act);

(2) Has authority to determine the individuals to be served in the SDA (section 403(a)(5)(A)(vii)(I));

(3) Has authority to determine the services to be provided in the SDA (section 403(a)(5)(A)(vii)(I));

(4) Ensures funds are expended on eligible recipients and on allowable activities, consistent with § 645.410(a)(5) of this part;

(5) Coordinates WtW fund expenditures with State TANF expenditures and other programs (section 403(a)(5)(A)(ii)(dd));

(6) Ensures that there is an assessment and an individual service strategy in place for each WtW participant, consistent with §§ 645.225(a) and (b) of this part;

(7) Conducts oversight and monitoring of subrecipients, consistent with the provisions at § 645.245 of this part;

(8) Ensures worker protection provisions and grievance process are observed, consistent with State guidelines (section 403(a)(5)(J)); and

(9) Consults with and provides comments on private entity Competitive Grant Application(s), consistent with the provisions at § 645.500(b)(1)(i) of this part.

Subpart E—Welfare-To-Work Competitive Grants

§ 645.500 Who are eligible applicants for competitive grants?

(a) Eligible applicants for competitive grants are:

(1) PICs;

(2) Political subdivisions of a State; and

(3) Private entities including nonprofit organizations such as community development corporations, community-based and faith-based organizations, disability community organizations, community action agencies, and public and private colleges and universities, and other qualified private organizations.

(b) Entities other than a PIC or a political subdivision of the State must submit an application for competitive grant funds in conjunction with the applicable PIC or political subdivision.

(1) The term ''in conjunction with'' shall mean that the application submitted by such an entity must include a signed certification by both the applicant and either the applicable PIC or political subdivision that:

(i) The applicant has consulted with the applicable PIC/political subdivision during the development of the application; and

(ii) The activities proposed in the application are consistent with, and will be coordinated with, WtW efforts of the PIC/political subdivision.

(2) If the applicant is unable to include such a certification in its application, the applicant will be required to certify, and provide information indicating that efforts were undertaken to consult with the PIC/political subdivision and that the PIC/political subdivision was provided a sufficient opportunity to cooperate in the development of the project plan and to review and comment on the application prior to its submission to the Secretary. ''Sufficient opportunity for PIC/political subdivision review and comment'' shall mean at least 30 calendar days.

(3) The certification described in paragraph (b)(1) of this section, or the evidence of efforts to consult described in paragraph (b)(2), must be with each PIC or political subdivision included in the geographic area in which the project proposed in the application is to operate (section 403(a)(5)(B)(ii) of the Act).

§ 645.510 What is the required consultation with the Governor?

(a) All applicants for competitive grants, including PICs and political subdivisions, must consult with the Governor by submitting their application to the Governor or the designated State administrative entity for the WtW program for review and comment prior to submission of the application to the Secretary. The application submitted to the Secretary must include:

(1) Comments on the application from the State; or

(2) Information indicating that the State was provided a sufficient opportunity for review and comment prior to submission to the Secretary. ''Sufficient opportunity for State review and comment'' shall mean at least 15 calendar days.

(b) For private entity applicants, the submission of the application for State review and comment must follow the 30 day period provided for PIC/political subdivision review. Evidence of PIC/political subdivision review should be included in the submission to the State (section 403(a)(5)(B)(ii) of the Act).

§ 645.515 What are the program and administrative requirements that apply to both the formula grants and competitive grants?

(a) All of the general program requirements and administrative standards set by 29 CFR part 645 subpart B apply (section 403(a)(5)(C) and section 404(b) of the Act).

(b) In addition, competitive grants will be subject to:

(1) Supplemental reporting requirements; and

(2) Additional monitoring and oversight requirements based on the negotiated scope-of-work of individual grant awards (section 403(a)(5)(B)(iii) and (v)).

§ 645.520 What are the application procedures and timeframes for competitive grant funds?

(a) The Secretary shall establish appropriate application procedures, selection criteria and an approval process to ensure that grant awards accomplish

the purpose of the competitive grant funds and that available funds are used in an effective manner.

(b) The Secretary shall publish such procedures in the FEDERAL REGISTER and establish submission timeframes in a manner that allows eligible applicants sufficient time to develop and submit quality project plans (section 403(a)(5)(B)(i) and (iii) of the Act).

§ 645.525 What special consideration will be given to rural areas and cities with large concentrations of poverty?

(a) Competitive grant awards will be targeted to geographic areas of significant need. In developing application procedures, special consideration will be given to rural areas and cities with large concentrations of residents living in poverty.

(b) Grant application guidelines will clarify specific requirements for documenting need in the local area (section 403(a)(5)(B)(iv) of the Act).

Subpart F—Administrative Appeal Process

§ 645.800 What administrative remedies are available under this part?

(a) Within 21 days of receipt of a final determination that has directly imposed a sanction or corrective action pursuant to §645.250(b) of this part, a recipient, subrecipient, or a vendor directly against which the Grant Officer has imposed a sanction or corrective action, may request a hearing before the Department of Labor Office of Administrative Law Judges, pursuant to the provisions of 29 CFR part 96 subpart 96.6.

(b) In accordance with 29 CFR 96.603(b)(2), the rules of practice and procedure published at 29 CFR part 18 shall govern the conduct of hearings under this section, except that a request for hearing under this section shall not be considered a complaint to which the filing of an answer by DOL or a DOL agency is required. Technical rules of evidence shall not apply to a hearing conducted pursuant to this part; however, rules or principles designed to assure production of the most credible evidence available and to subject testimony to cross-examination shall apply.

(c) The decision of the Administrative Law Judge (ALJ) shall constitute final agency action unless, within 20 days of the decision, a party dissatisfied with the decision of the ALJ has filed a petition for review with the Administrative Review Board (ARB) (established pursuant to the provisions of Secretary's Order No. 2–96, published at 61 FR 19977 (May 3, 1996)), specifically identifying the procedure, fact, law or policy to which exception is taken. Any exception not specifically urged shall be deemed to have been waived. A copy of the petition for review must be sent to the opposing party at that time. Thereafter, the decision of the ALJ shall constitute final agency action unless the ARB, within 30 days of the filing of the petition for review, has notified the parties that the case has been accepted for review. Any case accepted by the ARB shall be decided within 120 days of such acceptance. If not so decided, the decision of the ALJ shall constitute final agency action.

PART 646—PROVISIONS GOVERNING THE INDIAN AND NATIVE AMERICAN WELFARE-TO-WORK GRANT PROGRAM

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AUTHORITY: 42 U.S.C. 612(a)(3)(B)(iii), unless otherwise noted.

SOURCE: 63 FR 15988, Apr. 1, 1998, unless otherwise noted.

Subpart A—Introduction to Indian and Native American Welfare to Work Programs

§ 646.100 What is the purpose of the Indian and Native American Welfare-to-Work (INA WtW) Program?

The INA WtW Program, authorized by title V, section 5001(c) of the Balanced Budget Act of 1997, is a program to complement the Indian provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA—commonly called the ''Welfare Reform Act'') [Pub. L. 104–193, 42 U.S.C. 601 *et seq.*] by providing additional funds to eligible federally-recognized Indian tribes to facilitate the transition of public assistance recipients from welfare dependency to self-sufficiency by helping recipients to obtain lasting unsubsidized employment. The INA WtW Program is authorized by title V, section 5001(c) of the Balanced Budget Act of 1997 (Pub. L. 105–33), which amended title IV-A of the Social Security Act by adding section 412(a)(3) [42 U.S.C. 612(a)(3)].

§ 646.105 What are the purposes of these regulations?

These regulations are designed to provide INA WtW program operators with the basic rules and guidelines needed to operate a Welfare-to-Work program which helps Native American public assistance recipients secure unsubsidized employment. Where applicable, these regulations also establish definitions and parameters not defined in the amended Social Security Act. These regulations cross-reference title V of the Balanced Budget Act of 1997, title IV of the amended Social Security Act (42 U.S.C. 601 *et seq.*), and appropriate sections of the ''Welfare Reform Act''.

§ 646.110 What are the administrative requirements for the INA WtW Program?

Tribes and tribal consortia who are participating in the INA WtW Program shall follow the common rule, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, which is codified in DOL regulations at 29 CFR part 97. Alaska Native regional nonprofit corporations shall follow OMB Circular A–110, as codified by the Department at 29 CFR part 95. General principles of cost allowability may be found in OMB Circulars A–87 (for tribes) and A–122 (for nonprofits). The audit requirements of OMB Circular A–133 [issued in the FEDERAL REGISTER on June 30, 1997] shall apply to both tribes and nonprofits.

§ 646.115 What are the definitions which apply uniquely to the INA WtW program?

The definition of ''substantial services'' is only applicable to Indian and Native American Welfare-to-Work programs (see § 646.215 of this part).

Subpart B—Eligibility to Receive INA WtW Grants

§ 646.200 What entities are eligible to receive INA WtW grants?

The three categories of Federally-recognized Indian tribes or Alaska Native regional nonprofit corporations eligible to receive INA WtW funds, as described at section 412(a)(3)(B) of the amended Social Security Act, are those which: Operate a tribal TANF program; operate a NEW program; or operate an employment program funded through other sources under which substantial services are provided to recipients of assistance under a program funded under Part A of title IV of the Social Security Act. The term ''substantial services'' is defined at § 646.215 of this part.

§ 646.205 What entities are eligible to receive INA WtW grants in Alaska?

The twelve Alaska Native regional nonprofit corporations, along with the Metlakatla Indian Community of the Annette Islands Reserve, are the only entities in Alaska eligible to apply for INA WtW grants. These nonprofit corporations are listed in section 419(4)(B) of the amended Social Security Act [42 U.S.C. 619(4)(B)].

§ 646.210 Can a consortium composed of tribes which do not operate TANF or NEW programs still receive an INA WtW grant?

Yes, although the consortium must collectively meet the ''substantial

services'' criteria outlined at §646.215 below. Refer to subpart C of this part for more information on consortium requirements.

§ 646.215 How does a tribe document that it is currently providing "substantial services" to public assistance recipients?

Tribes which currently operate employment programs funded through other sources, such as those under the Job Training Partnership Act (JTPA) or Employment Assistance (EA) under the Bureau of Indian Affairs (BIA), must provide verifiable documentation that: At least twenty percent (20%) of those served in such an employment program were public assistance recipients during the most recent program or fiscal year; *and* employment services have been provided to a minimum of fifty (50) public assistance recipients over the last two program or fiscal years.

§ 646.220 What criteria apply to TANF/NEW tribes regarding the provision of "substantial services"?

None. Tribes which operate TANF or NEW programs do not need to meet the criteria for providing ''substantial services'' to public assistance recipients.

§ 646.225 If a tribe is awarded an INA WtW grant, is the tribe required to participate in an evaluation of the program?

Yes. The Act specifies that each INA WtW grantee ''must agree to negotiate in good faith with the Secretary of Health and Human Services with respect to the substance and funding of any evaluation * * * and to cooperate with the conduct of any such evaluation.'' [42 U.S.C. 612(a)(3)(B)(iv)]

Subpart C—Application for INA WtW Grants

§ 646.300 How does my tribe apply for an INA WtW grant?

Each eligible tribe must submit an INA WtW plan to the Department of Labor in accordance with the planning instructions issued by the Department of Labor. For those tribes with an approved tribal family assistance plan (TANF plan), the application for an INA WtW grant must take the form of an addendum to that TANF plan. Tribes already participating in the demonstration project under Public Law 102–477 [25 U.S.C. 3401 *et seq.*], The Indian Employment, Training and Related Services Demonstration Act of 1992, should reference §646.900 of this part. Planning information is also available on the INA WtW web site at www.wdsc.org/dinap.

§ 646.305 Can a consortium of Federally-recognized tribes apply for an INA WtW grant on behalf of consortium member tribes approved to operate a TANF or NEW program?

Yes. Consortium member tribes which operate approved TANF or NEW programs are by law eligible to apply for an INA WtW grant. Their consortium may apply for the INA WtW grant on their behalf, under the following circumstances: if an established consortium exists for one purpose, such as operating a JTPA grant, this established consortium may apply for an INA WtW grant on behalf of those member tribes authorized to receive NEW funding.

§ 646.310 Some of our consortium members operate their own TANF/NEW programs, and some do not. Can we still apply for an INA WtW grant as a consortium?

Yes. For those consortium member tribes which DO NOT operate TANF or NEW programs, they must collectively meet the ''substantial services'' criteria.

§ 646.315 If our consortium members not operating TANF or NEW programs meet the "substantial services" criteria, do we then have to submit two separate INA WtW plans?

Yes. Because of the different funding formulas involved for FY 1998, such a ''mixed consortium'' (composed of tribes which operate TANF/NEW programs and those which do not) shall submit two plans for providing WtW services across the consortium, one plan for the TANF/NEW tribes and the other for those tribes eligible under the ''substantial services'' criteria. However, once both plans have been funded,

the consortium may administer one program across the consortium.

§ 646.320 If we choose to operate a single INA WtW program for our "mixed consortium" for FY 1998, must we submit a single plan to the Department for FY 1999?

Yes. All FY 1998 INA WtW grantees must submit AFDC/TANF counts to the Department so that a single funding formula may be utilized for FY 1999.

§ 646.325 What unique documentation is required of a tribal consortium?

Consortium tribes must submit a legally-binding consortium agreement signed by all the tribes in the consortium with the grant application.

§ 646.330 If our tribe did not receive an INA WtW grant for FY 1998, can we still receive funding for FY 1999?

Yes, provided the tribe or consortium is eligible under the criteria cited at § 646.200 of this part. Tribes or consortia having to meet the ''substantial services'' criteria may use verifiable data from any employment program operated by the tribe, as was the case for FY 1998. Refer to section 646.215 for these criteria. Tribes or consortia are encouraged to submit State-negotiated AFDC/TANF counts for their area prior to applying for FY 1999 INA WtW funds.

Subpart D—Participant Eligibility, Limits, and Allowable Activities

§ 646.400 What TANF recipients are eligible for services under INA WtW grants?

Individual TANF clients must meet the conditions outlined at section 403(a)(5)(C), clauses (ii), or (iii), or (iv) of the amended Social Security Act. For INA WtW purposes, an individual determined to have low skills in reading or mathematics must be proficient at the 8.9 grade level or below. An individual determined to have a poor work history must have worked no more than three (3) consecutive months in the past twelve (12) calendar months.

§ 646.405 What activities are allowable under the Welfare-to-Work program?

All allowable activities are described at section 403(a)(5)(C)(i) of the Social Security Act. INA WtW funds shall be used to ''move individuals into and keep individuals in lasting unsubsidized employment by means of any of the following:''

(a) The conduct and administration of community service or work experience programs;

(b) Job creation through public or private sector employment wage subsidies;

(c) On-the-job training;

(d) Contracts with public or private providers of readiness, placement, and post-employment services;

(e) Job vouchers for placement, readiness, and post-employment services; and

(f) Job retention or support services if such services are not otherwise available.

§ 646.410 Are there any special rules governing the use of job vouchers?

In addition to the requirements at 29 CFR 97.36(i) and 29 CFR 95.48, contracts or vouchers for job placement services supported by INA WtW funds must include a provision to require that at least one-half (½) of the payment occur after an eligible individual placed into the workforce has been in the workforce for six (6) months. This provision applies only to placement in unsubsidized jobs.

§ 646.415 What kind of "job readiness" services are allowable under the INA WtW Program?

Job readiness services include activities necessary to prepare an individual for employment. Such activities include, but are not limited to: Intake; eligibility determination; testing; assessment; orientation to the world of work; job search skills; job search assistance; job clubs; and employment counseling.

§ 646.420 What assistance can be provided under the "supportive services" category?

The provision of supportive services must be directly related to retaining

employment, and not otherwise available to the client. Supportive services include, but are not limited to: Day care; transportation; work or protective clothing or equipment; tools; medical devices such as eyeglasses or braces; food; shelter; special services or equipment for the disabled; and financial counseling. Supportive services may be provided in-kind or through cash assistance. In cases where severe substance abuse or chemical dependency is a significant barrier to employment, substance abuse treatment may be undertaken as a ''supportive services'' activity, to the extent that such services do not constitute medical services.

§ 646.425 Are any education or training activities allowable under the INA WtW grant?

Although the Act does not authorize the use of grant funds for independent or stand-alone training activities, the Department recognizes that basic education and skills development as part of an employment experience will be needed by some recipients in order to achieve the ultimate objective of INA WtW assistance, which is self-sufficiency. Therefore, basic education and vocational skills training where needed, based on an assessment of the recipient's needs, may be provided as a post-employment service where the recipient is employed in either a subsidized or unsubsidized job.

§ 646.430 Are there any time limits on client participation under the INA WtW program?

There are no specific participant time limitations for the INA WtW program. However, grantees should keep in mind the purpose of WtW, which is to provide transitional assistance to hard-to-employ welfare recipients to help them secure lasting, unsubsidized employment.

Subpart E—Tribal Service Areas and Populations

§ 646.500 We're a TANF/NEW tribe. What is my tribe's service area and/or population under an INA WtW grant?

NEW tribes will have the same service area and service population as they have under the NEW program. TANF tribes may elect to serve only their own tribal members in their service area, in accordance with their TANF funding.

§ 646.505 My tribe (or consortium) must qualify for an INA WtW grant under the "substantial services" criteria. How will our service area be determined?

Tribes qualifying for the INA WtW program under the ''substantial services'' criteria (i.e., not operating their own TANF or NEW programs) may use the service area(s) established for the tribe under the JTPA or BIA Employment Assistance programs. INA WtW grantees funded under the ''substantial services'' criteria shall ensure that all AFDC/TANF recipients within the service area for which the grantee was designated are afforded an equitable opportunity for INA WtW services, because their funding is predicated on 1990 Census data for all Native Americans residing in their service area, regardless of tribal affiliation. While there is no individual entitlement to INA WtW services, all eligible AFDC/TANF recipients shall be afforded equal consideration in the decision to provide INA WtW services. Service areas differing from those outlined above may be negotiated with the Department of Labor.

§ 646.510 Are there any special service area provisions made for Indians residing in Oklahoma?

Yes. With the exception of the Osage reservation in Oklahoma, service areas will be determined by reference to the ''tribal jurisdiction statistical areas''

(TJSAs). TJSAs are defined by the Bureau of the Census as being areas, delineated by Federally-recognized tribes in Oklahoma without a reservation, for which the Census Bureau tabulates data. TJSAs represent areas generally containing the American Indian population over which one or more tribal governments have jurisdiction. Service areas for Oklahoma Indian residents differing from those outlined under the TJSAs may also be negotiated with the Department of Labor.

Subpart F—Funding and Spending Requirements

§ 646.600 How will the INA WtW grant funding allotments be determined?

Funds will be allotted to INA WtW grantees on a formula basis. To determine the FY 1998 allotments, poverty data from the 1990 Decennial Census will be used to determine the ''split'' between TANF/NEW tribes and all other tribes. The percentage of the annual appropriation reserved for TANF and NEW tribes will then be allocated using 1995 AFDC counts previously published by DHHS. For FY 1999, a single funding formula will be employed utilizing AFDC/TANF counts.

§ 646.605 What spending limitations are imposed on the INA WtW program?

No less than seventy percent (70%) of INA WtW funds must be spent directly on assistance for the benefit of TANF recipients who meet the eligibility requirements of section 403(a)(5)(C)(ii) of the Social Security Act. Up to thirty percent (30%) of INA WtW funds can be spent to provide assistance to individuals who meet the eligibility requirements of section 403(a)(5)(C)(iii) of the Social Security Act. No more than twenty percent (20%) of INA WtW grant funds may be spent for administration. Refer to § 646.400 for the definitions of ''low skills in reading or mathematics'' and ''poor work history''.

§ 646.610 What definition of "administration" is applicable to the INA WtW program?

Administrative costs consist of all direct and indirect costs associated with the management of the grantee's program. These costs include but are not limited to: the salaries and fringe benefits of personnel engaged in executive, fiscal, data collection, personnel, legal, audit, procurement, data processing, communications, maintenance, and similar functions; and related materials, supplies, equipment, office space costs, and staff training. Also included are salaries and fringe benefits of direct program administrative positions such as supervisors, program analysts, labor market analysts, and project directors. Additionally, all costs of clerical personnel, materials, supplies, equipment, space, utilities, and travel which are identifiable with these program administration positions are charged to administration.

§ 646.615 How long does the tribe have to spend INA WtW funds?

INA WtW grantees must expend all allotted funds within three years after the effective date of each fiscal year grant agreement signed by the Grant Officer, pursuant to section 403(a)(5)(C)(vii) of the Social Security Act. Unexpended funds must be returned to the Department in accordance with the closeout provisions at 29 CFR parts 97 or 95, as applicable.

§ 646.620 Are there any other restrictions on the use of INA WtW funds?

Yes. INA WtW funds may not be used for any other fund matching requirements under this Act or other Federal law, pursuant to section 403(a)(5)(C)(vi) of the Social Security Act.

Subpart G—Recordkeeping and Reporting Requirements

§ 646.700 What are the recordkeeping requirements for the INA WtW program?

Tribes must meet the recordkeeping and retention requirements of the Department's regulations at 29 CFR 97.42. Alaska Native regional nonprofit corporations must follow the requirements of 29 CFR 95.53. Tribes receiving INA WtW grants may follow the recordkeeping requirements of section 411 of the Social Security Act, as applicable.

§ 646.705 What are the reporting requirements for the INA WtW program?

Grantees are required to submit both quarterly and annual reports covering program activity and financial expenditures. Two forms have been approved by OMB for INA WtW reporting. A modified version of the Standard Form (SF) 269A (ETA 9069–1) shall be used to report financial expenditures. A Participation and Characteristics Report (PCR) (ETA 9069) shall be used to report program activity and participant characteristics.

§ 646.710 Are tribes operating a TANF program required to report INA WtW activities under TANF as well?

Yes. Pursuant to the requirements of section 411 of the Social Security Act, INA WtW grantees who are TANF tribes shall report INA WtW activities under the TANF program, in addition to submitting the INA WtW reports cited above. However, tribes operating a NEW program and an INA WtW program, but not their own TANF program, are exempt from the reporting requirements described in section 411 of the Social Security Act.

Subpart H—Waivers and Performance Standards

§ 646.800 Are statutory waivers allowable under the INA WtW program?

Yes. The Secretary of Labor may waive or modify any provision of section 403(a)(5)(C) [except for clause (vii) thereof, related to the deadline for expenditure of funds] of the Social Security Act, which are otherwise applicable to INA WtW grantees. Accordingly, the Secretary may waive the statutory requirements relating to client eligibility for services, allowable activities, and spending limits. Any waiver(s) requested must demonstrate how the waiver, if granted, will increase the efficiency or effectiveness of the program. Waivers may be requested at any time, and shall be effective as of the date indicated in the approval letter. Grantees must specify and support each provision to be waived.

§ 646.805 What are the performance measures tribes have to meet under the INA WtW program?

The Secretary has determined that the most important measures of the tribe's performance are the number of participants entering unsubsidized employment, the duration of that employment, and the increase in their earnings. Grant applicants will be required to submit planned outcome figures with their INA WtW plans. These planned outcomes will be compared against reported outcomes in the tribe's annual report. In addition, INA WtW grantees must negotiate in good faith with the Secretary of DHHS with respect to the substance and funding of any evaluation under section 413(j) of the Social Security Act, and must cooperate with the conduct of any such evaluation.

Subpart I—Miscellaneous Provisions and Requirements

§ 646.900 May a tribe combine its INA WtW grant with other employment and training programs under Pub. L. 102–477, the Indian Employment, Training and Related Services Demonstration Act of 1992?

Yes. All grants awarded under the INA WtW program are formula-funded, so any INA WtW grant funds awarded to a tribe can therefore be included in a consolidated plan authorized by Public Law 102–477. For those tribes already participating in the ''477'' demonstration effort, application for an INA WtW grant will take the form of a ''477 plan'' modification submitted to the lead agency responsible for the ''477'' program.

§ 646.905 What are the other Federal laws which must be followed by INA WtW grantees?

All otherwise applicable Federal statutes, including those dealing with equal employment opportunity, workplace safety, employment standards, treatment of individuals with disabilities, age discrimination, and civil rights, must be followed by all INA WtW fund recipients.

§ 646.910 What are a tribe's appeal rights under the INA WtW program?

The administrative procedures in proceedings initiated by grantees funded under section 401 of the Job Training Partnership Act, as codified at 20 CFR part 636, shall apply to appeals of agency action by INA WtW grantees. These appeal procedures include the following provisions:

(a) Within twenty-one (21) days of the receipt of a denial of a request for a statutory waiver under § 646.800 of this part, or within twenty-one (21) days of receipt of a final determination imposing a sanction or corrective action issued pursuant to 20 CFR 636.8, an INA WtW grantee whose request for a statutory waiver has been denied, or who seeks review of a Grant Officer's Final Determination, may request a hearing before the Department's Office of Administrative Law Judges pursuant to 20 CFR 636.10.

(b) The decision of an Administrative Law Judge (ALJ) shall be final unless, within twenty (20) days of the decision, a party dissatisfied with that ALJ decision has filed a petition for review with the Administrative Review Board (ARB), established pursuant to the provisions of Secretary's Order No. 2–96, published at 61 FR 19977 (May 3, 1996). This petition shall specifically identify the procedure, fact, law, and/or policy to which exception is taken. Those provisions of the determination not specified for review, or the entire determination when no hearing has been requested, shall be considered resolved and not subject to further review. A copy of the petition for review must be sent to the opposing party at that time. Thereafter, the decision of the ALJ shall constitute final agency action unless the ARB, within thirty (30) days of the filing of the petition for review, notifies the parties that the case has been accepted for review. Any case accepted by the ARB shall be decided within 120 days of such acceptance. If no decision is reached in that time, then the decision of the ALJ shall constitute final Departmental action.

§ 646.915 What administrative requirements must be met when the INA WtW program ends?

In accordance with the Department's regulations at 29 CFR 97.50 for tribes and 29 CFR 95.71 for nonprofits, all expiring grants will be closed out. This means that all funds drawn down under the INA WtW grant must be accounted for as allowable expenditures or returned to the Department. The Department will issue appropriate closeout forms and instructions to all INA WtW grantees after the program ends.

PART 650—STANDARD FOR APPEALS PROMPTNESS—UNEMPLOYMENT COMPENSATION

Sec.

650.1 Nature and purpose of the standard.
650.2 Federal law requirements.
650.3 Secretary's interpretation of Federal law requirements.
650.4 Review of State law and criteria for review of State compliance.
650.5 Annual appeals performance plan.

AUTHORITY: Sec. 1102 of the Social Security Act, 42 U.S.C. 1302; Secretary's Order No. 4–75, dated April 16, 1975. Interpret and apply secs. 303(a)(1), 303(a)(3), and 303(b)(2) of the Social Security Act (42 U.S.C. 503(a)(1), 503(a)(3), 503(b)(2)).

SOURCE: 37 FR 16173, Aug. 11, 1972, unless otherwise noted.

§ 650.1 Nature and purpose of the standard.

(a) This standard is responsive to the overriding concern of the U.S. Supreme Court in California Department of Human Resources v. Java, 402 U.S. 121 (1971), and that of other courts with delay in payment of unemployment compensation to eligible individuals, including delays caused specifically by the adjudication process. The standard seeks to assure that all administrative appeals affecting benefit rights are heard and decided with the greatest promptness that is administratively feasible.

(b) Sections 303(a) (1) and (3) of the Social Security Act require, as a condition for the receipt of granted funds, that State laws include provisions for methods of administration reasonably

calculated to insure full payment of unemployment compensation when due, and opportunity for a fair hearing for all individuals whose claims for unemployment compensation are denied. The Secretary has construed these provisions to require, as a condition for receipt of granted funds, that State laws include provisions for hearing and deciding appeals for all unemployment insurance claimants who are parties to an administrative benefit appeal with the greatest promptness that is administratively feasible. What is the greatest promptness that is administratively feasible in an individual case depends on the facts and circumstances of that case. For example, the greatest promptness that is administratively feasible will be longer in cases that involve interstate appeals, complex issues of fact or law, reasonable requests by parties for continuances or rescheduling of hearings or other unforeseen and uncontrollable factors than it will be for other cases.

(c) In addition, the Secretary has construed section 303(b)(2) of the Social Security Act as requiring States to comply substantially with the required provisions of State law. The Secretary considers as substantial compliance the issuance of minimum percentages of first level benefit appeal decisions within the periods of time specified in § 650.4.

(d) Although the interpretation of Federal law requirements in § 650.3 below applies to both first and second level administrative benefit appeals, the criteria for review of State compliance in § 650.3(b) apply only to first level benefit appeals.

§ 650.2 Federal law requirements.

(a) Section 303(a)(1) of the Social Security Act requires that a State law include provision for:

> Such methods of administration * * * as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due.

(b) Section 303(a)(3) of the Social Security Act requires that a State law include provision for:

> Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied.

(c) Section 303(b)(2) of the Social Security Act provides that:

> Whenever the Secretary of Labor, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law, finds that in the administration of the law there is—
>
> (1) * * *
>
> (2) A failure to comply substantially with any provision specified in subsection (a) [303(a)]; the Secretary of Labor shall notify such State agency that further payments will not be made to the State until he is satisfied that there is no longer any such denial or failure to comply. Until the Secretary of Labor is so satisfied, he shall make no further certification to the Secretary of the Treasury with respect to such State * * *

§ 650.3 Secretary's interpretation of Federal law requirements.

(a) The Secretary interprets sections 303(a)(1) and 303(a)(3) above to require that a State law include provision for—

(1) Hearing and decision for claimants who are parties to an appeal from a benefit determination to an administrative tribunal with the greatest promptness that is administratively feasible, and

(2) Such methods of administration of the appeals process as will reasonably assure hearing and decision with the greatest promptness that is administratively feasible.

(b) The Secretary interprets section 303(b)(2) above to require a State to comply substantially with provisions specified in paragraph (a) of this section.

§ 650.4 Review of State law and criteria for review of State compliance.

(a) A State law will satisfy the requirements of § 650.3(a) if after calendar year 1973 it contains a provision requiring, or is construed to require, hearing and decision for claimants who are parties to an administrative appeal affecting benefit rights with the greatest promptness that is administratively feasible.

(b) A State will be deemed to comply substantially with the State law requirements set forth in § 650.3(a) with respect to first level appeals, if for the calendar year 1975 and ensuing years, the State has issued at least 60 percent

of all first level benefit appeal decisions within 30 days of the date of appeal, and at least 80 percent of all first level benefit appeal decisions within 45 days. These computations will be derived from the State's regular reports required pursuant to the Employment Security Manual, part III, sections 4400–4450.[1]

(c) To afford the States a reasonable opportunity to make the changes necessary to meet these criteria, the Secretary will not evaluate substantial compliance until calendar year 1974 and for that year he will apply less stringent criteria than for future years. A State law will be deemed to comply substantially with the State law promptness requirement for calendar year 1974 if the State has issued at least 50 percent of all first level benefit appeal decisions within 30 days of the date of appeal; at least 75 percent of its first level benefit appeal decisions within 45 days; and at least 90 percent of its first level benefit appeal decisions within 75 days. These computations also will be derived from the aforementioned reports required pursuant to the Employment Security Manual.

[37 FR 16173, Aug. 11, 1972, as amended at 41 FR 6757, Feb. 13, 1976]

§ 650.5 Annual appeals performance plan.

No later than December 15, 1974, and the 15th of December of each ensuing year, each State shall submit an appeals performance plan showing how it will operate during the following calendar year so as to achieve or maintain the issuance of at least 60 percent of all first level benefit appeals decisions within 30 days of the date of appeal, and 80 percent within 45 days.

(Approved by the Office of Management and Budget under control number 1205–0132)

(Pub. L. No. 96–511)

[41 FR 6757, Feb. 13, 1976, as amended at 49 FR 18295, Apr. 30, 1984]

[1] The Employment Security Manual is available at each regional office of the Department of Labor and at the headquarters' office of each State employment security agency.

PART 651—GENERAL PROVISIONS GOVERNING THE FEDERAL–STATE EMPLOYMENT SERVICE SYSTEM

§ 651.10 Definitions of terms used in parts 651–658.

Administrator, United States Employment Service (Administrator) means the chief official of the United States Employment Service (USES) or the Administrator's designee.

Affirmative action means positive, result-oriented action imposed on or assumed by an employer pursuant to legislation, court order, consent decree, directive of a fair employment practice authority, government contract, grant or loan, or voluntary affirmative action plan adopted pursuant to the Affirmative Action Guidelines of the Equal Employment Opportunity Commission to provide equal employment opportunities for members of a specified group which for reasons of past custom, historical practice, or other nonoccupationally valid purposes has been discouraged from entering certain occupational fields.

Agricultural worker means a worker, whose primary work experience has been in farmwork in industries with a Standard Industrial Classification (SIC) of 01–07, except 027, 074, 0752, and 078, whether alien or citizen, who is legally allowed to work in the United States.

Applicant means a person who files an application for services with a local office of a State agency, with outstationed staff or with an outreach worker.

Application card means the basic local office record for an applicant.

A *Bona Fide Occupational Qualification (BFOQ)* means that an employment decision or request based on age, sex, national origin or religion is based on a finding that such characteristic is necessary to the individual's ability to perform the job in question. Since a BFOQ is an exception to the general prohibition against discrimination on the basis of age, sex, national origin or religion, it must be interpreted narrowly in accordance with the Equal Employment Opportunity Commission regulations set forth at 29 CFR parts 1604, 1605 and 1627.

Clearance means activities in the placement process involving joint action of local offices in different labor market areas and/or States in the location, selection and the job referral of an applicant.

Complaint means a representation made or referred to a State or local JS office of a violation of the JS regulations and/or other federal, State or local employment related law.

Complainant means the individual, employer, organization, association, or other entity filing a complaint.

Day-haul means the assembly of workers at a pick-up point waiting to be employed, transportation of them to farm employment, and the return of the workers to the pick-up point on the same day. For the purposes of this definition ''day-haul'' shall exclude transportation and return of workers employed under regularly scheduled job orders such as corn detasseling jobs for youth.

Decertification means the rescission by the Secretary of the year end certification made under Section 7 of the Wagner-Peyser Act to the Secretary of the Treasury that the State agency may receive funds authorized by the Wagner-Peyser Act.

Dictionary of Occupational Titles (DOT) means the Dictionary of Occupational Titles, the reference work published by the USES which contains brief, non-technical definitions of U.S. job titles, distinguishing number codes, and worker trait data.

DOL means the Department of Labor.

D.O.T. means the Dictionary of Occupational Titles, the reference work published by the USES which contains brief, non-technical definitions of U.S. job titles, distinguishing number codes, and worker trait data.

Employment and Training Administration (ETA) means the component of the Department of Labor containing the United States Employment Service (USES).

Employer means a person, firm, corporation or other association or organization (1) which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a worker at a place within the United States and (2) which has an employer relationship with respect to employees under this subpart as indicated by the fact that it hires, pays, fires, supervises and otherwise controls the work of such employee. An association of employers shall be considered an employer if it has all of the indicia of an employer set forth in this definition. Such an association, however, shall be considered as a joint employer with the employer member if either shares in exercising one or more of the definitional indicia.

Establishment means a public or private economic employing unit generally at a single physical location which produces and/or sells goods or services, for example, a mine, factory, store, farm orchard or ranch. It is usually engaged in one, or predominantly one, type of commerical or governmental activity. Each branch or subsidiary unit of a large employer in a geographical area or community should be considered an individual establishment, except that all such units in the same physical location shall be considered a single establishment. A component of an establishment which may not be located in the same physical structure (such as the warehouse of a department store) should also be considered as part of the parent establishment. For the purpose of the ''seasonal farmworker'' definition, farm labor contractors and crew leaders are not considered establishments; it is the organizations to which they supply the workers that are the establishments.

Farmwork means work performed for wages in agricultural production or agricultural services in establishments included in industries 01—Agricultural Production-Crops; 02—Agricultural Production-Livestock excluding 027—Animal Specialties; 07—Agricultural Services excluding 074—Veterinary Services, 0752—Animal Speciality Services, and 078—Landscape and Horticultural Services, as defined in the most recent edition of the Standard Industrial Classification (SIC) Code definitions.

Farmworker, see *Agricultural worker.*

Full application means an application for an applicant who has participated in an application interview and which

includes the applicant's personal characteristics, work history and an occupational classification and DOT code.

Hearing Officer means a Department of Labor Administrative Law Judge, designated to preside at DOL administrative hearings.

Identification card (applicant identification card) means a card given to the applicant on which are recorded identifying information and the dates of the applicant's visits to the local employment office.

Intrastate job order means a job order describing one or more hard-to-fill job openings, which a local office uses to request recruitment assistance from other local offices within the State.

JS regulations means the Federal regulations at 20 CFR parts 601–604, 620, 621, and 651–658, and at 29 CFR parts 8, 26, and 75.

Job bank means a computer assisted system which provides listings of current job openings in the area, on a regular basis, for distribution to JS and WIN offices and to cooperating agencies.

Job development means the process of securing a job interview with a public or private employer for a specific applicant for whom the local office has no suitable opening on file.

Job information means information derived from data compiled in the normal course of employment service activities from reports, job orders, applications and the like.

Job opening means a single job opportunity for which the local office has on file a request to select and refer on applicant or applicants.

Job Information Service (JIS) means a unit or an area within a JS local office where applicants primarily, on a self-service basis or with minimum professional help, can obtain specific and general information on where and how to get a job.

Job referral means (1) the act of bringing to the attention of an employer an applicant or group of applicants who are available for specific job openings and (2) the record of such referral. ''Job referral'' means the same as ''referral to a job.''

Job Service (JS) means the nationwide system of public employment offices, funded through the United States Employment Service (USES) as grantee State agencies, and the various offices of the State agencies.

Labor market area means a geographic area consisting of a central city (or cities) and the surrounding territory within a reasonable commuting distance.

Labor Market Information (LMI) means that body of knowledge pertaining to the socio-economic forces influencing the employment process in specific labor market areas. These forces, which affect labor demand-supply relationships and define the content of the LMI program, include population and growth charcteristics, trends in industrial and occupational structure, technological developments, shifts in consumer demands, unionization, trade disputes, retirement practices, wage levels, conditions of employment, training opportunities, job vacancies, and job search information.

Local office manager means the JS official in charge of all JS activities in a local office of a State agency.

LMI means labor market information.

Migrant farmworker is a seasonal farmworker who had to travel to do the farmwork so that he/she was unable to return to his/her permanent residence within the same day. Full-time students traveling in organized groups rather than with their families are excluded.

Migrant food processing worker means a person who during the preceding 12 months has worked at least an aggregate of 25 or more days or parts of days in which some work was performed in food processing (as classified in the 1972 Standard Industrial Classification (SIC) definitions 201, 2033, 2035, and 2037 for food processing establishments), earned at least half of his/her earned income from processing work and was not employed in food processing year round by the same employer, provided that the food processing required travel such that the worker was unable to return to his/her permanent residence in the same day. Migrant food processing workers who are full-time students but who travel in organized groups rather than with their families are excluded.

MSFW means a migrant farmworker, a migrant food processing worker, or a seasonal farmworker.

Partial application means the application of an applicant who has not participated in an application interview and which does not include an occupational classification of DOT code. Partial applications prepared for Migrants and Seasonal Farmworkers must include a signed waiver for full services at that time in accordance with 20 CFR 653.103.

Placement means the hiring by a public or private employer of an individual referred by the employment office for a job or an interview, provided that the employment office completed all of the following steps:

(a) Prepared a job order form prior to referral, except in the case of a job development contact on behalf of a specific applicant;

(b) Made prior arrangements with the employer for the referral of an individual or individuals;

(c) Referred an individual who had not been specifically designated by the employer, except for referrals on agricultural job orders for a specific crew leader or worker;

(d) Verified from a reliable source, preferably the employer, that the individual had entered on a job; and

(e) Appropriately recorded the placement.

Program Budget Plan (PBP) means the annual planning document for the SESA required by Sec. 8 of the Wagner-Peyser Act containing the SESA's detailed planning, programming and budget for carrying out employment security activities. For the purpose of JS regulations, this definition shall be restricted to the employment service portion of the PBP.

Public housing means housing operated by or on behalf of any public agency.

RA; see *Regional Administrator.*

Regional Administrator, Employment and Training Administration (RA) means the chief DOL Employment and Training Administration (ETA) official in each DOL regional office.

Respondent means the employer or State agency (including a State agency official) who is alleged to have committed the violation described in a complaint.

Rural area means an area which is not included in the urban area of a Standard Metropolitan Statistical Area and which has a population of less than 10,000.

Seasonal farmworker means a person who during the preceding 12 months worked at least an aggregate of 25 or more days or parts of days in which some work was performed in farmwork, earned at least half of his/her earned income from farmwork, and was not employed in farmwork year round by the same employer. For the purposes of this definition only, a farm labor contractor is not considered an employer. Non-migrant individuals who are full-time students are excluded.

Secretary means the Secretary of the U.S. Department of Labor or the Secretary's designee.

SESA; see *State Employment Service Agency.*

Significant MSFW States shall be those States designated annually by ETA and shall include the twenty (20) States with the highest number of MSFW applicants.

Significant MSFW local offices shall be those designated annually by ETA and include those local offices where MSFWs account for 10% or more of annual applicants and those local offices which the Administrator determines should be included due to special circumstances such as an estimated large number of MSFWs in the local office service area. In no event shall the number of significant MSFW local offices be less than 100 offices on a nationwide basis.

Significant bilingual MSFW local offices shall be those designated annually by ETA and include those significant MSFW offices where 10% or more of MSFW applicants are estimated to require service provisions in Spanish unless the Administrator determines other local offices also should be included due to special circumstances.

Solicitor means the chief legal officer of the U.S. Department of Labor or the Solicitor's designee.

Standard Metropolitan Statistical Area (SMSA) means a metropolitan area designated by the Bureau of Census which contains (1) at least one city of 50,000

inhabitants or more, or (2) twin cities with a combined population of at least 50,000.

State shall include the fifty States, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands.

State Administrator means the chief official of the State Employment Security Agency (SESA).

State agency means the State job service agency designated under section 4 of the Wagner-Peyser Act to cooperate with the USES in the operation of the job service system.

State Employment Security Agency (SESA) means the State agency which, under the State Administrator, contains both the State Employment service agency (State agency) and the State unemployment compensation agency.

State hearing official means a State official designated to preside at State administrative hearings convened to resolve JS-related complaints pursuant to subpart E of part 658 of this chapter.

Supportive services means services other than employment or training that are needed to enable individuals to obtain or retain employment, or to participate in employment and training programs.

Tests means a standardized method of measuring an individual's possession of, interest in, or ability to acquire, job skills and knowledge. Use of tests by employment service staff must be in accordance with the provisions of:

(1) 41 CFR part 60–3, *Uniform Guidelines on Employee Selection Procedures;*

(2) 29 CFR part 1627, *Records To Be Made or Kept Relating to Age; Notices To Be Posted; Administrative Exemptions;* and

(3) The Department of Labor's regulations on Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance, which have been published as 29 CFR part 32 at 45 FR 66706 (Oct. 7, 1980).

Training means a planned, systematic sequence of instruction or other learning experience on an individual or group basis under competent supervision, which is designed to impart skills, knowledge, or abilities to prepare individuals for employment.

Transaction means a single ES activity performed on behalf of an individual seeking assistance and/or the result of such an activity, e.g., applicant registration referral to a job, referral to a supportive service, counseling interview, testing, job development, job placement, enrollment in training, and inactivation of an applicant registration.

United States Employment Service (USES) means the component of the Employment and Training Administration of DOL which was established under the Wagner-Peyser Act of 1933 to promote and develop a national system of public job service offices.

Vocational Plan means a plan developed jointly by a counselor or counselor trainee and the applicant which describes: (1) The applicant's short-range and long-range occupational goals and (2) the actions to be taken to place the plan into effect.

Work Incentive Program (WIN) means the employment and training program under part C of title IV of the Social Security Act, administered by a State agency (such as the State employment service) or another public or nonprofit private agency.

(Wagner-Peyser Act of 1933, as amended, 29 U.S.C. 49 et seq.; 5 U.S.C. 301; and 38 U.S.C. chapters 41 and 42)

[45 FR 39457, June 10, 1980. Redesignated and amended at 7767 and 7768, Jan. 23, 1981]

PART 652—ESTABLISHMENT AND FUNCTIONING OF STATE EMPLOYMENT SERVICES

Subpart A—Employment Service Planning and Operations

Sec.

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652.3 Basic labor exchange system.
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652.216 May the One-Stop operator provide guidance to a merit-staffed employee under the Act?

AUTHORITY: 29 U.S.C. 49k; 38 U.S.C. chapters 41 and 42.

Subpart A—Employment Service Planning and Operations

SOURCE: 48 FR 50665, Nov. 2, 1983, unless otherwise noted.

§ 652.1 Introduction and definitions.

(a) These regulations implement the provisions of the Wagner-Peyser Act, known hereafter as the Act, as amended by the Workforce Investment Act of 1998 (WIA). Congress intended that the States exercise broad authority in implementing provisions of the Act.

(b) Except as otherwise provided the definitions contained in section 2 of the Act apply to these regulations.

Act means the Wagner-Peyser Act (29 U.S.C. 49 et seq.).

Department means the United States Department of Labor (DOL), including its agencies and organizational units.

Governor means the chief executive of any State.

JTPA means the Job Training Partnership Act of 1982 (29 U.S.C. 1501 *et seq.).*

State means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam.

State Agency means the State governmental unit designated under section 4 of the Act to cooperate with the Secretary in the operation of the public employment service system.

State Job Training Coordinating Council (SJTCC) means the entity within a State appointed by the Governor under section 122 of the Job Training Partnership Act which reviews and certifies the employment service plan.

State Workforce Investment Board (State Board) means the entity within a State appointed by the Governor under section 111 of the Workforce Investment Act.

WIA means the Workforce Investment Act of 1998 (29 U.S.C. 2801 *et seq.*).

[48 FR 50665, Nov. 2, 1983, as amended at 64 FR 18761, Apr. 15, 1999]

§ 652.2 Scope and purpose of the employment service system.

The basic purpose of the employment service system is to improve the functioning of the nation's labor markets by bringing together individuals who are seeking employment and employers who are seeking workers.

§ 652.3 Basic labor exchange system.

At a minimum, each State shall administer a labor exchange system which has the capacity:

(a) To assist jobseekers in finding employment;

(b) To assist employers in filling jobs;

(c) To facilitate the match between jobseekers and employers;

(d) To participate in a system for clearing labor between the States, including the use of standardized classification systems issued by the Secretary, under section 15 of the Act; and.

(e) To meet the work test requirements of the State unemployment compensation system.

[48 FR 50665, Nov. 2, 1983, as amended at 64 FR 18762, Apr. 15, 1999]

§ 652.4 Allotment of funds and grant agreement.

(a) *Allotments.* The Secretary shall provide planning estimates in accordance with section 6(b)(5) of the Act. Within 30 days of receipt of planning estimates from the Secretary, the State shall make public the substate resource distributions, and describe the process and schedule under which these resources will be issued, planned and committed. This notification shall include a description of the procedures by which the public may review and comment on the substate distributions, including a process by which the State will resolve any complaints.

(b) *Grant Agreement.* To establish a continuing relationship under the Act, the Governor and the Secretary shall sign a Governor/Secretary Agreement, including a statement assuring that the State shall comply with the Act and all applicable rules and regulations. Consistent with this Agreement and section 6 of the Act, State allotments will be obligated through a Notification of Obligation.

(Approved by the Office of Management and Budget under control number 1205–0209)

§ 652.5 Services authorized.

The sums allotted to each State pursuant to section 6 of the Act shall be expended consistent with an approved plan under 20 CFR 660.100–660.104 and §§ 652.222–214 of this part. At a minimum, each State shall provide the basic labor exchange elements at § 652.3 of this part.

[64 FR 18762, Apr. 15, 1999]

§ 652.6 [Reserved]

§ 652.7 [Reserved]

§ 652.8 Administrative provisions.

(a) *Administrative Requirements.* The Employment Security Manual shall not be applicable to funds appropriated under the Wagner-Peyser Act. Except as provided for in paragraph (f) of this section, administrative requirements and cost principles applicable to grants under this part 652 are as specified in 41 CFR part 29–70 and 41 CFR part 1–15.7.

(b) *Management systems, reporting and recordkeeping.* (1) The State shall ensure that financial systems provide fiscal control and accounting procedures sufficient to permit preparation of required reports, and the tracing of funds to a level of expenditure adequate to establish that funds have not been expended in violation of the restrictions on the use of such funds (section 10(a)).

(2) The financial management system and the program information system shall provide federally required records and reports that are uniform in definition, accessible to authorized Federal and State staff, and verifiable for monitoring, reporting, audit and evaluation purposes (section 10(c)).

(c) *Reports Required.* (1) Each State shall make reports pursuant to instructions issued by the Secretary and in such format as the Secretary shall prescribe.

(2) The Secretary is authorized to monitor and investigate pursuant to section 10 of the Act.

(d) *Special Administrative and Cost Provisions.* (1) Neither the Department nor the State is a guarantor of the accuracy or truthfulness of information obtained from employers or applicants in the process of operating a labor exchange activity.

(2) Prior approval authority, as described in various sections of 41 CFR part 29–70 and 41 CFR 1–15.7, is delegated to the State except that the Secretary reserves the right to require transfer of title on nonexpendable Automated Data Processing Equipment (ADPE), in accordance with provisions contained in 41 CFR 29–70.215. The Secretary reserves the right to exercise prior approval authority in other

areas, after providing advance notice to the State.

(3) Application for financial assistance and modification requirements shall be as specified under this part.

(4) Cost of promotional and informational activities consistent with the provisions of the Act, describing services offered by employment security agencies, job openings, labor market information, and similar items are allowable.

(5) Each State shall retain basic documents for the minimum period specified below:

(i) Work Application: One year.

(ii) Job Order: One Year.

(6) Costs of employer contributions and expenses incurred for State agency fringe benefit plans that do not meet the requirements in 41 CFR 1–15.711–13 and 711–10 are allowable, provided that:

(i) For retirement plans, on behalf of individuals employed before the effective date of this part, the plan is authorized by State law and previously approved by the Secretary; the plan is insured by a private insurance carrier which is licensed to operate this type of plan; and any dividends or similar credits due to participation in the plan are credited against the next premium falling due under the contract;

(ii) For retirement plans on behalf of individuals employed after the effective date of this part, and for fringe benefit plans other than retirement, the Secretary grants a time extension to cover an interim period if State legislative action is required for such employees to be covered by plans which meet the requirements of 41 CFR 1–15.711–13 and 711–10. During this interim period, State agency employees may be enrolled in plans open to State agency employees only. No such extension may continue beyond the 60th day following the completion of the next full session of the State legislature which begins after the effective date of this part;

(iii) For fringe benefit plans other than retirement, the Secretary grants a time extension which may continue until such time as they are comparable in cost to those fringe benefit plans available to other similarly employed employees of the State on the condition that there are no benefit improvements. The Secretary may grant this time extension if the State agency can demonstrate that the extension is necessary to prevent loss of benefits to current States agency employees, retireees and/or their fringe benefit plan beneficiaries, or that it is necessary to avoid unreasonable expenditures on behalf of the employee or employer to maintain such fringe benefits for current employees and retirees. At such time as the cost of these fringe benefit plans becomes equitable with those available to other similarly employed State employees, the time extension will cease and the requirements of 41 CFR 1–15.711–13 and 1–15.711–10 will apply;

(iv) Requests for time extensions under this section will include an opinion of the State Attorney General, that either legislative action is required to accomplish compliance with 41 CFR 1–15.711–13 and 1–15.711–10 or, for (d)(6)(iii) of this section that such compliance would result in either loss of current benefits to State agency employees and retirees or unreasonable expenditures to maintain these benefits. Such requests will be filed with the Secretary no later than 30 days after the effective date of this part; and

(v) Time extensions granted relative to (d)(6)(iii) of this section require a signed statement by the State agency Administrator, that no improvements have been made to fringe benefits under the extension and that the plan(s) is (are) not consistent with those available to other similarly employed State employees, for each year of the extension. Documentation supporting the affidavit shall be maintained for audit purposes.

(7) Payments from the State's Wagner-Peyser allotment made into a State's account in the Unemployment Trust Fund for the purpose of reducing charges against Reed Act funds (section 903(c) of the Social Security Act, as amended (42 U.S.C. 1103(c)) are allowable costs, provided that:

(i) The charges against Reed Act funds were for amounts appropriated, obligated, and expended for the acquisition of automatic data processing installations or for the acquisition or major renovation of State owned office building; and

(ii) With respect to each acquisition of improvement of property pursuant to paragraph (d)(7)(i) of this section, the payments are accounted for in the State's records as credits against equivalent amounts of Reed Act Funds used for administrative expenditures.

(e) *Disclosure of Information.* (1) The State shall assure the proper disclosure of information pursuant to section 3(b) of the Act.

(2) The information specified in section 3(b) and other sections of the Act, shall also be provided to officers or any employee of the Federal Government of a State government lawfully charged with administration of unemployment compensation laws, employment service activities under the Act or other related legislation, but only for purposes reasonably necessary for the proper administration of such laws.

(f) *Audits,* (1) At least once every 2 years, the State shall prepare or have prepared an independent financial and compliance audit covering each full program year not covered in the previous audit, except that funds expended pursuant to section 7(b) of the Act shall be audited annually.

(2) The Comptroller General and the Inspector General of the Department shall have the authority to conduct audits, evaluations or investigations necessary to meet their responsibilities under sections 9(b)(1) and 9(b)(2), respectively, of the Act.

(3) The audit, conducted pursuant to paragraph (f)(1) or (f)(2) of this section, shall be submitted to the Secretary who shall make an initial determination. Such determinations shall be based on the requirements of the Act, regulations, and State plan.

(i) The initial determination shall identify the audit findings, state the Secretary's proposed determination of the allowability of questioned costs and activities, and provide for informal resolution of those matters in controversy contained in the initial determination.

(ii) The Secretary shall not impose sanctions and corrective actions without first providing the State with an opportunity to present documentation or arguments to resolve informally those matters in controversy contained in the Secretary's initial determination. The informal resolution period shall be at least 60 days from issuance of the initial determination and no more that 170 days from the receipt by the Secretary of the final approved audit report. If the matters are resolved informally, the Secretary shall issue a final determination pursuant to paragraph (f)(3)(iii) of this section which notifies the parties in writing of the nature of the resolution and may close the file.

(iii) If the matter is not resolved informally, the Secretary shall provide each party with a final written determination by certified mail, return receipt requested. In the case of audits, the final determination shall be issued not later than 180 days after the receipt by the Secretary of the final approved audit report. The final determination shall:

(A) Indicate that efforts to resolve informally matters contained in the initial determination have been unsuccessful;

(B) List those matters upon which the parties continue to disagree;

(C) List any modifications to the factual findings and conclusions set forth in the initial determination;

(D) Establish a debt if appropriate;

(E) Determine liability, method of restitution of funds and sanctions;

(F) Offer an opportunity for a hearing in accordance with 20 CFR 658.707 through 658.711 in the case of a final determination imposing a sanction or corrective action; and

(G) Constitute final agency action unless a hearing is requested.

(g) *Sanctions for Violation of the Act.* (1) The Secretary may impose appropriate sanctions and corrective actions for violation of the Act, regulations, or State plan, including the following:

(i) Requiring repayment, for debts owed the Government under the grant, from non-Federal funds;

(ii) Offsetting debts arising from the misexpenditure of grant funds, against amounts to which the State is or may be entitled under the Act, provided that debts arising from gross negligence or willful misuse of funds shall not be offset against future grants. When the Secretary reduces amounts allotted to the State by the amount of

the misexpenditure, the debt shall be fully satisfied;

(iii) Determining the amount of Federal cash maintained by the State or a subrecipient in excess of reasonable grant needs, establishing a debt for the amount of such excessive cash, and charging interest on that debt;

(iv) Imposing other appropriate sanctions or corrective actions, except where specifically prohibited by the Act or regulations.

(2) To impose a sanction or corrective action, the Secretary shall utilize the initial and final determination procedures outlined in (f)(3) of this section.

(h) *Other violations.* Violations or alleged violations of the Act, regulations, or grant terms and conditions except those pertaining to audits or discrimination shall be determined and handled in accordance with 20 CFR part 658, subpart H.

(i) *Fraud and abuse.* Any persons having knowledge of fraud, criminal activity or other abuse shall report such information directly and immediately to the Secretary. Similarly, all complaints involving such matters should also be reported to the Secretary directly and immediately.

(j) *Nondiscrimination and Affirmative Action Requirements.* States shall:

(1) Assure that no individual be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration of or in connection with any services or activities authorized under the Act because of age, race, sex, color, religion, national origin, handicap, political affiliation or belief. All complaints alleging discrimination shall be filed and processed according to the procedures in the applicable DOL nondiscrimination regulations.

(2) Assure that discriminatory job orders will not be accepted, except where the stated requirement is a bona fide occupational qualification (BFOQ). See, generally, 42 U.S.C. 2000(e)–2(e), 29 CFR parts 1604, 1606, 1625.

(3) Assure that employers' valid affirmative action requests will be accepted and a significant number of qualified applicants from the target group(s) will be included to enable the employer to meet its affirmative action obligations.

(4) Assure that employment testing programs will comply with 41 CFR part 60–3 and 29 CFR parts 1627 and 32.

(5) Nondiscrimination and equal opportunity requirements and procedures, including complaint processing and compliance reviews, will be governed by the applicable DOL nondiscrimination regulations.

[48 FR 50665, Nov. 2, 1983, as amended at 64 FR 18762, Apr. 15, 1999]

§ 652.9 Labor disputes.

(a) State agencies shall make no job referral on job orders which will aid directly or indirectly in the filling of a job opening which is vacant because the former occupant is on strike, or is being locked out in the course of a labor dispute, or the filling of which is otherwise an issue in a labor dispute involving a work stoppage.

(b) Written notification shall be provided to all applicants referred to jobs not at issue in the labor dispute that a labor dispute exists in the employing establishment and that the job to which the applicant is being referred is not at issue in the dispute.

(c) When a job order is received from an employer reportedly involved in a labor dispute involving a work stoppage, State agencies shall:

(1) Verify the existence of the labor dispute and determine its significance with respect to each vacancy involved in the job order; and

(2) Notify all potentially affected staff concerning the labor dispute.

(d) State agencies shall resume full referral services when they have been notified of, and verified with the employer and workers' representative(s), that the labor dispute has been terminated.

(e) State agencies shall notify the regional office in writing of the existence of labor disputes which:

(1) Result in a work stoppage at an establishment involving a significant number of workers; or

(2) Involve multi-establishment employers with other establishments outside the reporting State.

Subpart B—Services for Veterans

§ 652.100 Services for veterans.

Services for veterans are administered by the Office of the Assistant Secretary for Veterans' Employment and Training (OASVET). OASVET's general regulations are located in chapter IX of this title.

[54 FR 39354, Sept. 26, 1989]

Subpart C—Wagner-Peyser Act in a One-Stop Delivery System Environment

SOURCE: 64 FR 18762, Apr. 15, 1999, unless otherwise noted.

§ 652.200 What is the purpose of this subpart?

(a) This subpart provides guidance to States to implement the services provided under the Act, as amended by WIA, in a One-Stop delivery system environment.

(b) Except as otherwise provided, the definitions contained in this part 652 and section 2 of the Act apply to this subpart.

§ 652.201 What is the role of the State Agency in the One-Stop delivery system?

(a) The role of the State Agency in the One-Stop delivery system is to ensure the delivery of services authorized under section 7(a) of the Act. The State Agency is a required One-Stop partner in each local One-Stop delivery system and is subject to the provisions relating to such partners that are described at 20 CFR part 662.

(b) Consistent with those provisions, the State agency must:

(1) Participate in the One-Stop delivery system in accordance with section 7(e) of the Act;

(2) Be represented on the Workforce Investment Boards that oversee the local and State One-Stop delivery system and be a party to the Memorandum of Understanding described at 20 CFR 662.300 addressing operational issues of the One-Stop delivery system; and

(3) Provide these services as part of the One-Stop delivery system.

§ 652.202 May local Employment Service Offices exist outside the One-Stop delivery system?

(a) No.

(b) However, local Employment Service Offices may operate as affiliated sites, or through electronically or technologically linked access points as part of the One-Stop delivery system, provided the following conditions are met:

(1) All labor exchange services are delivered as a part of the local One-Stop delivery system in accordance with section 7(e) of the Act;

(2) The services described in paragraph (b)(1) of this section are available in at least one physical center from which job seekers and employers can access them; and

(3) The Memorandum of Understanding between the State Agency local One-Stop partner and the Local Workforce Investment Board meets the requirements of § 662.300.

§ 652.203 Who is responsible for funds authorized under the Act in the workforce investment system?

The State Agency retains responsibility for all funds authorized under the Act, including those funds authorized under section 7(a) required for providing the services and activities delivered as part of the One-Stop delivery system.

§ 652.204 Must funds authorized under section 7(b) of the Act (the Governor's reserve) flow through the One-Stop delivery system?

No. These funds are reserved for use by the Governor for the three categories of activities specified in section 7(b) of the Act. However, these funds may flow through the One-Stop delivery system.

§ 652.205 May funds authorized under the Act be used to supplement funding for labor exchange programs authorized under separate legislation?

(a) Section 7(c) of the Act enables States to use funds authorized under section 7(a) or 7(b) of the Act to supplement funding of any workforce activity carried out under WIA.

(b) Funds authorized under the Act may be used under section 7(c) to provide additional funding to other activities authorized under WIA if:

(1) The activity meets the requirements of the Act, and its own requirements;

(2) The activity serves the same individuals as are served under the Act;

(3) The activity provides services that are coordinated with services under the Act; and

(4) The funds supplement, rather than supplant, funds provided from non-Federal sources.

§ 652.206 May a State use funds authorized under the Act to provide "core services" and "intensive services" as defined in WIA?

Yes. Funds authorized under section 7(a) of the Act must be used to provide core services as defined at 20 CFR 663.150 and may be used to provide intensive services as defined at 20 CFR 663.200. Funds authorized under section 7(b) of the Act may be used to provide core or intensive services. Core and intensive services must be provided consistent with the requirements of the Act.

§ 652.207 How does a State meet the requirement for universal access to services provided under the Act?

(a) A State has discretion in how it meets the requirement for universal access to services provided under the Act. In exercising this discretion, a State must meet the Act's requirements.

(b) These requirements are:

(1) Labor exchange services must be available to all employers and job seekers, including unemployment insurance (UI) claimants, veterans, migrant and seasonal farm workers, and individuals with disabilities;

(2) The State must have the capacity to deliver labor exchange services to employers and job seekers, as described in the Act, on a Statewide basis through:

(i) Self-service,

(ii) Facilitated self-help service; and

(iii) Staff-assisted service;

(3) In each Workforce Investment Area, in at least one physical center, staff funded under the Act must provide core and applicable intensive services including staff-assisted labor exchange services.

(4) Those labor exchange services provided under the Act in a Workforce Investment Area must be described in the Memorandum of Understanding.

§ 652.208 How are core services and intensive services related to the methods of service delivery described in § 652.207(b)(2)?

Core services and intensive services may be delivered through any of the three methods of service delivery described in § 652.207(b)(2). These methods are:

(a) Self-service;

(b) Facilitated self-help services; and

(c) Staff-assisted service.

§ 652.209 What are the requirements under the Act for providing reemployment services to referred UI claimants?

In accordance with section 3(c)(3) of the Act, a State must provide reemployment services to UI claimants for whom such services are required as a condition for receipt of UI benefits. The State Agency, through the One-Stop delivery system, must provide reemployment services to UI claimants. Services must be appropriate to the needs of the UI claimants who are referred to reemployment services under any Federal or State UI law and must be provided to the extent that funds are available.

§ 652.210 What are the Act's requirements for administration of the work test and assistance to UI claimants?

(a) State UI law or rules establish the requirements under which UI claimants must register and search for work in order to fulfill the UI work test requirements.

(b) Staff funded under the Act must assure that:

(1) UI claimants receive the full range of labor exchange services available under the Act that are necessary and appropriate to facilitate their earliest return to work;

(2) UI claimants requiring assistance in seeking work receive the necessary guidance and counseling to ensure they make a meaningful and realistic work search; and

(3) UI program staff receive information about a UI claimant's ability or availability for work, or the suitability of work offered to them.

§ 652.211 What are State planning requirements under the Act?

The State Agency designated to administer funds authorized under the Act must prepare and submit a five-year Statewide plan for the delivery of services provided under the Act in accordance with WIA regulations at 20 CFR 661.220. The State Plan must contain a detailed description of services that will be provided under the Act, which are adequate and reasonably appropriate for carrying out the provisions of the Act, including the requirements of section 8(b) of the Act.

§ 652.212 When should a State submit modifications to the five-year plan?

(a) A State has the authority to submit modifications to the five-year plan as necessary during the five-year period, and to do so in accordance with the same collaboration, notification, and other requirements that apply to the original plan. Modifications are likely to be needed to keep the strategic plan a viable and living document over its five-year life.

(b) That portion of the plan addressing the Act must be updated to reflect any reorganization of the State Agency designated to deliver services under the Act, any change in service delivery strategy, any change in levels of performance, or any change in services delivered by public merit-staff employees.

§ 652.213 What information must a State include when the plan is modified?

A State must follow the instructions for modifying the strategic five-year plan as addressed in 20 CFR 661.230.

§ 652.214 How often may a State submit modifications to the plan?

A State may modify its plan as changes occur in Federal or State law or policies, Statewide vision or strategy, or if changes in economic conditions occur. A State must submit modifications to adjust service strategies if performance goals are not met.

§ 652.215 Do any provisions in WIA change the requirement that publicly funded merit-staff employees must deliver services provided under the Act?

No. The Secretary has the legal authority to set staffing standards and requirements to ensure the effective delivery of services provided under the Act. The Secretary requires that labor exchange services provided under authority of the Act, to include services to veterans, be provided by public merit-staff employees. This interpretation is authorized by and consistent with the provisions in sections 3(a) and 5(b) of the Act and the Intergovernmental Personnel Act.

§ 652.216 May the One-Stop operator provide guidance to a merit-staffed employee under the Act?

Yes. The One-Stop system envisions a partnership in which Wagner-Peyser Act labor exchange services are coordinated with other activities provided by other partners in a One-Stop setting. As part of the local Memorandum of Understanding, One-Stop partners may agree to have staff receive guidance from the One-Stop operator regarding the provision of labor exchange services. Personnel matters, including compensation, personnel actions, terms and conditions of employment, performance appraisals, and accountability of merit-staff employees funded under the Wagner-Peyser Act, remain under the authority of the State Agency (including such matters that are delegated to any other public agency). Such guidance given to employees must be consistent with the provisions of the Wagner-Peyser Act.

PART 653—SERVICES OF THE EMPLOYMENT SERVICE SYSTEM

Subpart A—Basic Services of the Employment Service System [Reserved]

Subpart B—Services for Migrant and Seasonal Farmworkers (MSFWs)

Sec.

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Subpart F—Agricultural Clearance Order Activity

653.500 Purpose and scope of subpart.
653.501 Requirements for accepting and processing clearance orders.
653.502 Changes in crop and recruitment situations.
653.503 Field checks.

AUTHORITY: 38 U.S.C. chapters 41 and 42; Wagner-Peyser Act, as amended, 29 U.S.C. 49 et seq.; sec. 104 of the Emergency Jobs and Unemployment Assistance Act of 1974 Pub. L. 93–567, 88 Stat. 1845, unless otherwise noted.

Subpart A—Basic Services of the Employment Service System [Reserved]

Subpart B—Services for Migrant and Seasonal Farmworkers (MSFWs)

SOURCE: 45 FR 39459, June 10, 1980, unless otherwise noted.

§ 653.100 Purpose and scope of subpart.

This subpart sets forth the principal regulations of the United States Employment Service (USES) for counseling, testing, and job and training referral services for migrant and seasonal farmworkers (MSFWs) on a basis which is qualitatively equivalent and quantitatively proportionate to services provided to non-MSFWs. It also contains requirements that State agencies establish a system to monitor their own compliance with USES regulations governing services to MSFWs, including the regulations under this subpart. Special services to ensure that MSFWs receive the full range of employment related services are established under this subpart.

§ 653.101 Provision of services to migrant and seasonal farmworkers (MSFWs).

(a) Each State agency and each local office shall offer to migrant and seasonal farmworkers (MSFWs) the full range of employment services, benefits and protections, including the full range of counseling, testing, and job and training referral services as are provided to non-MSFWs. In providing such services, the State agency shall consider and be sensitive to the preferences, needs, and skills of individual MSFWs and the availability of job and training opportunities.

(b) Each State agency shall assure that, in a local area, the same local offices, including itinerant and satellite offices, but exclusive of day-haul operations, offer services to both non-MSFWs and MSFWs. Separate farm labor service local offices, which offer only farmwork to agricultural workers while another local office serving the same geographical area offers other JS services to other applicants, are prohibited so that all applicants receive employment services on the same basis.

§ 653.102 Job information.

All State agencies shall make job order information conspicuous and available to MSFWs in all local offices. This information shall include Job Bank information in local offices where it is available. Such information shall be made available either by computer terminal, microfiche, hard copy, or other equally effective means. Each significant MSFW local office shall provide adequate staff assistance to each MSFW to use the job order information effectively. In those offices designated as significant MSFW bilingual offices, such assistance shall be provided to MSFWs in Spanish and English, wherever requested or necessary, during any period of substantial MSFW activity.

§ 653.103 MSFW job applications.

(a) Every local office shall determine whether or not applicants are MSFWs as defined at § 651.10 of this chapter.

(b) Except as provided in § 653.105, when an MSFW applies for JS services at a local office or is contacted by an Outreach worker, the services available through the JS shall be explained to the MSFW. In local offices which have been designated as significant MSFW bilingual offices by ETA, this explanation shall be made in Spanish, if necessary or requested during any period of substantial MSFW activity. Other local offices shall provide bilingual explanations wherever feasible.

(c) The local office staff member shall provide the MSFW a list of those services. The list shall be written in English and Spanish and shall specify those services which are available after completion of a full application and those services which are available after completion of a partial application. The JS staff member shall explain to each MSFW the advantages of completing a full application.

Applications shall be reviewed periodically by the local office manager or a member of his/her staff to ensure their accuracy and quality. Applications and the application-taking process shall also be reviewed during State and Federal onsite reviews by the State and Regional MSFW Monitor Advocates and/or review staff, who shall check overall accuracy and quality, and offer technical advice on corrections or improvements.

(d) If the MSFW wishes to complete a full application, the staff shall provide all assistance necessary to complete the application and shall ensure that the form includes complete information. It shall include, to the extent possible, the significant history of the MSFW's prior employment, training and educational background and a statement of any desired employment and any training needs in order to permit a thorough assessment of the applicant's skills, abilities and preferences. All applicable items shall be completed according to the ETA instructions for preparation of the application card (ES–511). Additional Dictionary of Occupational Titles codes or keywords shall be assigned, where appropriate, based on the MSFW's work history, training, and skills, knowledges, and abilities. Secondary cards shall be completed and separately filed when keywords are not used. In extremely small local offices where the limited applicant load and file size does not require completion of secondary cards, additional D.O.T. codes shall be noted on the primary application card.

(e) If an MSFW wishes any JS service, and does not wish or is unable to file a full application, the interviewer shall try to obtain as much information as possible for a partial application. The interviewer shall enter the information on the partial application. The interviewer shall offer to refer the applicant to any available jobs for which the MSFW may be qualified, and any JS services permitted by the limited information available. He/she shall advise the MSFW that he/she may file a full application at any time.

(f) Partial applications shall be completed according to ETA instructions.

(g) Partial applications for MSFWs shall be filed in accordance with local office procedures for filing other partial applications.

(h) To minimize the need for additional applications in other offices, States shall issue JS cards to MSFWs at the initial visit under the following conditions:

(1) When automated data retrieval systems are available in the State. In this instance, JS staff shall advise the MSFW that the JS card may be presented at any other JS office in the State and that services will be provided without completion of an additional application unless the services requested require additional information for adequate service delivery.

(2) When an MSFW is referred on an interstate or intrastate order. In this instance, when it is known to the order-holding local office (through the presentation of an JS card or otherwise) that the MSFW has completed a full application or partial application in the applicant holding office or elsewhere, an additional application shall

not be taken by the order-holding office unless the MSFW requests JS services in addition to referral on the clearance order.

(Approved by the Office of Management and Budget under control number 1205–0039)

(Pub. L. No. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[45 FR 39459, June 10, 1980, as amended at 46 FR 7772, Jan. 23, 1981; 47 FR 145, Jan. 5, 1982]

§ 653.104 Services to MSFW family members, farm labor contractors, and crew members.

(a) In addition to other requirements in this subpart, the following special requirements are established for services to MSFW family members, farm labor contractors and crew members. Except as provided at §§ 653.103(e) and 653.105, no local office shall refer an MSFW family or crew unless each working member of the family or crew being referred, has filed either a full or partial application pursuant to § 653.103(b) at a local office or has been issued a JS card in instances set forth in § 653.103(h). Local offices may, upon request, provide general information, e.g., the types of crops in other areas, to farm labor contractors and family heads prior to the registration of all working members.

(b) No local office shall accept an application from an individual for employment as a farm labor contractor or fill an agricultural job order submitted by a farm labor contractor (''FLC'') or farm labor contractor employee (''FLCE'') unless the FLC or FLCE shows or obtains a valid FLC certificate, or FLCE identification card where required by Federal law, and a valid State certification where required by State law. If a FLC or FLCE is temporarily without his or her valid FLC certificate or FLCE identification card the local office shall try to verify the existence of the valid certificate or identification card by telephoning the State central office and/or the Department of Labor's Employment Standards Administration regional office. The local office, however, shall not serve the FLC or FLCE until the existence of the valid certificate or identification card is verified.

(c) Local offices may refer workers to registered farm labor contractors who are employers provided that a valid job order has been placed with the local office which clearly specifies all the terms and conditions of employment with the farm labor contractor shown as employer of record. Before a local office may refer workers to a farm labor contractor offering employment in another area of the State or in another State, one of two requirements must be met: Either a valid interstate clearance order from another State agency is on file in the office, or an intrastate order has been received from an office in another area of the State which is not within commuting distance of the office where the farm labor contractor is recruiting workers. Unless one of these conditions exists, the local office may only refer workers to a registered farm labor contractor who is an employer placing a local job order. Whenever the job order includes the provision of transportation, a FLC certificate authorizing transportation must be shown before workers are referred on the order.

§ 653.105 Job applications at day-haul facilities.

If the State agency is operating a day-haul facility under the exceptional circumstances provisions described in § 653.106(a), a list of JS services shall be distributed and a full application shall be completed whenever an MSFW requests the opportunity to file a full application unless this is impractical at that time. In such cases, a full application shall be taken at the earliest practical time. In all other cases, a list of JS services shall be distributed.

§ 653.106 JS day-haul responsibilities.

(a) State agencies shall not establish, operate, or supervise any agricultural day-haul facilities unless exceptional circumstances warrant such action and prior approval of the Regional Administrator is obtained.

(b) No JS applicants shall be referred to non-JS operated day-haul facilities, unless the applicant is referred on a specific job order and is provided with a checklist summarizing wages, working conditions, and other material specifications on the job order. Such checklists, where necessary, shall be in English and Spanish. State agencies

shall use a standard checklist format provided by ETA unless a variance has been approved by the Regional Administrator. However, general labor market information on the availability of jobs, the level of activity of agricultural and nonagricultural employment, and crop conditions shall be provided, upon request, to applicants where specific referrals to employment cannot be made.

(c) JS outreach workers shall visit all JS and non-JS operated day-haul facilities with substantial activity during their operation for purposes of providing MSFWs with information and assistance pursuant to § 653.107(j). Monitoring of such activity shall be conducted pursuant to § 653.108(p).

(Approved by the Office of Management and Budget under control number 1205–0039)

(Pub. L. No. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[45 FR 39459, June 10, 1980, as amended at 47 FR 145, Jan. 5, 1982]

§ 653.107 Outreach.

(a) Each State agency shall operate an outreach program in order to locate and to contact MSFWs who are not being reached by the normal intake activities conducted by the local offices. Upon receipt of planning instructions and resource guidance from ETA, each State agency shall develop an annual outreach plan, setting forth numerical goals, policies and objectives. This plan shall be subject to the approval of the Regional Administrator as part of the program budget plan (PBP) process. Wherever feasible, State agencies shall coordinate their outreach efforts with those of public and private community service agencies and MSFW groups.

(b) In determining the extent of their outreach program, States shall be guided by the following statement of ETA policy:

(1) State agencies should make sufficient penetration in the farmworker community so that a large number of MSFWs are aware of the full range of JS services.

(2) Signficant MSFW Local offices should conduct especially vigorous outreach in their service areas.

(3) State agencies in supply States should conduct particularly thorough outreach efforts with extensive follow-up activities which capitalize on the relatively long duration of MSFW residence in the State.

(c) The plan shall be based on the actual conditions which exist in the particular State, taking into account the State agency's history of providing outreach services, the estimated number of MSFWs in the State, and the need for outreach services in that State. The approval of the Regional Administrator shall be based upon his/her consideration of the following features of the outreach plan:

(1) *Assessment of need.* This assessment of need shall include:

(i) A review of the previous year's agricultural activity in the State.

(ii) A review of the previous year's MSFW activity in the State.

(iii) A projected level of agricultural activity in the State for the coming year.

(iv) A projected number of MSFWs in the State for the coming year, which shall take into account data supplied by CETA 303 grantees, other MSFW organizations, employer organizations and federal and/or State agency data sources such as the Department of Agriculture and the United States Employment Service.

(v) A statement of the consideration given to the State Monitor Advocate's recommendation as set forth in the annual summary developed under § 653.108(t).

(2) *Assessment of available resources.* This assessment of the resources available for outreach shall include:

(i) The level of funds available from all sources, including the funds specifically made available to the State agency for outreach.

(ii) Resources made available through existing cooperative agreements with public and private community service agencies and MSFW groups.

(iii) Where fewer resources are available for outreach than in a prior year, a statement of why fewer resources are available.

(3) *Proposed outreach activities.* The proposed outreach activities shall be designed to meet the needs determined under paragraph (c)(1) of this section

with the available resources determined under paragraph (c)(2) of this section. The plan for the proposed outreach activities shall include:

(i) Numerical goals for the number of MSFWs to contacted during the fiscal year by JS staff. The number of MSFWs planned to be contacted by other agencies under cooperative arrangements during the fiscal year also should be included in the plan. These numerical goals shall be based on the number of MSFWs estimated to be in the State in the coming year, taking into account the varying concentration of MSFWs during the seasons in each geographic area, the range of services needed in each area and the number of JS and/or cooperating agency staff who will conduct outreach.

(ii) Numerical goals for the staff years to be utilized for outreach during the fiscal year.

(iii) The level of funding to be utilized for outreach during the fiscal year.

(iv) The tools which will be used to conduct outreach contacts, including personal contact, printed matter, videotapes, slides, and/or cassette recordings.

(v) The records to be maintained by the JS outreach staff—logs of daily contacts to include the number of MSFWs contacted and assistance provided. The name of the individual contacted should be recorded when:

(A) An application for work is taken by an outreach worker,

(B) A referral to a job is made by an outreach worker, and/or

(C) A complaint is taken by an outreach worker.

(d) In developing the outreach plan, the State agency shall solicit information and suggestions from CETA 303 grantees, other appropriate MSFW groups, public agencies, agricultural employer organizations, and other interested organizations. In addition, at least 45 days before submitting its final outreach plan to the Regional Administrator, the State agency shall provide a proposed plan to CETA 303 grantees, public agencies, agricultural employer organizations, and other organizations expressing an interest and allow at least 30 days for review and comment. The State agency shall:

(1) Consider any comments received in formulating its final proposed plan.

(2) Inform all commenting parties in writing whether their comments have been incorporated and, if not, the reasons therefore.

(3) Transmit the comments and recommendations received and its responses to the Regional Administrator with the submission of the plan. (If the comments are received after the submission of the plan, they may be sent separately to the Regional Administrator.)

(e) The outreach plan shall be submitted as an essential part of the State's annual PBP. The resource requirement of the plan shall be reflected in the PBP budget request. The plan, including the resource requirement, shall be reviewed by the Regional Administrator during the annual PBP approval process. The State agency shall be required to implement the approved outreach plan as part of its compliance with the PBP.

(f) The Regional Administrator shall review and evaluate the outreach plan, including the assessments of needs and resources, in light of the history of the State's outreach efforts and the statements of policy set forth in §653.107(b). He/she shall approve the plan only if it demonstrates that adequate outreach will be conducted. The approved outreach plan shall be available for review by interested parties.

(g) As part of the annual PBP process, funding of State agencies shall be contingent upon the substantial and timely compliance of the State agency with its prior year outreach plan. However, if the Regional Administrator makes a finding of good faith efforts, he/she may fund a State agency even though it did not achieve substantial and timely compliance.

(h) For purposes of hiring and assigning staff to outreach duties, State agencies shall seek, through merit system procedures, qualified candidates:

(1) Who are from MSFW backgrounds, and/or

(2) Who speak Spanish, and/or

(3) Who are racially or ethnically representative of the MSFWs in the service area.

(i) The five States with the highest estimated year round MSFW activity

shall assign, in accordance with State merit staff requirements, full-time, year round staff to outreach duties. The remainder of the significant MSFW states shall make maximum efforts to hire outreach staff with MSFW experience for year round positions and shall assign outreach staff to work full-time during the period of the highest MSFW activity. Such outreach staff shall be bilingual if warranted by the characteristics of the MSFW population in the State, and shall spend a majority of their time in the field. The Regional Administrator may grant approval for a deviation from the requirements of this section if the State agency provides adequate evidence that outreach activities and service delivery to MSFWs would be improved through other staffing arrangements.

(j) For purposes of this subpart, an outreach ''contact'' shall include either the presentation of information and offer of assistance specified in paragraphs (j)(1) and (j)(2) of this section, or the followup activity specified in paragraph (j)(3) of this section.

(1) Outreach workers shall explain to MSFWs at their working, living or gathering areas, including day-haul sites, by means of written and oral presentations either spontaneous or recorded, in a language readily understood by them, the following;

(i) The services available from the local office, including the availability of referrals to agricultural and non-agricultural employment, to training, to supportive services, as well as the availability of testing, counseling and other job development services;

(ii) Types of specific employment opportunities which are currently available in the JS system;

(iii) Information on the JS complaint system and other organizations serving MSFWs;

(iv) A basic summary of farmworker rights with respect to the terms and conditions of employment;

(v) *Provided, however,* That outreach workers shall not enter work areas to perform outreach duties described in this section on an employer's property without permission of the employer, unless otherwise authorized to enter by law, shall not enter workers' living areas without the permission of the workers, and shall comply with appropriate State laws regarding access.

(2) After making the presentation, outreach workers shall urge the MSFWs to go to the local office to obtain the full range of JS services. If an MSFW cannot or does not wish to visit the local JS office, the outreach workers shall offer to provide on-site the following:

(i) Assistance in the preparation of applications;

(ii) If an unemployed MSFW, assistance in obtaining referral to specific employment opportunities currently available; if an employed MSFW, information regarding the types of employment opportunities which will become available upon the date on which the MSFW indicates that he/she will be available following his/her current employment.

(iii) Assistance in the preparation of either JS or non-JS related complaints;

(iv) Receipt and subsequent referral of complaints to the local office complaint specialist or local officer manager;

(v) Referral to supportive services for which the individual or a family member may be eligible;

(vi) As needed, assistance in making appointments and arranging transportation for individual MSFWs or members of their family to and from local offices or other appropriate agencies.

(3) Outreach workers shall make follow-up contacts as are necessary and appropriate to provide to the maximum extent possible the assistance specified in paragraphs (j)(1) and (j)(2) of this section.

(4) In addition to the foregoing outreach contacts, the State agency shall publicize the availability of JS services through such means as newspaper and electronic media publicity. Contacts with public and priviate community agencies, employers and/or employer organizations, and MSFW groups also shall be utilized to facilitate the widest possible distribution of information concerning JS services.

(k) Outreach workers shall be alert to observe the working and living conditions of MSFWs and, upon observation, or upon receipt of information regarding a suspected violation of federal

or State employment-related law, document and refer information to the local office manager for processing in accordance with § 653.113.

(l) Outreach workers shall be trained in local office procedures and in the services, benefits, and protections afforded MSFWs by the JS. They shall also be trained in the procedure for informal resolution of complaints. The program for such training shall be formulated by the State Administrator, pursuant to uniform guidelines developed by ETA, and each State's program shall be reviewed and commented upon in advance by the State MSFW Monitor Advocate.

(m) During months when outreach activities are conducted, outreach workers shall maintain complete records of their contacts with MSFWs and the services they perform in accordance with a format developed by ETA. These records shall include a daily log, a copy of which shall be sent monthly to the local office manager and maintained on file for at least two years. These records shall include the number of contacts and names of contacts (where applicable), the services provided (e.g., whether a complaint was received, whether an application was taken, and whether a referral was made). Outreach workers also shall maintain records of each possible violation or complaint of which they have knowledge, and their actions in ascertaining the facts and referring the matters as provided herein. These records shall include a description of the circumstances and names of any employers who have refused outreach workers access to MSFWs pursuant to § 653.107(l).

(n) During months when outreach activities are conducted, each local office manager shall file with the State MSFW Monitor Advocate a monthly summary report of outreach efforts. These reports shall summarize information collected, pursuant to paragraph (m) of this section. The local office manager and/or other appropriate State office staff members shall assess the performance of outreach workers by examining the overall quality and productivity of their work, including the services provided and the methods and tools used to offer services. Performance shall not be judged solely by the number of contacts made by the worker. The monthly reports and daily outreach logs shall be made available to the State MSFW Monitor Advocate and federal On-Site Review Teams. In addition, the distribution of any special funds for outreach, should funds become available, shall be based on the effectiveness and need of the State's outreach program as monitored by ETA.

(o) Outreach workers shall not engage in political, unionization or antiunionization activities during the performance of their duties.

(p) Outreach workers shall be provided with, carry and display, upon request, identification cards or other material identifying them as employees of the State agency.

(Approved by the Office of Management and Budget under control number 1205–0039)

(Pub. L. No. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[45 FR 39459, June 10, 1980, as amended at 47 FR 145, Jan. 5, 1982]

§ 653.108 State agency self-monitoring.

(a) State Administrators shall assure that their State agencies monitor their own compliance with JS regulations in serving MSFWs on an ongoing basis. The State Administrator shall have overall responsibility for State agency self-monitoring.

(b) The State Administrator shall appoint a State MSFW Monitor Advocate. The State Administrator shall inform farmworker organizations and other organizations with expertise concerning MSFWs of the opening and encourage them to refer qualified applicants to apply through the State merit system prior to appointing a State MSFW Monitor Advocate. Among qualified candidates determined through State merit system procedures, the State agencies shall seek persons (1) who are from MSFW backgrounds, or (2) who speak Spanish or other languages of a significant proportion of the State MSFW population, or (3) who are racially or ethnically similar to the MSFWs in the State, or (4) who have substantial work experience in farmworker activities.

(c) The State MSFW Monitor Advocate shall have direct, personal access, whenever he/she finds it necessary, to the State Administrator and shall work in the State central office. The State MSFW Monitor Advocate shall have status and compensation as approved by the civil service classification system and be comparable to other State positions assigned similar levels of tasks, complexity and responsibility.

(d) The State MSFW Monitor Advocates shall be assigned staff necessary to fulfill effectively all of his/her duties as set forth in this subpart. The number of staff positions shall be determined by reference to:

(1) The number of MSFWs in the State, as measured at the time of the peak MSFW population (MSFW activity), and (2) the need for monitoring activity in the State. The MSFW Monitor Advocates shall devote full time to Monitor Advocate functions, except that the USES Administrator may reallocate positions from States of low MSFW activity to States of higher MSFW activity and may approve a plan for less than full-time work in States of low MSFW activity. Any such plan must demonstrate that the State MSFW Monitor Advocate function can be effectively performed with part-time staffing.

(e) All State MSFW Monitor Advocates and Assistant MSFW Monitor Advocates shall attend within the first three months of their tenure a training session conducted by the Regional MSFW Monitor Advocate. They shall also attend whatever additional training sessions are required by the Regional or National MSFW Monitor Advocate.

(f) The State MSFW Monitor Advocate shall provide any relevant documentation requested from the State agency by the Regional MSFW Monitor Advocate.

(g) The State MSFW Monitor Advocate shall:

(1) Conduct an ongoing review of the delivery of services and protections afforded by JS regulations to MSFWs by the State agency and local offices. The State MSFW Monitor Advocate, without delay, shall advise the State agency and local offices of (i) problems, deficiencies, or improper practices in the delivery of services and protections afforded by these regulations (including progress made in achieving affirmative action goals and timetables), and (ii) means to improve such delivery.

(2) Participate in onsite local office MSFW formal monitoring reviews on a regular basis.

(3) Assure that all significant MSFW local offices not reviewed onsite by Federal staff, are reviewed at least once a year by State staff, and that, if necessary, those local offices in which significant problems are revealed by required reports, management information, the JS complaint system or otherwise are reviewed as soon as possible.

(4) Assure that the monitoring review format, developed by ETA, is used as a guideline in the conduct of local office MSFW onsite formal monitoring reviews. This format will ensure that applications and the application-taking process are reviewed during State onsite reviews by State MSFW Monitor Advocates and/or review staff, who shall check overall accuracy and quality, and offer technical advice on corrections or improvements.

(5) Review the State agency's outreach plan, and on a random basis, the outreach workers' daily logs and other reports including those showing or reflecting the workers' activities, to ensure that they comply with the outreach plan.

(h) Formal onsite MSFW monitoring reviews of local offices shall be conducted using the following procedures:

(1) Before beginning such a review, the State MSFW Monitor Advocate and/or review staff shall study:

(i) Program performance data,

(ii) Reports of previous reviews,

(iii) Corrective action plans developed as a result of previous reviews,

(iv) Complaint logs, and

(v) Complaints elevated from the office or concerning the office.

(2) Upon completion of a local office onsite formal monitoring review, the State MSFW Monitor Advocate shall hold one or more wrap-up sessions with the local office manager and staff to discuss any obvious findings and offer initial recommendations and appropriate technical assistance.

(3) After each review the State MSFW Monitor Advocate shall conduct an indepth analysis of the review data. The conclusions and recommendations of the State MSFW Monitor Advocate shall be put in writing, shall be sent to the State Administrator, to the offical of the State agency with line authority over the local office, and other appropriate State agency officials.

(4) The state MSFW Monitor Advocate may recommend that the review responsibility set forth in this subsection be delegated to a responsible professional member of the administrative staff of the State agency, if and when the State Administrator finds such delegation necessary. In such event, the State MSFW Monitor Advocate shall be responsible for and shall approve the written report of the review.

(5) The local office manager shall develop and propose a written corrective action plan. The plan shall be approved, or appropriately revised, by appropriate superior officials and the State MSFW Monitor Advocate. The plan shall include actions required to correct or to take major steps to correct any problems within 30 days or if the plan allows for more than 30 days for full compliance, the length of, and the reasons for, the extended period shall be specifically stated.

(6) State agencies, through line supervisory staff, shall be responsible for assuring and documenting that the local office is in compliance within the time period designated in the plan. State agencies shall submit to the appropriate ETA regional offices copies of the onsite local office formal monitoring review reports and corrective action plans for significant local offices.

(i) The State MSFW Monitor Advocate shall participate in federal reviews conducted pursuant to subpart G.

(j) At the discretion of the State Administrator, the State MSFW Monitor Advocate may be assigned the responsibility as the complaint specialist. The State MSFW Monitor Advocate shall participate in and monitor the performance of the complaint system, as set forth at 20 CFR 658.400 *et seq.* The State MSFW Monitor Advocate shall review the local office managers' informal resolution of complaints relating to MSFWs and shall ensure that the State agency transmits copies of the logs of MSFW complaints to the regional office quarterly.

(k) The State MSFW Monitor Advocate also shall serve as an advocate to improve services for MSFWs within JS. The State MSFW Monitor Advocate shall establish ongoing liaison with CETA 303 and other organizations serving farmworkers, and employers and/or employer organizations, in the State. The State MSFW Monitor Advocate shall meet frequently with representatives of these organizations to receive complaints, assist in referrals of alleged violations to enforcement agencies, receive input on improving coordination with JS or improving JS services to MSFWs.

(l) The State MSFW Monitor Advocate shall conduct frequent field visits to the working and living areas of MSFWs, and shall discuss JS services and other employment-related programs with MSFWs, crew leaders, and employers. Records shall be kept of each such visit.

(m) The State MSFW Monitor Advocate shall participate in the appropriate regional public meeting(s) held by the Department of Labor Regional Farm Labor Coordinated Enforcement Committee.

(n) The State MSFW Monitor Advocate shall ensure that outreach efforts in all significant MSFW local offices are reviewed at least yearly to ensure that there is continuing compliance with 20 CFR 653.107. This review will include accompanying at least one outreach worker from each significant MSFW local office on his/her visits to MSFWs' working and living areas. The State MSFW Monitor Advocate shall review findings from these reviews.

(o) The State MSFW Monitor Advocate shall review and assess the adequacy of the annual State affirmative action plan for MSFWs, and shall report such findings to the State Administrator.

(p) The State MSFW Monitor Advocate shall ensure that JS outreach activities are reviewed periodically at day-haul sites at which these activities are conducted. Complete records of such visits shall be kept. The State

MSFW Monitor Advocate shall ensure that local offices and the State Administrator are advised of any deficiencies.

(q) The State MSFW Monitor Advocate shall review on at least a quarterly basis all statistical and other MSFW-related data reported by significant MSFW local offices in order (1) to determine the extent to which the State agency has complied with regulations at § 653.100 *et seq.*, and (2) to identify the areas of inadequate compliance.

(r) The State MSFW Monitor Advocate shall have full access to all statistical and other MSFW-related information gathered by State agencies and local offices and may interview State and local office staffs with respect to reporting methods. Subsequent to each review, the State MSFW Monitor Advocate shall consult, as necessary, with State and local offices and provide technical assistance to ensure accurate reporting.

(s) The State MSFW Monitor Advocate shall review and comment on proposed State JS directives, manuals, and operating instructions relating to MSFWs and shall ensure (1) that they accurately reflect the requirements of the regulations, and (2) that they are clear and workable. The State MSFW Monitor Advocate also shall explain and make available at the requestor's cost, pertinent directives and procedures to employers, employer organizations, farmworkers, farmworker organizations and other parties expressing an interest in a readily identifiable directive or procedure issued and receive suggestions on how these documents can be improved.

(t) The State MSFW Monitor Advocate shall prepare for the State Administrator an annual summary of JS services to MSFWs within his/her State based on statistical data and his/her reviews and activities set forth in these regulations. The summary shall include an assessment of the State agency's activities related to MSFWs such as those covered in the State agency's PBP, outreach plan, and affirmative action plan, and the other matters with respect to which the State MSFW Monitor Advocate has responsibilities under these regulations. A copy of this summary shall be forwarded to the Regional Administrator by the State Administrator.

(Approved by the Office of Management and Budget under control number 1205–0039)

(Pub. L. No. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[45 FR 39459, June 10, 1980, as amended at 47 FR 145, Jan. 5, 1982]

§ 653.109 Data collection.

State agencies shall: (a) Collect data on MSFWs, including data on the number (1) contacted through outreach activities, (2) registering for service, (3) referred to agricultural jobs, (4) referred to non-agricultural jobs, (5) placed in agricultural jobs, (6) placed in non-agricultural jobs, (7) referred to training, (8) receiving counseling, (9) receiving job development, (10) receiving testing, (11) referred to supportive service, (12) receiving some service, (13) placed according to wage rates, and (14) placed according to duration. The State agencies also shall collect data on agricultural clearance orders (including field checks), MSFW complaints, and monitoring activities, as directed by ETA. These data shall be collected in accordance with the ESARS Handbook and applicable ETA Reports and Anlaysis Letters.

(b) Collect data on the number of MSFWs who were served as to whether they were male, female, black, Hispanic, American Indian, Asian, or Pacific Islander.

(c) Provide necessary training to State agency, including local office personnel, to assure accurate reporting of data;

(d) Collect and submit to ETA as directed by ETA, data on MSFWs required by the PBP, and

(e) Periodically collect and verify data required under this subsection, take necessary steps to ensure its validity, and collect and submit data for verification to ETA, as directed by ETA; and

(f) Submit additional reports to the ETA at such times and containing such items as ETA directs.

(Approved by the Office of Management and Budget under control number 1205–0039)

(Pub. L. No. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[45 FR 39459, June 10, 1980, as amended at 47 FR 145, Jan. 5, 1982]

§ 653.110 Disclosure of data.

(a) State agencies shall disclose to the public, on written request, in conformance with applicable State and Federal law, the data collected by State and local offices pursuant to § 653.109, if possible within 10 working days after receipt of the request.

(b) If a request for data held by a State agency is made to the ETA national or regional office, the ETA shall forward the request to the State agency for response.

(c) If the requested data cannot be supplied within 10 working days of receipt by the State agency of the request, the State agency shall respond to the requestor in writing, giving the reason for the delay and specifying the date by which it expects to be able to comply.

(d) State agency intra-agency memoranda and reports (or parts thereof) and memoranda and reports (or parts thereof) between the State agency and the ETA, however, to the extent that they contain statements of opinion rather than facts, may be withheld from public disclosure provided this reason for withholding is given to the requestor in writing. Similarly, documents or parts thereof, which, if disclosed, would constitute an unwarranted invasion of personal or employer privacy, may also be withheld provided the reason is given to the requestor in writing.

§ 653.111 State agency staffing requirements.

(a) On a statewide basis, staff representative of the racial and ethnic characteristics in the work force shall be distributed in substantially the same proportion among (1) all ''job groups'' (as that term is defined by the Office of Federal Contract Compliance Programs), and (2) all offices in the plan(s).

(b)(1) As part of the PBP, each State agency shall develop and submit to the Regional Administrator affirmative action plans for all significant local offices within its jurisdiction (which, for the purposes of this provision, means those local offices representing the top 20 per cent of MSFW activity nationally). These affirmative action plans shall include goals and timetables and shall ensure that sufficient numbers of qualified, permanent minority staff are hired. Where qualified minority applicants are not available to be hired as permanent staff, qualified minority part-time, provisional, or temporary staff shall be hired in accordance with State merit system procedures, where applicable. These affirmative action plans shall be prepared on an individual office basis.

(2) The affirmative action plans shall include an analysis of the racial and ethnic characteristics of the work force in the local office service area. To determine the ''work force'' for the purpose of this paragraph, the State agency shall include the racial and ethnic characteristics of any MSFW population which is not a part of the permanent work force by computing an estimate of the total work years MSFWs collectively spend in the area and including a number of workers equivalent to this estimate as part of the permanent work force. This computation shall be made by calculating the average length of time, as a fractional part of a year, MSFWs stay in the area and then multiplying this figure by the total estimated MSFW population in the area during the previous year.

(3) The affirmative action plan also shall include an analysis of the local office staffing characteristics. The plan shall provide a comparison between the characteristics of the staff and the work force and determine if the composition of the local office staff(s) is representative of the racial and ethnic characteristics of the work force in the local office service area(s).

(4) If the staff under-represents any of these characteristics, the State agency shall establish a staffing goal at a level equivalent to the percentage of the characteristics in the work force in the local office service areas. The State agency also shall establish a reasonable timetable for achieving the staffing goal by hiring or promoting available, qualified staff in the under-represented categories. In establishing

timetables, the State agency shall consider the vacancies anticipated through expansion, contraction, and turnover in the office(s) and available funds, and all affirmative action plans shall establish timetables that are designed to achieve the staffing goal no later than December 31, 1983.

(c) In addition, each State agency which has significant local offices, shall undertake special efforts to recruit MSFWs and persons from MSFW back-grounds for its staff, shall document achievements, and shall include in the affirmative action plan(s) a complete description of specific actions which the agency will take and time frames within which these actions will be taken.

(d) In developing the affirmative action plan for significant local offices, the State agency shall solicit from CETA 303 and other appropriate MSFW groups, employer organizations and other interested organizations, estimates of the total MSFW population in each local office service area, and the average length of time the MSFWs stay in the area. In addition, State agencies shall solicit, consider, incorporate as appropriate, respond to and include copies of comments from CETA 303, other appropriate MSFW groups, employer organizations, and other interested organizations, following procedures set forth for the annual outreach plan at § 653.107(d).

(e) As part of the annual Program and Budget Plan (PBP) process, the funding of State agencies which are required to develop and implement affirmative action plans for significant local offices shall be contingent upon the timely submittal of adequate affirmative action plans and the substantial and timely attainment of the goals and timetables contained in those plans. However, if the Regional Administrator makes a finding of good faith efforts, he/she may fund a State agency even though it did not achieve substantial and timely compliance.

(f) All State Employment Security Agencies (SESAs) required to develop affirmative action plans for significant local offices shall keep accurate records of their employment practices for those offices, including information on all applications. These records shall be maintained in accordance with the recordkeeping requirements concerning affirmative action which are established by ETA and distributed to the SESAs. All records shall be made available to the State MSFW Monitor Advocate, EEO staff and Federal On-Site Review Teams.

(g) Affirmative action plans shall contain a description of specific steps to be taken for the adequate recruitment of MSFWs for all vacant positions in significant local offices and the central office. These steps shall include advertisements in newspapers, radio or other media, in a manner calculated to best reach the MSFW population, and contacts by outreach workers and the State MSFW Monitor Advocate with groups serving the MSFW population.

(h) State EEO staff shall have the responsibility for developing affirmative action plans. The State MSFW Monitor Advocate(s) shall comment on the plan to the State Administrator. Upon submission of the affirmative action plan as part of the State agency's PBP submittal, the Regional MSFW Monitor Advocate shall review the affirmative action plan(s) as it pertains to MSFWs and comment to the Regional Administrator. As part of his/her regular reviews of State agency compliance, the Regional MSFW Monitor Advocate shall monitor the extent to which the State has complied with its affirmative action plan(s) as it pertains to MSFWs. The Regional MSFW Monitor Advocate's finding as to the adequacy of the plan(s) and as to the State's compliance with the plan(s) shall be considered in PBP decisions involving future funding of the State agency.

(Approved by the Office of Management and Budget under control number 1205–0039)

(Pub. L. No. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[45 FR 39459, June 10, 1980, as amended at 47 FR 145, Jan. 5, 1982]

§ 653.112 State agency program budget plans.

(a) Each State agency, in its annual program budget plan, shall describe its plan to carry out the requirements of this subpart in the following year. The plan shall include, where applicable,

the outreach and affirmative action plans required by §§653.107 and 653.111, respectively. For significant MSFW States, ETA shall establish program performance indicators reflecting equity indicators and indicators measuring minimum levels of service to MSFWs which the significant MSFW State agencies will be required to meet. These program performance indicator requirements shall be contained in the PBP Guidelines which ETA promulgates on an annual basis.

(b) Equity indicators shall address JS controllable services and shall include, at a minimum, individuals referred to a job; receiving counselling; receiving job development; receiving some service; and referred to supportive service.

(c) Minimum level of service indicators shall address other services to MSFWs and shall include, at a minimum, individuals placed in a job; placed in a job with a wage exceeding the Federal minimum wage by at least 50 cents/hour; placed long-term (150 days or more) in a non-agricultural job; review of significant MSFW local offices; field checks on agricultural clearance orders; outreach contacts per staff day; and processing of complaints. The determination of the minimum service levels required of significant MSFW States for each year shall be based on the following:

(1) Past State agency performance in serving MSFWs, as reflected in on-site reviews and data collected under §653.109;

(2) The need for services to MSFWs in the following year, comparing prior and projected levels of MSFW activity;

(3) The ETA program priorities for the following year; and

(4) Special circumstances and external factors existing in the particular State.

(d) The Regional Administrator shall review this portion of the PBP, and approve it upon making a written determination that it is acceptable in light of the requirements of this subpart. The Regional Administrator's written determination shall be available to the public upon request.

(Approved by the Office of Management and Budget under control number 1205–0039.)

(Pub. L. No. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[45 FR 39459, June 10, 1980, as amended at 47 FR 145, Jan. 5, 1982]

§ 653.113 Processing apparent violations.

(a) If a State agency employee observes, has reason to believe, or is in receipt of information regarding a suspected violation of employment related laws or JS regulations by an employer, except as provided at §653.503 (field checks) or §658.400 of this chapter (complaints), the employee shall document the suspected violation and refer this information to the local office manager.

(b) If the employer has filed a job order with the JS office within the past 12 months, the local office shall attempt informal resolution. If the employer does not remedy the suspected violation within 5 working days, procedures at part 658, subpart F of this chapter shall be initiated and, if a violation of an employment related law is involved, the violation shall be referred to the appropriate enforcement agency in writing.

(c) If the employer has not filed a job order with the local office during the past 12 months, the suspected violation of an employment related law shall be referred to the appropriate enforcement agency in writing.

Subpart C—Services for Veterans [Reserved]

Subpart D—Services to the Handicapped [Reserved]

Subpart E—Support Services [Reserved]

Subpart F—Agricultural Clearance Order Activity

SOURCE: 45 FR 39466, June 10, 1980, unless otherwise noted.

§ 653.500 Purpose and scope of subpart.

This section contains the requirements for acceptance and handling of intrastate and interstate job clearance

orders seeking workers to perform agricultural or food processing work on a less than year round basis. Orders seeking workers to perform agricultural or food processing work on a year round basis which involves permanent relocation are not subject to the requirements of this subpart. This section, therefore, contains requirements which affect not only applicants who are categorized as MSFWs based on their past employment, but all workers who are recruited through the JS intrastate and interstate clearance systems for less than year round agricultural or food processing work.

§ 653.501 Requirements for accepting and processing clearance orders.

(a) In view of the statutorily established basic function of the job service as a no-fee labor exchange, that is, as a forum for bringing together employers and job seekers, neither the ETA nor the State agencies are guarantors of the accuracy or truthfulness of information contained on job orders submitted by employers. Nor does any job order accepted or recruited upon by the JS constitute a contractual job offer to which the ETA or a State agency is in any way a party. Nevertheless, if the ETA or a State agency discovers that an employer's job order contains a material misrepresentation, the procedures of subpart F of part 658 of this chapter shall be followed.

(b) Intrastate and interstate job orders shall include the language of the first two sentences of paragraph (a) of this section.

(c) No local office or State agency shall place into intrastate or interstate clearance any job order seeking workers to perform agricultural or food processing work before reviewing it pursuant to paragraphs (d) or (e) of this section, as applicable.

(d) No local office shall place a job order seeking workers to perform agricultural or food processing work into intrastate clearance unless:

(1) The job order does not contain an unlawful discriminatory specification by race, color, religion, national origin, age, sex, or mental or physical status unrelated to job performance (handicap);

(2) The employer has signed the job order and the job order states all the material terms and conditions of the employment, including:

(i) The crop;

(ii) The nature of the work;

(iii) The anticipated period and hours of employment;

(iv) The anticipated starting and ending date of employment and the anticipated number of days and hours per week for which work will be available;

(v) An assurance that:

(A) The employer will provide to workers referred through the clearance system the number of hours of work cited in paragraph (d)(2)(iv) of this section for the week beginning with the anticipated date of need, unless the employer has amended the date of need at least 10 working days prior to the original date of need (pursuant to paragraph (d)(2)(xiii) of this section) by so notifying the order-holding office. The State agency shall make a record of this notification and shall attempt to inform referred migrant workers of the change in accordance with the following procedure:

(B) All workers referred through the clearance system, farm labor contractors on behalf of migrant workers or family heads on behalf of migrant family members referred through the clearance system shall be notified to contact a local job service office, preferably the order-holding office, to verify the date of need cited no sooner than 9 working days and no later than 5 working days prior to the original date of need cited on the job order; and that failure to do so will disqualify the referred migrant worker from the assurance provided in paragraphs (a) and (d) of this section.

(C) If the worker referred through the clearance system contacts a local office (in any State) other than the order holding office, that local office shall assist the referred worker in contacting the order holding office on a timely basis. Such assistance shall include, if necessary, contacting the order holding office by telephone or other timely means on behalf of the worker referred through the clearance system.

(D) If the employer fails to notify the order-holding office at least 10 working

days prior to the original date of need the employer shall pay eligible (pursuant to paragraph (b) of this section) workers referred through the clearance system the specified hourly rate of pay, or in the absence of a specified hourly rate of pay, the higher of the Federal or State minimum wage for the first week starting with the originally anticipated date of need.

(E) Employers may require workers to perform alternative work if the guarantee in this section is invoked and if such alternative work is stated on the job order.

(F) For the purposes of this assurance, ''working days'' shall mean those days that the order-holding local office is open for public business.

(vi) The hourly wage rate or the piece rate estimated in hourly wage rate equivalents for each activity and unit size;

(vii) Any deductions to be made from wages;

(viii) A specification of any non-monetary benefits to be provided by the employer;

(ix) Any hours, days or weeks for which work is guaranteed, and, for each guaranteed week of work except as provided in paragraph (d)(2)(v) of this section, the exclusive manner in which the grarantee may be abated due to weather conditions or other acts of God beyond the employer's control;

(x) Any bonus or work incentive payments or other expenses which will be paid by the employer in addition to the basic wage rate, including the anticipated time period(s) within which such payments will be made. No such payments, however, shall be made contingent upon the worker continuing employment beyond the period of employment specified in the job order or, in the case of any worker with children, beyond the time needed to return home for the beginning of the school year;

(xi) An assurance that no extension of employment beyond the period of employment specified in the job order shall relieve the employer from paying the wages already earned, or if specified in the job order as a term of employment, providing transportation or paying transportation expenses to the worker's home;

(xii) Assurances that the working conditions comply with applicable Federal and State minimum wage, child labor, social security, health and safety, farm labor contractor registration and other employment-related laws;

(xiii) An assurance that the employer will expeditiously notify the order-holding local office or State agency by telephone immediately upon learning that a crop is maturing earlier or later, or that weather conditions, over-recruitment or other factors have changed the terms and conditions of employment. For orders submitted in conjunction with requests for foreign workers, an assurance that the employer will follow-up the telephone notification in writing.

(xiv) An assurance that the employer, if acting as a farm labor contractor (''FLC'') or farm labor contractor employee (''FLCE'') on the order, has a valid FLC certificate or FLCE identification card; and

(xv) An assurance of the availability of no cost or public housing which meets the Federal standards and which is sufficient to house the specified number of workers requested through the clearance system. This assurance shall cover the availability of housing for only those workers, and, when applicable, family members who are unable to return to their residence in the same day.

(xvi) An assurance that outreach workers shall have reasonable access to the workers in the conduct of outreach activities pursuant to § 653.107.

(3) The job order contains all the material terms and conditions of the job, and the employer assures that all items therein are actual conditions of the job by signing the following statement: ''This job order describes the actual terms and conditions of the employment being offered by me and contains all the material terms and conditions of the job'';

(4) The wages and working conditions offered are not less than the prevailing wages and working conditions among similarly employed agricultural workers in the area of intended employment or the applicable Federal or State minimum wage, whichever is higher. If the wages offered are expressed as piece rates or as base rates and bonuses, the

employer shall make the method of calculating the wage and supporting materials available to JS staff who shall check if the employer's calculation of the estimated hourly wage rate is reasonably accurate and is not less than the prevailing wage rate or applicable Federal or State minimum wage, whichever is higher;

(5) The employer has agreed to provide or pay for the transportation of the workers and their families on at least the same terms as transportation is commonly provided by employers in the area of intended employment to agricultural workers and their families recruited from the same area of supply;

(6) JS staff have determined, through a preoccupancy housing inspection performed by JS staff or other appropriate public agencies, that the housing assured by the employer is in fact available, and meets the full set of standards set forth at 20 CFR part 654, subpart E which details applicable housing standards and contains provisions for conditional access to the clearance system; except that mobile range housing for sheepherders shall meet existing Departmental guidelines; and

(7) The local office and employer have attempted and have not been able to obtain sufficient workers within the local labor market area, or the local office anticipates a shortage of local workers.

(e) No state agency shall place a job order seeking workers to perform agricultural or food processing work with interstate clearance unless:

(1) The job order meets the requirements set forth at paragraphs (d)(1) through (d)(6) of this section;

(2) The State agency and the employer have attempted and have not been able to locate sufficient workers within the state, or the State agency anticipates a shortage of workers within the State; and

(3) The order has been reviewed and approved by the ETA regional office within 10 working days after receipt from the State agency, and the Regional Administrator has approved the areas of supply to which the order shall be extended. Any denial by the Regional Administrator shall be in writing and set forth the reasons for the denial.

(f) (1) The local office shall use the agricultural clearance form prescribed by ETA, and shall see that all necessary items on the form are completed, including items on attachments to the form prescribed by ETA.

(2) (i) The original of an interstate agricultural clearance form shall be retained for the order-holding local office files. If the clearance order is submitted in conjunction with a request for certification of temporary alien agricultural workers, the procedures at 20 CFR 655.204(a) shall be followed. For other clearance orders, the order-holding local office shall transmit a complete copy to the State office. The State office shall distribute additional copies of the form with all attachments except that the State agency may, at its discretion, delegate this distribution to the local office, as follows:

(A) At least one clear copy to each of the State agencies selected for recruitment (areas of supply);

(B) One copy to each applicant-holding ETA regional office;

(C) One copy to the order-holding ETA regional office; and

(D) One copy to the Regional Farm Labor Coordinated Enforcement Committee in the area of employment, Attn: ESA Regional Administrator.

(ii) Applicant-holding offices shall provide workers referred on clearance orders with a checklist summarizing wages, working conditions and other material specifications on the job order. Such checklists, where necessary, shall be in English and Spanish. The checklist shall include language notifying the worker that a copy of the complete order is available for inspection. One copy of the form with all attachments shall be available for inspection in the applicant-holding office and the order-holding office. State agencies shall use a standard checklist format provided by ETA unless a variance has been approved by the Regional Administrator.

(iii) The applicant-holding office shall give each referred worker a copy of a description of worker's rights developed by the National Farm Labor Coordinated Enforcement Committee.

(g) The local office may place an intrastate or interstate order seeking workers to perform agricultural or food

processing work for a specific farm labor contractor or worker preferred by the employer provided the order meets JS nondiscrimination criteria. The order would not meet such criteria, for example, if it requested a ''white male crew leader'' or ''any white male crew leader.''

(h) In local offices which have been designated significant MSFW bilingual offices by ETA, and in any other local office with bilingual staff, bilingual (English-Spanish) staff shall assist all agricultural workers, upon request, to understand the terms and conditions of employment set forth in intrastate and interstate job orders and shall provide such workers with checklists in Spanish showing wage payment schedules, working conditions and other material specifications of the job order.

(i) No agricultural or food processing order shall be included in job bank listings available outside the local office commuting area unless the order has been processed according to requirements for intrastate or interstate clearance contained in this subpart. If the job bank for the local office area incorporates offices beyond the local office commuting area, the order may be included in the listing but must be clearly designated as prohibiting referral from outside the community area, unless the requirements of this subpart are met.

(j) If the labor supply State agency accepts a clearance order, the State agency shall actively recruit workers for referral. In the event a potential labor supply State agency rejects a clearance order, the reasons for rejection shall be documented and submitted to the Regional Administrator having jurisdiction over the State agency. The Regional Administrator will examine the reasons for rejection, and, if the Regional Administrator agrees, will inform the Regional Administrator with jurisdiction over the order-holding State agency of the rejection and the justifiable reasons. If the Regional Administrator who receives the notification of rejection does not concur with the reasons for rejection, that Regional Administrator will so inform the USES Administrator, who will make a final determination on the acceptance or rejection of the order.

(Approved by the Office of Management and Budget under control number 1205–0039)

(Pub. L. No. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[45 FR 39466, June 10, 1980, as amended at 47 FR 145, Jan. 5, 1982]

§ 653.502 Changes in crop and recruitment situations.

(a) If a labor demand State agency learns that a crop is maturing earlier than expected or that other material factors, including weather conditions and recruitment levels, have changed, the agency shall immediately contact the labor supply State agency, who shall in turn immediately inform crews and families scheduled through the JS clearance system of the changed circumstances and adjust arrangements on behalf of such crews of families.

(b) When there is a delay in the date of need, procedures required of employers and workers at §653.501(d)(2)(v) shall be followed. State agencies shall document notifications by employers and contacts by individual migrant workers or crew leaders on behalf of migrant workers or family heads on behalf of migrant family members to verify the date of need.

(c) In addition, if weather conditions, overrecruitment or other conditions have eliminated the scheduled job opportunities, the State agencies involved shall make every effort to place the workers in alternate job opportunities as soon as possible, especially if the worker(s) is already enroute or at the job site. JS staff shall keep records of actions under this section.

§ 653.503 Field checks.

(a) The State agency, through its local offices or otherwise, shall conduct random, unannounced field checks at a significant number of agricultural worksites to which JS placements have been made through the intrastate or interstate clearance system. These field checks shall include visit(s) to the worksite at a time when workers are there. Both the employees and the employer shall be consulted, and JS shall determine and document whether wages, hours, working and housing

conditions are as specified in job orders. JS staff shall keep records of all field checks. If State agency personnel observe or receive information, or otherwise have reason to believe that conditions are not as stated on the job order or that an employer is violating an employment related law, the State agency shall document the finding and attempt informal resolution. If the matter has not been resolved within 5 working days, the State agency shall follow the procedures set forth at subpart F of part 658 of this chapter. Violations of employment related laws shall be referred to appropriate enforcement agencies in writing.

(b) State agencies, to the maximum extent possible, shall make formal or informal arrangements with appropriate State and Federal enforcement agencies pursuant to which such agencies will agree to conduct compliance reviews in their areas of enforcement responsibility at agricultural worksites where the State agency has placed workers through the agricultural clearance system and to inform the State agency if violations are found. An enforcement agency compliance review shall satisfy the requirement for State agency field checks where all aspects of wages, hours, working and housing conditions have been reviewed by the enforcement agency reviews. The State agency shall supplement enforcement agency efforts with field checks focusing on areas not addressed by enforcement agencies. State agencies shall report difficulties in making such formal or informal arrangements with State enforcement agencies as well as deficiencies in State enforcement agency activities to the Regional Farm Labor Coordinated Enforcement Committee.

(Approved by the Office of Management and Budget under control number 1205–0039)

(Pub. L. No. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[46 FR 39466, June 10, 1980, as amended at 47 FR 145, Jan. 5, 1982]

PART 654—SPECIAL RESPONSIBILITIES OF THE EMPLOYMENT SERVICE SYSTEM

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SOURCE: 44 FR 1689, Jan. 5, 1979, unless otherwise noted.

Subpart A—Responsibilities Under Executive Order 12073

AUTHORITY: 41 U.S.C. 10a *et seq*; 29 U.S.C. 49 *et seq*; 15 U.S.C. 644(n); E.O. 12073; 10582, as amended by E.O. 11051 and 12148.

§ 654.1 Purpose of subpart.

This subpart implements the responsibilities of the Secretary of Labor in classifying labor surplus areas in accordance with Executive Order 12073 (Federal Procurement in Labor Surplus Areas). The Secretary of Labor has delegated responsibilities to the Assistant Secretary, Employment and Training Administration.

[44 FR 1689, Jan. 5, 1979, as amended at 48 FR 15616, Apr. 12, 1983]

§ 654.3 Description of Executive Order 12073.

Executive Order 12073 requires executive agencies to emphasize procurement set-asides in labor surplus areas. The Secretary of Labor is responsible under this order for classifying and designating labor surplus areas.

[44 FR 1689, Jan. 5, 1979, as amended at 48 FR 15616, Apr. 12, 1983]

§ 654.4 Definitions.

(a) *Assistant Secretary* shall mean Assistant Secretary for Employment and Training, U.S. Department of Labor.

(b) *Civil jurisdiction* shall mean:

(1) Cities of 25,000 or more population on the basis of the most recently available Bureau of the Census estimates; or

(2) Towns and townships in the States of New Jersey, New York, Michigan, and Pennsylvania of 25,000 or more population and which possess powers and functions similar to cities; or

(3) All counties, except those counties which contain any of the types of political jurisdictions defined in paragraphs (b) (1) and (2) of this section; or

(4) All other counties are defined as ''balance of county'' (i.e., total county less component cities and townships identified in paragraphs (b) (1) and (2) of this section); or

(5) County equivalents which are towns in the States of Massachusetts, Rhode Island and Connecticut.

(c) *Labor surplus area* shall mean a civil jurisdiction that, in accordance with the criteria specified in § 654.5, has been classified as a labor surplus area.

(d) *Reference period* shall mean the two year period ending December 31 of the year prior to the October 1 annual date of eligibility determination.

[44 FR 1689, Jan. 5, 1979, as amended at 44 FR 26071, May 5, 1979; 48 FR 15616, Apr. 12, 1983; 53 FR 23347, June 21, 1988]

§ 654.5 Classification of labor surplus areas.

(a) *Basic criteria.* The Assistant Secretary shall classify a civil jurisdiction as a labor surplus area whenever, as determined by the Bureau of Labor Statistics, the average unemployment rate for all civilian workers in the civil jurisdiction for the reference period is (1) 120 percent of the national average unemployment rate for civilian workers or higher for the reference period as determined by the Bureau of Labor Statistics, or (2) 10 percent or higher. No civil jurisdiction shall be classified as a labor surplus area if the average unemployment rate for all civilian workers for the reference period is less than 6.0 percent.

(b) *Criteria for exceptional circumstances.* The Assistant Secretary, upon petition submitted by the appropriate State employment security agency, may classify a civil jurisdiction, a Metropolitan Statistical Area, or a Primary Metropolitan Statistical Area as a labor surplus area whenever such an area meets or is expected to meet the unemployment tests established under § 654.5(a) as a result of exceptional circumstances. For purposes of this paragraph ''exceptional circumstances'' shall mean catastrophic events, such as natural disasters, plant closings, and contract cancellations expected to have a long-term impact on labor market area conditions, discounting temporary or seasonal factors. For purposes of this paragraph, ''Metropolitan Statistical Area'' and ''Primary Metropolitan Statistical Area'' shall mean the areas officially

defined and designated as such by the Office of Management and Budget.

(Approved by OMB under control number 1205–0207)

[48 FR 15616, Apr. 12, 1983, as amended at 53 FR 23347, June 21, 1988]

§ 654.6 Termination of classification.

(a) *Basic procedure.* The Assistant Secretary shall terminate the classification of a civil jurisdiction as a labor surplus area after any year in which the Assistant Secretary determines that the criteria established under § 654.5 (a) are no longer met.

(b) *Procedure for exceptional circumstances.* The Assistant Secretary shall terminate the classification of a civil jurisdiction classified as a labor surplus area pursuant to the provisions of § 654.5(b) after any year in which the Assistant Secretary determines that the exceptional circumstances criteria of that paragraph are no longer met.

[44 FR 1689, Jan. 5, 1979, as amended at 48 FR 15616, Apr. 12, 1983]

§ 654.7 Publication of area classifications.

The Assistant Secretary shall publish annually a list of labor surplus areas together with geographic descriptions thereof. The Assistant Secretary periodically may cause these lists to be published in the Federal Register.

[44 FR 1689, Jan. 5, 1979, as amended at 48 FR 15616, Apr. 12, 1983]

§ 654.8 Services to firms and individuals in labor surplus areas.

To carry out the purposes and policy objectives of Executive Order 12073 and Executive Order 10582, the Assistant Secretary shall cooperate with and assist the State employment service agencies and the Secretary of Commerce, as appropriate, to:

(a) Provide relevant labor market data and related economic information to assist in the initiation of industrial expansion programs in labor surplus areas;

(b) Identify upon request the skills and numbers of unemployed persons available for work in labor surplus areas, providing such information to firms interested in establishing new plants and facilities or expanding existing plants and facilities in such areas;

(c) Identify the occupational composition and skill requirements of industries contemplating locating in labor surplus areas and make such information available to training and apprenticeship agencies and resources in the community for purposes of appropriate training and skill development;

(d) Identify unemployed individuals in need of, and having the potential for, training in occupations and skills required by new or expanding industries and refer such individuals to appropriate training opportunities;

(e) Receive job openings on a voluntary basis and/or under the mandatory listing program provided by 38 U.S.C. 2012 and Executive Order 11701 and refer qualified unemployed workers to such openings, making appropriate efforts to refer to such openings qualified individuals who reside in the labor surplus area.

[44 FR 1689, Jan. 5, 1979, as amended at 48 FR 15616, Apr. 12, 1983]

§ 654.9 Filing of complaints.

Complaints alleging that the Department of Labor has violated the labor surplus area regulations should be mailed to the Assistant Secretary for Employment and Training, U.S. Department of Labor, Washington, DC 20210. Such complaints should include: (a) The allegations of wrongdoing; (b) the date of the incident; and (c) any other relevant information available to the complainant. The Assistant Secretary shall make a determination and respond to the complainant after investigation of the incident. If the complaint is not resolved following this investigation, the Assistant Secretary, at his discretion, may offer, in writing by certified mail, the complainant a hearing before a Department of Labor Administrative Law Judge, provided that the complainant requests such a hearing from the Assistant Secretary within 20 working days of the certified date of receipt of the Assistant Secretary's offer of a hearing.

[48 FR 15616, Apr. 12, 1983]

§ 654.10 Transition provisions.

The annual list of labor surplus areas for the period June 1, 1982, through May 31, 1983, shall be extended through September 30, 1983.

[48 FR 15616, Apr. 12, 1983]

Subpart B—Responsibilities Under Executive Order 10582

AUTHORITY: 41 U.S.C. 10a *et seq.*; 29 U.S.C. 49 *et seq.*; 15 U.S.C. 644(n); E.O. 12073, E.O. 10582 as amended by E.O. 11051 and 12148.

§ 654.11 Purpose of subpart.

This subpart implements the responsibilities of the Secretary of Labor in determining areas of substantial unemployment in accordance with Executive Order 10582 issued pursuant to the Buy American Act, 41 U.S.C. 10a et seq.

§ 654.12 Description of Executive Order 10582.

(a) Under the Buy American Act, heads of executive agencies are required to determine, as a condition precedent to the purchase by their agencies of materials of foreign origin for public use within the United States, (1) that the price of like materials of domestic origin is unreasonable, or (2) that the purchase of like materials of domestic origin is inconsistent with the public interest.

(b) Section 3(c) of Executive Order 10582 issued pursuant to the Buy American Act permits executive agencies to reject a bid or offer to furnish materials of foreign origin in any situation in which the domestic supplier, offering the lowest price for furnishing the desired materials, undertakes to produce substantially all of the materials in areas of substantial unemployment, as determined by the Secretary of Labor.

§ 654.13 Determination of areas of substantial unemployment.

An area of substantial unemployment, for purposes of Executive Order 10582, shall be any area classified as a labor surplus area at § 654.5 of this part pursuant to the procedures set forth at subpart A of this part.

§ 654.14 Filing of complaints.

Complaints arising under subpart B of this part alleging that the Department of Labor has violated the labor surplus area regulations shall be made pursuant to the procedures set forth at § 654.9 of this part.

[48 FR 15616, Apr. 12, 1983]

Subparts C–D [Reserved]

Subpart E—Housing for Agricultural Workers

AUTHORITY: 29 U.S.C. 49k; 8 U.S.C. 1188(c)(4); 41 Op.A.G. 406 (1959).

SOURCE: 45 FR 14182, Mar. 4, 1980, unless otherwise noted.

PURPOSE AND APPLICABILITY

§ 654.400 Scope and purpose.

(a) This subpart sets forth the Employment and Training Administration standards for agricultural housing. Local Job Service offices, as part of the State employment service agencies and in cooperation with the United States Employment Service, assist employers in recruiting agricultural workers from places outside the area of intended employment. The experiences of the employment service indicate that employees so referred have on many occasions been provided with inadequate, unsafe, and unsanitary housing conditions. To discourage this practice, it is the policy of the Federal-State employment service system, as set forth in § 653.108 of this chapter, to deny its intrastate and interstate recruitment services to employers until the State employment service agency has ascertained that the employer's housing meets certain standards.

(b) To implement this policy, § 653.108 of this chapter provides that recruitment services shall be denied unless the employer has signed an assurance, a preoccupancy inspection has been conducted and the ES staff has ascertained that, with respect to intrastate clearance, if the workers are to be housed, the employer's housing meets or, with respect to interstate clearance, that the employer will provide housing for the workers which meets either the full set of standards

set forth at 29 CFR 1910.142 or the full set of standards set forth in this subpart. Whichever is applicable under the criteria set forth in § 654.401; except that for mobile range housing for sheepherders, the housing shall meet existing Departmental guidelines.

[45 FR 14182, Mar. 4, 1980; 45 FR 22901, Apr. 4, 1980]

§ 654.401 Applicability; transitional provisions.

(a) Employers whose housing was constructed in accordance with the ETA housing standards may continue to follow the full set of ETA standards set forth in this subpart only where prior to April 3, 1980 the housing was completed or under construction, or where prior to March 4, 1980 a contract for the construction of the specific housing was signed.

(b) To effectuate these transitional provisions, agricultural housing to which this subpart applies and which complies with the full set of standards set forth in this subpart shall be considered to be in compliance with the Occupational Safety and Health Administration temporary labor camp standards at 29 CFR 1910.142.

§ 654.402 Variances.

(a) An employer may apply for a permanent, structural variance from a specific standard(s) in this subpart by filing a written application for such a variance with the local Job Service office serving the area in which the housing is located. This application must be filed by June 2, 1980 and must:

(1) Clearly specify the standard(s) from which the variance is desired;

(2) Provide adequate justification that the variance is necessary to obtain a beneficial use of an existing facility, and to prevent a practical difficulty or unnecessary hardship; and

(3) Clearly set forth the specific alternative measures which the employer has taken to protect the health and safety of workers and adequately show that such alternative measures have achieved the same result as the standard(s) from which the employer desires the variance.

(b) Upon receipt of a written request for a variance under paragraph (a) of this section, the local Job Service office shall send the request to the State office which, in turn, shall forward it to the Regional Administrator, Employment and Training Administration (RA). The RA shall review the matter and, after consultation with OSHA, shall either grant or deny the request for a variance.

(c) The variance granted by the RA shall be in writing, shall state the particular standard(s) involved, and shall state as conditions of the variance the specific alternative measures which have been taken to protect the health and safety of the workers. The RA shall send the approved variance to the employer and shall send copies to the Regional Administrator of the Occupational Safety and Health Administration, the Regional Administrator of the Employment Standards Administration, and the appropriate State agency and the local Job Service office. The employer shall submit and the local Job Service office shall attach copies of the approved variance to each of the employer's job orders which is placed into intrastate or interstate clearance.

(d) If the RA denies the request for a variance, the RA shall provide written notice stating the reasons for the denial to the employer, the appropriate State agency and the local Job Service office. The notice shall also offer the employer an opportunity to request a hearing before a DOL Hearing Officer, provided the employer requests such a hearing from the RA within 30 calendar days of the date of the notice. The request for a hearing shall be handled in accordance with the employment service complaint procedures set forth at §§ 658.421 (i) and (j), 658.422 and 658.423 of this chapter.

(e) The procedures of paragraphs (a) through (d) of this section shall only apply to an employer who has chosen, as evidenced by its written request for a variance, to comply with the ETA housing standards at §§ 654.404—654.417 of this subpart.

§ 654.403 Conditional access to the intrastate or interstate clearance system.

(a) *Filing requests for conditional access*—(1) *''Noncriteria'' employers.* Except as provided in paragraph (a)(2) of

this section, an employer whose housing does not meet applicable standards may file with the local Job Service office serving the area in which its housing is located, a written request that its job orders be conditionally allowed into the intrastate or interstate clearance system, provided that the employer's request assures that its housing will be in full compliance with the requirements of the applicable housing standards at least 20 calendar days (giving the specific date) before the housing is to be occupied.

(2) *''Criteria'' employers.* If the request for conditional access described in paragraph (a)(1) of this section is from an employer filing a job order pursuant to an application for temporary alien agricultural labor certification for H–2A alien agricultural workers or H–2 alien workers under subpart B or subpart C, respectively, of part 655 of this chapter, the request shall be filed with the RA as an attachment to the application for temporary alien agricultural labor certification.

(3) *Assurance.* The employer's request pursuant to paragraphs (a)(1) or (a)(2) of this section shall contain an assurance that the housing will be in full compliance with the applicable housing standards at least 20 calendar days (stating the specific date) before the housing is to be occupied.

(b) *Processing requests*—(1) *State agency processing.* Upon receipt of a written request for conditional access to the intrastate or interstate clearance system under paragraph (a)(1) of this section, the local Job Service office shall send the request to the State office, which, in turn, shall forward it to the Regional Administrator, Employment and Training Administration, (RA).

(2) *Reqional office processing and determination.* Upon receipt of a request for conditional access pursuant to paragraph (a)(2) or paragraph (b)(1) of this section, the RA shall review the matter and, as appropriate, shall either grant or deny the request.

(c) *Authorization.* The authorization for conditional access to the intrastate or interstate clearance system shall be in writing, and shall state that although the housing does not comply with the applicable standards, the employer's job order may be placed into intrastate or interstate clearance until a specified date. The RA shall send the authorization to the employer and shall send copies to the appropriate State agency and local Job Service office. The employer shall submit and the local Job Service shall attach copies of the authorization to each of the employer's job orders which is placed into intrastate or interstate clearance.

(d) *Notice of denial.* If the RA denies the request for conditional access to the intrastate or interstate clearance system, the RA shall provide written notice to the employer, the appropriate State agency, and the local Job Service office, stating the reasons for the denial.

(e) *Inspection.* (1) The local Job Service office serving the area containing the housing of any employer granted conditional access to the intrastate or interstate clearance system shall assure that the housing is inspected no later than the date by which the employer has promised to have its housing in compliance with the requirements of this subpart. An employer, however, may request an earlier preliminary inspection. If, on the date set forth in the authorization, the housing is not in full compliance with the applicable housing standards as assured in the request for conditional access, the local Job Service office shall afford the employer five calendar days to bring the housing into full compliance. After the five-calendar-day period, if the housing is not in full compliance with the applicable housing standards as assured in the request for conditional access, the local Job Service office immediately:

(i) Shall notify the RA;

(ii) Shall remove the employer's job orders from intrastate and interstate clearance; and

(iii) Shall, if workers have been recruited against these orders, in cooperation with the employment service agencies in other States, make every reasonable attempt to locate and notify the appropriate crew leaders or workers, and to find alternative and comparable employment for the workers.

[52 FR 20506, June 1, 1987, as amended at 64 FR 34965, June 29, 1999]

HOUSING STANDARDS

§ 654.404 Housing site.

(a) Housing sites shall be well drained and free from depressions in which water may stagnate. They shall be located where the disposal of sewage is provided in a manner which neither creates nor is likely to create a nuisance, or a hazard to health.

(b) Housing shall not be subject to, or in proximity to conditions that create or are likely to create offensive odors, flies, noise, traffic, or any similar hazards.

(c) Grounds within the housing site shall be free from debris, noxious plants (poison ivy, etc.) and uncontrolled weeds or brush.

(d) The housing site shall provide a space for recreation reasonably related to the size of the facility and the type of occupancy.

§ 654.405 Water supply.

(a) An adequate and convenient supply of water that meets the standards of the State health authority shall be provided.

(b) A cold water tap shall be available within 100 feet of each individual living unit when water is not provided in the unit. Adequate drainage facilities shall be provided for overflow and spillage.

(c) Common drinking cups shall not be permitted.

§ 654.406 Excreta and liquid waste disposal.

(a) Facilities shall be provided and maintained for effective disposal of excreta and liquid waste. Raw or treated liquid waste shall not be discharged or allowed to accumulate on the ground surface.

(b) Where public sewer systems are available, all facilities for disposal of excreta and liquid wastes shall be connected thereto.

(c) Where public sewers are not available, a subsurface septic tank-seepage system or other type of liquid waste treatment and disposal system, privies or portable toilets shall be provided. Any requirements of the State health authority shall be complied with.

§ 654.407 Housing.

(a) Housing shall be structurally sound, in good repair, in a sanitary condition and shall provide protection to the occupants against the elements.

(b) Housing shall have flooring constructed of rigid materials, smooth finished, readily cleanable, and so located as to prevent the entrance of ground and surface water.

(c) The following space requirements shall be provided:

(1) For sleeping purposes only in family units and in dormitory accommodations using single beds, not less than 50 square feet of floor space per occupant;

(2) For sleeping purposes in dormitory accommodations using double bunk beds only, not less than 40 square feet per occupant;

(3) For combined cooking, eating, and sleeping purposes not less than 60 square feet of floor space per occupant.

(d) Housing used for families with one or more children over 6 years of age shall have a room or partitioned sleeping area for the husband and wife. The partition shall be of rigid materials and installed so as to provide reasonable privacy.

(e) Separate sleeping accommodations shall be provided for each sex or each family.

(f) Adequate and separate arrangements for hanging clothing and storing personal effects for each person or family shall be provided.

(g) At least one-half of the floor area in each living unit shall have a minimum ceiling height of 7 feet. No floor space shall be counted toward minimum requirements where the ceiling height is less than 5 feet.

(h) Each habitable room (not including partitioned areas) shall have at least one windown or skylight opening directly to the out-of-doors. The minimum total window or skylight area, including windows in doors, shall equal at least 10 percent of the usable floor area. The total openable area shall equal at least 45 percent of the minimum window or skylight area required, except where comparably adequate ventilation is supplied by mechanical or some other method.

§ 654.408 Screening.

(a) All outside openings shall be protected with screening of not less than 16 mesh.

(b) All screen doors shall be tight fitting, in good repair, and equipped with self-closing devices.

§ 654.409 Heating.

(a) All living quarters and service rooms shall be provided with properly installed, operable heating equipment capable of maintaining a temperature of at least 68° F. if during the period of normal occupancy the temperature in such quarters falls below 68°.

(b) Any stoves or other sources of heat utilizing combustible fuel shall be installed and vented in such a manner as to prevent fire hazards and a dangerous concentration of gases. No portable heaters other than those operated by electricity shall be provided. If a solid or liquid fuel stove is used in a room with wooden or other combustible flooring, there shall be a concrete slab, insulated metal sheet, or other fireproof material on the floor under each stove, extending at least 18 inches beyond the perimeter of the base of the stove.

(c) Any wall or ceiling within 18 inches of a solid or liquid fuel stove or a stovepipe shall be of fireproof material. A vented metal collar shall be installed around a stovepipe, or vent passing through a wall, ceiling, floor or roof.

(d) When a heating system has automatic controls, the controls shall be of the type which cut off the fuel supply upon the failure or interruption of the flame or ignition, or whenever a predetermined safe temperature or pressure is exceeded.

[45 FR 14182, Mar. 4, 1980; 45 FR 22901, Apr. 4, 1980]

§ 654.410 Electricity and lighting.

(a) All housing sites shall be provided with electric service.

(b) Each habitable room and all common use rooms, and areas such as: Laundry rooms, toilets, privies, hallways, stairways, etc., shall contain adequate ceiling or wall-type light fixtures. At least one wall-type electrical convenience outlet shall be provided in each individual living room.

(c) Adequate lighting shall be provided for the yard area, and pathways to common use facilities.

(d) All wiring and lighting fixtures shall be installed and maintained in a safe condition.

§ 654.411 Toilets.

(a) Toilets shall be constructed, located and maintained so as to prevent any nuisance or public health hazard.

(b) Water closets or privy seats for each sex shall be in the ratio of not less than one such unit for each 15 occupants, with a minimum of one unit for each sex in common use facilities.

(c) Urinals, constructed of nonabsorbent materials, may be substituted for men's toilet seats on the basis of one urinal or 24 inches of trough-type urinal for one toilet seat up to a maximum of one-third of the required toilet seats.

(d) Except in individual family units, separate toilet accommodations for men and women shall be provided. If toilet facilities for men and women are in the same building, they shall be separated by a solid wall from floor to roof or ceiling. Toilets shall be distinctly marked ''men'' and ''women'' in English and in the native language of the persons expected to occupy the housing.

(e) Where common use toilet facilities are provided, an adequate and accessible supply of toilet tissue, with holders, shall be furnished.

(f) Common use toilets and privies shall be well lighted and ventilated and shall be clean and sanitary.

(g) Toilet facilities shall be located within 200 feet of each living unit.

(h) Privies shall not be located closer than 50 feet from any living unit or any facility where food is prepared or served.

(i) Privy structures and pits shall be fly tight. Privy pits shall have adequate capacity for the required seats.

§ 654.412 Bathing, laundry, and handwashing.

(a) Bathing and handwashing facilities, supplied with hot and cold water under pressure, shall be provided for

the use of all occupants. These facilities shall be clean and sanitary and located within 200 feet of each living unit.

(b) There shall be a minimum of 1 showerhead per 15 persons. Showerheads shall be spaced at least 3 feet apart, with a minimum of 9 square feet of floor space per unit. Adequate, dry dressing space shall be provided in common use facilities. Shower floors shall be constructed of nonabsorbent nonskid materials and sloped to properly constructed floor drains. Except in individual family units, separate shower facilities shall be provided each sex. When common use shower facilities for both sexes are in the same building they shall be separated by a solid nonabsorbent wall extending from the floor to ceiling, or roof, and shall be plainly designated ''men'' or ''women'' in English and in the native language of the persons expected to occupy the housing.

(c) Lavatories or equivalent units shall be provided in a ratio of 1 per 15 persons.

(d) Laundry facilities, supplied with hot and cold water under pressure, shall be provided for the use of all occupants. Laundry trays or tubs shall be provided in the ratio of 1 per 25 persons. Mechanical washers may be provided in the ratio of 1 per 50 persons in lieu of laundry trays, although a minimum of 1 laundry tray per 100 persons shall be provided in addition to the mechanical washers.

§ 654.413 Cooking and eating facilities.

(a) When workers or their families are permitted or required to cook in their individual unit, a space shall be provided and equipped for cooking and eating. Such space shall be provided with:

(1) A cookstove or hot plate with a minimum of two burners; and (2) adequate food storage shelves and a counter for food preparation; and (3) provisions for mechanical refrigeration of food at a temperature of not more than 45° F.; and (4) a table and chairs or equivalent seating and eating arrangements, all commensurate with the capacity of the unit; and (5) adequate lighting and ventilation.

(b) When workers or their families are permitted or required to cook and eat in a common facility, a room or building separate from the sleeping facilities shall be provided for cooking and eating. Such room or building shall be provided with:

(1) Stoves or hot plates, with a minimum equivalent of two burners, in a ratio of 1 stove or hot plate to 10 persons, or 1 stove or hot plate to 2 families; and (2) adequate food storage shelves and a counter for food preparation; and (3) mechanical refrigeration for food at a temperature of not more than 45° F.; and (4) tables and chairs or equivalent seating adequate for the intended use of the facility; and (5) adequate sinks with hot and cold water under pressure; and (6) adequate lighting and ventilation; and (7) floors shall be of nonabsorbent, easily cleaned materials.

(c) When central mess facilities are provided, the kitchen and mess hall shall be in proper proportion to the capacity of the housing and shall be separate from the sleeping quarters. The physical facilities, equipment and operation shall be in accordance with provisions of applicable State codes.

(d) Wall surface adjacent to all food preparation and cooking areas shall be of nonabsorbent, easily cleaned material. In addition, the wall surface adjacent to cooking areas shall be of fire-resistant material.

§ 654.414 Garbage and other refuse.

(a) Durable, fly-tight, clean containers in good condition of a minimum capacity of 20 gallons, shall be provided adjacent to each housing unit for the storage of garbage and other refuse. Such containers shall be provided in a minimum ratio of 1 per 15 persons.

(b) Provisions shall be made for collection of refuse at least twice a week, or more often if necessary. The disposal of refuse, which includes garbage, shall be in accordance with State and local law.

§ 654.415 Insect and rodent control.

Housing and facilities shall be free of insects, rodents, and other vermin.

§ 654.416 Sleeping facilities.

(a) Sleeping facilities shall be provided for each person. Such facilities shall consist of comfortable beds, cots, or bunks, provided with clean mattresses.

(b) Any bedding provided by the housing operator shall be clean and sanitary.

(c) Triple deck bunks shall not be provided.

(d) The clear space above the top of the lower mattress of a double deck bunk and the bottom of the upper bunk shall be a minimum of 27 inches. The distance from the top of the upper mattress to the ceiling shall be a minimum of 36 inches.

(e) Beds used for double occupancy may be provided only in family accommodations.

§ 654.417 Fire, safety, and first aid.

(a) All buildings in which people sleep or eat shall be constructed and maintained in accordance with applicable State or local fire and safety laws.

(b) In family housing and housing units for less than 10 persons, of one story construction, two means of escape shall be provided. One of the two required means of escape may be a readily accessible window with an openable space of not less than 24 x 24 inches.

(c) All sleeping quarters intended for use by 10 or more persons, central dining facilities, and common assembly rooms shall have at least two doors remotely separated so as to provide alternate means of escape to the outside or to an interior hall.

(d) Sleeping quarters and common assembly rooms on the second story shall have a stairway, and a permanent, affixed exterior ladder or a second stairway.

(e) Sleeping and common assembly rooms located above the second story shall comply with the State and local fire and building codes relative to multiple story dwellings.

(f) Fire extinguishing equipment shall be provided in a readily accessible place located not more than 100 feet from each housing unit. Such equipment shall provide protection equal to a 2½ gallon stored pressure or 5-gallon pump-type water extinguisher.

(g) First aid facilities shall be provided and readily accessible for use at all time. Such facilities shall be equivalent to the 16 unit first aid kit recommended by the American Red Cross, and provided in a ratio of 1 per 50 persons.

(h) No flammable or volatile liquids or materials shall be stored in or adjacent to rooms used for living purposes, except for those needed for current household use.

(i) Agricultural pesticides and toxic chemicals shall not be stored in the housing area.

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AUTHORITY: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H) (i) and (ii), 1182 (m) and (n), 1184, 1188, and 1288 (c) and (d); 29 U.S.C. 49 *et seq.;* sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); Pub. L. 103–206, 107 Stat 2419; and 8 CFR 214.2(h)(4)(i).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184, and 1188; 29 U.S.C. 49 *et seq.;* and 8 CFR 214.2(h)(4)(i).

Subparts A and C issued under 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184; 29 U.S.C. 49 *et seq.;* and 8 CFR 214.2(h)(4)(i).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184, and 1188; and 29 U.S.C. 49 *et seq.*

Subparts D and E issued under 8 U.S.C. 1101(a)(15)(H)(i)(a), 1182(m), and 1184; 29 U.S.C. 49 *et seq.;* and sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note).

Subparts F and G issued under 8 U.S.C. 1184 and 1288 (c) and (d); 29 U.S.C. 49 *et seq.*; and Pub. L. 103–206, 107 Stat 2419.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184; 29 U.S.C. 49 *et seq.;* and sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1182 note).

Subparts J and K issued under 29 U.S.C. 49 *et seq.;* and sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

SOURCE: 42 FR 45899, Sept. 13, 1977, unless otherwise noted.

§ 655.0 Scope and purpose of part.

(a) *Subparts A, B, and C.* (1) *General.* Subparts A, B, and C of this part set out the procedures adopted by the Secretary to secure information sufficient to make factual determinations of: (i) Whether U.S. workers are available to perform temporary employment in the United States, for which an employer desires to employ nonimmigrant foreign workers, and (ii) whether the employment of aliens for such temporary work will adversely affect the wages or working conditions of similarly employed U.S. workers. These factual determinations (or a determination that there are not sufficient facts to make one or both of these determinations) are required to carry out the policies of the Immigration and Nationality Act (INA), that a nonimmigrant alien worker not be admitted to fill a particular temporary job opportunity unless no qualifed U.S. worker is available to fill the job opportunity, and unless the employment of the foreign worker in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers.

(a)(2) *The Secretary's determinations.* Before any factual determination can be made concerning the availability of U.S. workers to perform particular job opportunities, two steps must be taken. First, the minimum level of wages, terms, benefits, and conditions for the particular job opportunities, below which similarly employed U.S. workers would be adversely affected, must be established. (The regulations in this part establish such minimum levels for wages, terms, benefits, and conditions of employment.) Second, the wages, terms, benefits, and conditions offered and afforded to the aliens must be compared to the established minimum levels. If it is concluded that adverse effect would result, the ultimate determination of availability within the meaning of the INA cannot be made since U.S. workers cannot be expected to accept employment under conditions below the established minimum levels. *Florida Sugar Cane League, Inc.* v. *Usery,* 531 F. 2d 299 (5th Cir. 1976).

Once a determination of no adverse effect has been made, the availability of U.S. workers can be tested only if U.S. workers are actively recruited through the offer of wages, terms, benefits, and conditions at least at the minimum level or the level offered to the aliens, whichever is higher. The regulations in this part set forth requirements for recruiting U.S. workers in accordance with this principle.

(a)(3) *Construction.* This part and its subparts shall be construed to effectuate the purpose of the INA that U.S. workers rather than aliens be employed wherever possible. *Elton Orchards, Inc.* v. *Brennan,* 508 F. 2d 493, 500 (1st Cir. 1974), *Flecha* v. *Quiros,* 567 F. 2d 1154 (1st Cir. 1977). Where temporary alien workers are admitted, the terms and conditions of their employment

must not result in a lowering of the terms and conditions of domestic workers similarly employed, *Williams* v. *Usery*, 531 F. 2d 305 (5th Cir. 1976); *Florida Sugar Cane League, Inc.* v. *Usery*, 531 F. 2d 299 (5th Cir. 1976), and the job benefits extended to any U.S. workers shall be at least those extended to the alien workers.

(b) *Subparts D and E.* Subparts D and E of this part set forth the process by which health care facilities can file attestations with the Department of Labor for the purpose of employing or otherwise using nonimmigrant registered nurses under H–1A visas.

(c) *Subparts F and G.* Subparts F and G of this part set forth the process by which employers can file attestations with the Department of Labor for the purpose of employing alien crewmembers in longshore work under D-visas and enforcement provisions relating thereto.

(d) *Subparts H and I of this part.* Subparts H and I of this part set forth the process by which employers can file with, and the requirements for obtaining approval from, the Department of Labor of labor condition applications necessary for the purpose of petitioning INS for H–1B visas for aliens to be employed in specialty occupations or as fashion models of distinguished merit and ability, and the enforcement provisions relating thereto.

(e) *Subparts J and K of this part.* Subparts J and K of this part set forth the process by which employers can file attestations with the Department of Labor for the purpose of employing nonimmigrant alien students on F-visas in off-campus employment and enforcement provisions relating thereto.

[43 FR 10312, Mar. 10, 1978, as amended at 52 FR 20507, June 1, 1987; 55 FR 50510, Dec. 6, 1990; 56 FR 24667, May 30, 1991; 56 FR 54738, Oct. 22, 1991; 56 FR 56875, Nov. 6, 1991; 57 FR 1337, Jan. 13, 1992; 57 FR 40989, Sept. 8, 1992]

§ 655.00 Authority of the Regional Administrator under subparts A, B, and C.

Pursuant to the regulations under this part, temporary labor certification determinations under subparts A, B, and C of this part are ordinarily made by the Regional Administrator of an Employment and Training Administration region. The Director, however, may direct that certain types of applications or certain applications shall be handled by, and the determinations made by, the United States Employment Service (USES) in Washington, DC. In those cases the Regional Administrator will informally advise the employer or agent of the name of the official who will make determinations with respect to the application.

[43 FR 10313, Mar. 10, 1978, as amended at 52 FR 20507, June 1, 1987; 55 FR 50510, Dec. 6, 1990]

Subpart A—Labor Certification Process for Temporary Employment in Occupations Other Than Agriculture, Logging, or Registered Nursing in the United States (H–2B Workers)

§ 655.1 Scope and purpose of subpart A.

This subpart sets forth the procedures governing the labor certification process for the temporary employment of nonimmigrant aliens in the United States in occupations other than agriculture, logging, or registered nursing.

[55 FR 50510, Dec. 6, 1990]

§ 655.2 Applications.

Application forms for certification of temporary employment of nonimmigrant aliens may be obtained from and should be filed in duplicate with the local office of the State employment service serving the area of proposed employment.

(Approved by the Office of Management and Budget under control number 1205–0015)

(Pub. L. No. 96–511)

[33 FR 7570, May 22, 1968, as amended at 49 FR 18295, Apr. 30, 1984. Redesignated and amended at 55 FR 50510, Dec. 6, 1990]

§ 655.3 Determinations.

(a) When received, applications for certification shall be forwarded by the local office of the State employment service to the appropriate Regional Administrator, Employment and Training Administration, who will issue them if he or she finds that qualified persons in

the United States are not available and that the terms of employment will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(b) In making this finding, such matter as the employer's attempts to recruit workers and the appropriateness of the wages and working conditions offered, will be considered. The policies of the United States Employment Service set forth in part 652 of this chapter and subparts B and C of this part shall be followed in making the findings.

(c) In any case in which the Regional Administrator, Employment and Training Administration, determines after examination of all the pertinent facts before him or her that certification should not be issued, he or she shall promptly so notify the employer requesting the certification. Such notification shall contain a statement of the reasons on which the refusal to issue a certification is based.

(d) The certification or notice of denial thereof is to be used by the employer to support its visa petition, filed with the District Director of the Immigration and Naturalization Service.

[33 FR 7570, May 22, 1968, as amended at 43 FR 10311, Mar. 10, 1978. Redesignated and amended at 55 FR 50510, Dec. 6, 1990]

§ 655.4 Territory of Guam.

Subpart A of this part does not apply to temporary employment in the Territory of Guam, and the Department of Labor does not certify to the Immigration and Naturalization Service (INS) the temporary employment of nonimmigrant aliens under H–2B visas in the Territory of Guam. Pursuant to INS regulations, that function is performed by the Governor of Guam, or the Governor's designated representative within the Territorial Government.

[56 FR 56875, Nov. 6, 1991]

Subpart B—Labor Certification Process for Temporary Agricultural Employment in the United States (H–2A Workers)

SOURCE: 52 FR 20507, June 1, 1987, unless otherwise noted.

§ 655.90 Scope and purpose of subpart B.

(a) *General.* This subpart sets out the procedures established by the Secretary of Labor to acquire information sufficient to make factual determinations of: (1) Whether there are sufficient able, willing, and qualified U.S. workers available to perform the temporary and seasonal agricultural employment for which an employer desires to import nonimmigrant foreign workers (H–2A workers); and (2) whether the employment of H–2A workers will adversely effect the wages and working conditions of workers in the U.S. similarly employed. Under the authority of the INA, the Secretary of Labor has promulgated the regulations in this subpart. This subpart sets forth the requirements and procedures applicable to requests for certification by employers seeking the services of temporary foreign workers in agriculture. This subpart provides the Secretary's methodology for the two-fold determination of availability of domestic workers and of any adverse effect which would be occasioned by the use of foreign workers, for particular temporary and seasonal agricultural jobs in the United States.

(b) *The statutory standard.* (1) A petitioner for H–2A workers must apply to the Secretary of Labor for a certification that, as stated in the INA:

(A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

(B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(2) Section 216(b) of the INA further requires that the Secretary may not issue a certification if the conditions regarding U.S. worker availability and adverse effect are not met, and may not issue a certification if, as stated in the INA:

(1) There is a strike or lockout in the course of a labor dispute which, under the regulations, precludes such certification.

(2)(A) The employer during the previous two-year period employed H–2A workers and the Secretary has determined, after notice

and opportunity for a hearing, that the employer at any time during that period substantially violated a material term or condition of the labor certification with respect to the employment of domestic or non-immigrant workers.

(B) No employer may be denied certification under subparagraph (A) for more than three years for any violation described in such subparagraph.

(3) The employer has not provided the Secretary with satisfactory assurances that if the employment for which the certification is sought is not covered by State workers' compensation law, the employer will provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment.

(4) The Secretary determines that the employer has not made positive recruitment efforts within a multistate region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed. Positive recruitment under this paragraph is in addition to, and shall be conducted within the same time period as, the circulation through the interstate employment service system of the employer's job offer. The obligation to engage in positive recruitment . . . shall terminate on the date the H–2A workers depart for the employer's place of employment.

(3) Regarding the labor certification determination itself, section 216(c)(3) of the INA, as quoted in the following, specifically directs the Secretary to make the certification if:

(i) the employer has complied with the criteria for certification (including criteria for the recruitment of eligible individuals as prescribed by the Secretary), and

(ii) the employer does not actually have, or has not been provided with referrals of, qualified individuals who have indicated their availability to perform such labor or services on the terms and conditions of a job offer which meets the requirements of the Secretary.

(c) *The Secretary's determinations.* Before any factual determination can be made concerning the availability of U.S. workers to perform particular job opportunities, two steps must be taken. First, the minimum level of wages, terms, benefits, and conditions for the particular job opportunities below which similarly employed U.S. workers would be adversely affected must be established. (The regulations in this subpart establish such minimum levels for wages, terms, benefits, and conditions of employment). Second, the wages, terms, benefits, and conditions offered and afforded to the aliens must be compared to the established minimum levels. If it is concluded that adverse effect would result, the ultimate determination of availability within the meaning of the INA cannot be made since U.S. workers cannot be expected to accept employment under conditions below the established minimum levels. *Florida Sugar Cane League, Inc.* v. *Usery,* 531 F. 2d 299 (5th Cir. 1976). Once a determination of no adverse effect has been made, the availability of U.S. workers can be tested only if U.S. workers are actively recruited through the offer of wages, terms, benefits, and conditions at least at the minimum level or the level offered to the aliens, whichever is higher. The regulations in this subpart set forth requirements for recruiting U.S. workers in accordance with this principle.

(d) *Construction.* This subpart shall be construed to effectuate the purpose of the INA that U.S. workers rather than aliens be employed wherever possible. *Elton Orchards, Inc.* v. *Brennan,* 508 F. 2d 493, 500 (1st Cir. 1974); *Flecha* v. *Quiros,* 567 F.2d 1154, 1156 (1st Cir. 1977). Where temporary alien workers are admitted, the terms and conditions of their employment must not result in a lowering of the wages, terms, and conditions of domestic workers similarly employed. *Williams* v. *Usery,* 531 F. 2d 305, 306 (5th Cir. 1976), *cert. denied,* 429 U.S. 1000, and the job benefits extended to any U.S. workers shall be at least those extended to the alien workers.

§ 655.92 Authority of the Regional Administrator.

Under this subpart, the accepting for consideration and the making of temporary alien agricultural labor certification determinations are ordinarily performed by the Regional Administrator (RA) of an Employment and Training Administration region, who, in turn, may delegate this responsibility to a designated staff member.

The Director of the United States Employment Service, however, may direct that certain types of applications or certain applications shall be handled by, and the determinations made by USES in Washington, DC. In those cases, the RA will informally advise the employer or agent of the name of the official who will make determinations with respect to the application.

§ 655.93 Special circumstances.

(a) *Systematic process.* The regulations under this subpart are designed to provide a systematic process for handling applications from the kinds of employers who have historically utilized nonimmigrant alien workers in agriculture, usually in relation to the production or harvesting of a particular agricultural crop for market, and which normally share such characteristics as:

(1) A fixed-site farm, ranch, or similar establishment;

(2) A need for workers to come to their establishment from other areas to perform services or labor in and around their establishment;

(3) Labor needs which will normally be controlled by environmental conditions, particularly weather and sunshine; and

(4) A reasonably regular workday or workweek.

(b) *Establishment of special procedures.* In order to provide for a limited degree of flexibility in carrying out the Secretary's responsibilities under the INA, while not deviating from the statutory requirements to determine U.S. worker availability and make a determination as to adverse effect, the Director has the authority to establish special procedures for processing H–2A applications when employers can demonstrate upon written application to and consultation with the Director that special procedures are necessary. In a like manner, for work in occupations characterized by other than a reasonably regular workday or workweek, such as the range production of sheep or other livestock, the Director has the authority to establish monthly, weekly, or biweekly adverse effect wage rates for those occupations, for a Statewide or other geographical area, other than the rates established pursuant to § 655.107 of this part, provided that the Director uses a methodology to establish such adverse effect wage rates which is consistent with the methodology in § 655.107(a). Prior to making determinations under this paragraph (b), the Director may consult with employer representatives, appropriate RAs, and worker representatives.

(c) *Construction.* This subpart shall be construed to permit the Director to continue and, where the Director deems appropriate, to revise the special procedures previously in effect for the handling of applications for sheepherders in the Western States (and to adapt such procedures to occupations in the range production of other livestock) and for custom combine crews.

§ 655.100 Overview of this subpart and definition of terms.

(a) *Overview*—(1) *Filing applications.* This subpart provides guidance to an employer who desires to apply for temporary alien agricultural labor certification for the employment of H–2A workers to perform agricultural employment of a temporary or seasonal nature. The regulations in this subpart provide that such employer shall file an H–2A application, including a job offer, on forms prescribed by the Employment and Training Administration (ETA), which describes the material terms and conditions of employment to be offered and afforded to U.S. workers and H–2A workers, with the Regional Administrator (RA) having jurisdiction over the geographical area in which the work will be performed. The entire application shall be filed with the RA no less than 45 calendar days before the first date of need for workers, and a copy of the job offer shall be submitted at the same time to the local office of the State employment service agency which serves the area of intended employment. Under the regulations, the RA will promptly review the application and notify the applicant in writing if there are deficiencies which render the application not acceptable for consideration, and afford the applicant a five-calendar-day period for resubmittal of an amended application or an appeal of the RA's refusal to approve the application as acceptable for consideration. Employers are encouraged

to file their applications in advance of the 45-calendar-day period mentioned above in this paragraph (a)(1). Sufficient time should be allowed for delays that might arise due to the need for amendments in order to make the application acceptable for consideration.

(2) *Amendment of applications.* This subpart provides for the amendment of applications, at any time prior to the RA's certification determination, to increase the number of workers requested in the initial application; without requiring, under certain circumstances, an additional recruitment period for U.S. workers.

(3) *Untimely applications.* If an H–2A application does not satisfy the specified time requirements, this subpart provides for the RA's advice to the employer in writing that the certification cannot be granted because there is not sufficient time to test the availability of U.S. workers; and provides for the employer's right to an administrative review or a *de novo* hearing before an administrative law judge. Emergency situations are provided for, wherein the RA may waive the specified time periods.

(4) *Recruitment of U.S. workers; determinations*—(i) *Recruitment.* This subpart provides that, where the application is accepted for consideration and meets the regulatory standards, the State agency and the employer begin to recruit U.S. workers. If the employer has complied with the criteria for certification, including recruitment of U.S. workers, by 20 calendar days before the date of need specified in the application (except as provided in certain cases), the RA makes a determination to grant or deny, in whole or in part, the application for certification.

(ii) *Granted applications.* This subpart provides that the application for temporary alien agricultural labor certification is granted if the RA finds that the employer has not offered foreign workers higher wages or better working conditions (or has imposed less restrictions on foreign workers) than those offered and afforded to U.S. workers; that sufficient U.S. workers who are able, willing, and qualified will not be available at the time and place needed to perform the work for which H–2A workers are being requested; and that the employment of such aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers.

(iii) *Fees*—(A) *Amount.* This subpart provides that each employer (except joint employer associations) of H–2A workers shall pay to the RA fees for each temporary alien agricultural labor certification received. The fee for each employer receiving a temporary alien agricultural labor certification is $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee to an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. In the case of a joint employer association receiving a temporary alien agricultural labor certification, each employer-member receiving a temporary alien agricultural labor certification shall pay a fee of $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee to an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. The joint employer association will not be charged a separate fee.

(B) *Timeliness of payment.* The fee must be received by the RA no later than 30 calendar days after the granting a each temporary alien agricultural labor certification. Fees received any later are untimely. Failure to pay fees in a timely manner is a substantial violation which may result in the denial of future temporary alien agricultural labor certifications.

(iv) *Denied applications.* This subpart provides that if the application for temporary alien agricultural labor certification is denied, in whole or in part, the employer may seek review of the denial, or a *de novo* hearing, by an administrative law judge as provided in this subpart.

(b) *Definitions of terms used in this subpart.* For the purposes of this subpart:

Accept for consideration means, with respect to an application for temporary alien agricultural labor certification, the action by the RA to notify the employer that a filed temporary alien agricultural labor certification application meets the adverse effect criteria

necessary for processing. An application accepted for consideration ultimately will be approved or denied in a temporary alien agricultural labor certification determination.

Administrative law judge means a person within the Department of Labor Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105; or a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by part 656 of this chapter, but which shall hear and decide appeals as set forth in § 655.112 of this part. ''Chief Administrative Law Judge'' means the chief official of the Department of Labor Office of Administrative Law Judges or the Chief Administrative Law Judge's designee.

Adverse effect wage rate (AEWR) means the wage rate which the Director has determined must be offered and paid, as a minimum, to every H–2A worker and every U.S. worker for a particular occupation and/or area in which an employer employs or seeks to employ an H–2A worker so that the wages of similarly employed U.S. workers will not be adversely affected.

Agent means a legal entity or person, such as an association of agricultural employers, or an attorney for an association, which (1) is authorized to act on behalf of the employer for temporary alien agricultural labor certification purposes, and (2) is not itself an employer, or a joint employer, as defined in this paragraph (b).

Director means the chief official of the United States Employment Service (USES) or the Director's designee.

DOL means the United States Department of Labor.

Eligible worker means a *U.S. worker*, as defined in this section.

Employer means a person, firm, corporation or other association or organization which suffers or permits a person to work and (1) which has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ workers at a place within the United States and (2) which has an employer relationship with respect to employees under this subpart as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee. An association of employers shall be considered the sole employer if it has the indicia of an employer set forth in this definition. Such an association, however, shall be considered as a joint employer with an employer member if it shares with the employer member one or more of the definitional indicia.

Employment Service (ES) and *Employment Service (ES) System* mean, collectively, the USES, the State agencies, the local offices, and the ETA regional offices.

Employment Standards Administration means the agency within the Department of Labor (DOL), which includes the Wage and Hour Division, and which is charged with the carrying out of certain functions of the Secretary under the INA.

Employment and Training Administration (ETA) means the agency within the Department of Labor (DOL) which includes the United States Employment Service (USES).

Federal holiday means a legal public holiday as defined at 5 U.S.C. 6103.

H–2A worker means any nonimmigrant alien admitted to the United States for agricultural labor or services of a temporary or seasonal nature under section 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)).

Immigration and Naturalization Service (INS) means the component of the U.S. Department of Justice which makes the determination under the INA on whether or not to grant visa petitions to employers seeking H–2A workers to perform temporary agricultural work in the United States.

INA means the Immigration and Nationality Act, as amended (8 U.S.C. 1101 *et seq.*).

Job offer means the offer made by an employer or potential employer of H–2A workers to both U.S. and H–2A workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

Job opportunity means a job opening for temporary, full-time employment at a place in the United States to which U.S. workers can be referred.

Local office means the State agency's office which serves a particular geographic area within a State.

Positive recruitment means the active participation of an employer or its authorized hiring agent in locating and interviewing applicants in other potential labor supply areas and in the area where the employer's establishment is located in an effort to fill specific job openings with U.S. workers.

Prevailing means, with respect to certain benefits other than wages provided by employers and certain practices engaged in by employers, that:

(i) Fifty percent or more of employers in an area and for an occupation engage in the practice or offer the benefit; and

(ii) This 50 percent or more of employers also employs 50 percent or more of U.S. workers in the occupation and area (including H–2A and non-H–2A employers for purposes of determinations concerning the provision of family housing, frequency of wage payments, and workers supplying their own bedding, but non-H–2A employers only for determinations concerning the provision of advance transportation and the utilization of farm labor contractors).

Regional Administrator, Employment and Training Administration (RA) means the chief ETA official of a DOL regional offfice or the RA's designee.

Secretary means the Secretary of Labor or the Secretary's designee.

Solicitor of Labor means the Solicitor, United States Department of Labor, and includes employees of the Office of the Solicitor of Labor designated by the Solicitor to perform functions of the Solicitor under this subpart.

State agency means the State employment service agency designated under §4 of the Wagner-Peyser Act to cooperate with the USES in the operation of the ES System.

Temporary alien agricultural labor certification means the certification made by the Secretary of Labor with respect to an employer seeking to file with INS a visa petition to import an alien as an H–2A worker, pursuant to sections 101(a)(15)(H)(ii)(a), 214(a) and (c), and 216 of the INA that (1) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the agricultural labor or services involved in the petition, and (2) the employment of the alien in such agricultural labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed (8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184 (a) and (c), and 1186).

Temporary alien agricultural labor certification determination means the written determination made by the RA to approve or deny, in whole or in part, an application for temporary alien agricultural labor certification.

United States Employment Service (USES) means the agency of the U.S. Department of Labor, established under the Wagner-Peyser Act, which is charged with administering the national system of public employment offices and carrying out certain functions of the Secretary under the INA.

United States (U.S.) worker means any worker who, whether a U.S. national, a U.S. citizen, or an alien, is legally permitted to work in the job opportunity within the United States (as defined at §101(a)(38) of the INA (8 U.S.C. 1101(a)(38)).

Wages means all forms of cash remuneration to a worker by an employer in payment for personal services.

(c) *Definition of agricultural labor or services of a temporary or seasonal nature.* For the purposes of this subpart, ''agricultural labor or services of a temporary or seasonal nature'' means the following:

(1) *''Agricultural labor or services''.* Pursuant to section 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)), ''agricultural labor or services'' is defined for the purposes of this subpart as either ''agricultural labor'' as defined and applied in section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)) or ''agriculture'' as defined and applied in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)). An occupation included in either statutory definition shall be ''agricultural labor or services'', notwithstanding the exclusion of that occupation from the other statutory definition. For informational purposes, the statutory provisions are quoted below:

(i) *''Agricultural labor''.* Section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)), quoted as follows, defines the term ''agricultural labor'' to include all service performed:

(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife;

(2) Services performed in the employ of the owner or tenant or other operator of a farm, in connection with the operation, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(3) In connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. 1141j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(4) (A) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(B) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in subparagraph (A), but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this subparagraph, any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar quarter in which such service is performed;

(C) The provisions of subparagraphs (A) and (B) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(5) On a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

As used in this subsection, the term ''farm'' includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(ii) *''Agriculture''* Section 203(f) of title 29, United States Code, (section 3(f) of the Fair Labor Standards Act of 1938, as codified), quoted as follows, defines ''agriculture'' to include:

(f) * * * farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities as defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(iii) *''Agricultural commodity''.* Section 1141j(g) of title 12, United States Code, (section 15(g) of the Agricultural Marketing Act, as amended), quoted as follows, defines ''agricultural commodity'' to include:

(g) * * * in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: Gum spirits of turpentine, and gum rosin, as defined in section 92 of Title 7.

(iv) *''Gum rosin''.* Section 92 of title 7, United States Code, quoted as follows, defines ''gum spirits of turpentine'' and ''gum rosin'' as—

(c) ''Gum spirits of turpentine'' means spirits of turpentine made from gum (oleoresin) from a living tree.

* * * * *

(h) ''Gum rosin'' means rosin remaining after the distillation of gum spirits of turpentine.

(2) *''Of a temporary or seasonal nature''*—(i) *''On a seasonal or other temporary basis''.* For the purposes of this subpart, ''of a temporary or seasonal nature'' means ''on a seasonal or other temporary basis'', as defined in the

Employment Standards Administration's Wage and Hour Division's regulation at 29 CFR 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

(ii) *MSPA definition.* For informational purposes, the definition of ''on a seasonal or other temporary basis'', as set forth at 29 CFR 500.20, is provided below:

''On a seasonal or other temporary basis'' means:

* * * * *

Labor is performed on a seasonal basis, where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.

* * * * *

A worker is employed on ''other temporary basis'' where he is employed for a limited time only or his performance is contemplated for a particular piece of work, usually of short duration. Generally, employment, which is contemplated to continue indefinitely, is not temporary.

* * * * *

''On a seasonal or other temporary basis'' does not include the employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis.

* * * * *

''On a seasonal or other temporary basis'' does not include the employment of any worker who is living at his permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his employer and is not primarily employed to do field work.

(iii) ''*Temporary*''. For the purposes of this subpart, the definition of ''temporary'' in paragraph (c)(2)(ii) of this section refers to any job opportunity covered by this subpart where the employer needs a worker for a position, either temporary or permanent, for a limited period of time, which shall be for less than one year, unless the original temporary alien agricultural labor certification is extended based on unforeseen circumstances, pursuant to § 655.106(c)(3) of this part.

[52 FR 20507, June 1, 1987, as amended at 57 FR 43123, Sept. 17, 1992; 64 FR 34966, June 29, 1999]

§ 655.101 Temporary alien agricultural labor certification applications.

(a) *General*—(1) *Filing of application.* An employer who anticipates a shortage of U.S. workers needed to perform agricultural labor or services of a temporary or seasonal nature may apply to the RA in whose region the area of intended employment is located, for a temporary alien agricultural labor certification for temporary foreign workers (H–2A workers). A signed application for temporary alien agricultural worker certification shall be filed by the employer, or by an agent of the employer, with the RA. At the same time, a duplicate application shall be submitted to the local office serving the area of intended employment.

(2) *Applications filed by agents.* If the temporary alien agricultural labor certification application is filed by an agent on behalf of an employer, the agent may sign the application if the application is accompanied by a signed statement from the employer which authorizes the agent to act on the employer's behalf. The employer may authorize the agent to accept for interview workers being referred to the job and to make hiring commitments on behalf of the employer. The statement shall specify that the employer assumes full responsibility for the accuracy of the application, for all representations made by the agent on the employer's behalf, and for compliance with all regulatory and other legal requirements.

(3) *Applications filed by associations.* If an association of agricultural producers which uses agricultural labor or services files the application, the association shall identify whether it is: (i)

The sole employer; (ii) a joint employer with its employer-member employers; or (iii) the agent of its employer-members. The association shall submit documentation sufficient to enable the RA to verify the employer or agency status of the association; and shall identify by name and address each member which will be an employer of H–2A workers.

(b) *Application form.* Each H–2A application shall be on a form or forms prescribed by ETA. The application shall state the total number of workers the employer anticipates employing in the agricultural labor or service activity during the covered period of employment. The application shall include:

(1) A copy of the job offer which will be used by each employer for the recruitment of U.S. and H–2A workers. The job offer shall state the number of workers needed by the employer, based upon the employer's anticipation of a shortage of U.S. workers needed to perform the agricultural labor or services, and the specific estimated date on which the workers are needed. The job offer shall comply with the requirements of §§ 655.102 and 653.501 of this chapter, and shall be signed by the employer or the employer's agent on behalf of the employer; and

(2) An agreement to abide by the assurances required by § 655.103 of this part.

(c) *Timeliness.* Applications for temporary alien agricultural labor certification are not required to be filed more than 45 calendar days before the first day of need. The employer shall be notified by the RA in writing within seven calendar days of filing the application if the application is not approved as acceptable for consideration. The RA's temporary alien agricultural labor certification determination on the approved application shall be made no later than 20 calendar days before the date of need if the employer has complied with the criteria for certification. To allow for the availability of U.S. workers to be tested, the following process applies:

(1) *Application filing date.* The entire H–2A application, including the job offer, shall be filed with the RA, in duplicate, no less than 45 calendar days before the first date on which the employer estimates that the workers are needed. Applications may be filed in person; may be mailed to the RA (Attention: H–2A Certifying Officer) by certified mail, return receipt requested; or delivered by guaranteed commercial delivery which will ensure delivery to the RA and provide the employer with a documented acknowledgment of receipt of the application by the RA. Any application received 45 calendar days before the date of need will have met the minimum timeliness of filing requirement as long as the application is eventually approved by the RA as being acceptable for processing.

(2) *Review of application; recruitment; certification determination period.* Section 655.104 of this part requires the RA to promptly review the application, and to notify the applicant in writing within seven calendar days of any deficiencies which render the application not acceptable for consideration and to afford an opportunity for resubmittal of an amended application. The employer shall have five calendar days in which to file an amended application. Section 655.106 of this part requires the RA to grant or deny the temporary alien agricultural labor certification application no later than 20 calendar days before the date on which the workers are needed, provided that the employer has complied with the criteria for certification, including recruitment of eligible individuals. Such recruitment, for the employer, the State agencies, and DOL to attempt to locate U.S. workers locally and through the circulation of intrastate and interstate agricultural clearance job orders acceptable under § 653.501 of this chapter and under this subpart, shall begin on the date that an acceptable application is filed, except that the local office shall begin to recruit workers locally beginning on the date it first receives the application. The time needed to obtain an application acceptable for consideration (including the job offer) after the five-calendar-day period allowed for an amended application will postpone day-for-day the certification determination beyond the 20 calendar days before the date of need, provided that the RA notifies the applicant of any deficiencies within seven calendar days after receipt of the

application. Delays in obtaining an application acceptable for consideration which are directly attributable to the RA will not postpone the certification determination beyond the 20 calendar days before the date of need. When an employer resubmits to the RA (with a copy to the local office) an application with modifications required by the RA, and the RA approves the modified application as meeting necessary adverse effect standards, the modified application will not be rejected solely because it now does not meet the 45-calendar-day filing requirement. If an application is approved as being acceptable for processing without need for any amendment within the seven-calendar-day review period after initial filing, recruitment of U.S. workers will be considered to have begun on the date the application was received by the RA; and the RA shall make the temporary alien agricultural labor certification determination required by §655.106 of this part no later than 20 calendar days before the date of need provided that other regulatory conditions are met.

(3) *Early filing.* Employers are encouraged, but not required, to file their applications in advance of the 45-calendar-day minimum period specified in paragraph (c)(1) of this section, to afford more time for review and discussion of the applications and to consider amendments, should they be necessary. This is particularly true for employers submitting H–2A applications for the first time who may not be familiar with the Secretary's requirements for an acceptable application or U.S. worker recruitment. Such employers particularly are encouraged to consult with DOL and local office staff for guidance and assistance well in advance of the minimum 45-calendar-day filing period.

(4) *Local recruitment; preparation of clearance orders.* At the same time the employer files the H–2A application with the RA, a copy of the application shall be submitted to the local office which will use the job offer portion—of the application to prepare a local job order and begin to recruit U.S. workers in the area of intended employment. The local office also shall begin preparing an agricultural clearance order, but such order will not be used to recruit workers in other geographical areas until the employer's H–2A application is accepted for consideration and the clearance order is approved by the RA and the local office is so notified by the RA.

(5) *First-time employers of H–2A workers.* With respect only to those applications filed on or before May 31, 1989, and notwithstanding the time requirements in paragraphs (c)(1) through (c)(4) of this section, under the following circumstances the RA shall make the certification determination required by §655.106 of this part no later than 10 calendar days before the date of need:

(i) The employer would be a first-time employer of H–2A workers (and, prior to June 1, 1987, did not use or apply for certification to use H–2 agricultural workers under the INA as then in effect) and has not previously applied for a temporary alien agricultural labor certification to use H–2A workers;

(ii) The RA, the employer, and the ES System have had a reasonable opportunity to test the availability of U.S. workers under the conditions of a job offer which has been determined to be acceptable by the RA in accordance with the provisions of §§655.102 and 655.103 of this part at least 30 calendar days before the date of need; and

(iii) The RA has determined that the employer has otherwise made good faith efforts to comply with the requirements of this subpart.

(d) *Amendments to application to increase number of workers.* Applications may be amended at any time, prior to an RA certification determination, to increase the number of workers requested in the initial application by not more than 20 percent (50 percent for employers of less than ten workers) without requiring an additional recruitment period for U.S. workers. Requests for increases above the percent prescribed, without additional recruitment, may be approved only when the need for additional workers could not have been foreseen, and that crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period.

(e) *Minor amendments to applications.* Minor technical amendments may be requested by the employer and made to the application and job offer prior to the certification determination if the RA determines they are justified and will have no significant effect upon the RA's ability to make the labor certification determination required by § 655.106 of this part. Amendments described at paragraph (d) of this section are not ''minor technical amendments''.

(f) *Untimely applications*—(1) *Notices of denial.* If an H–2A application, or any part thereof, does not satisfy the time requirements specified in paragraph (c) of this section, and if the exception in paragraph (d) of this section does not apply, the RA may then advise the employer in writing that the certification cannot be granted because, pursuant to paragraph (c) of this section, there is not sufficient time to test the availability of U.S. workers. The notice of denial shall inform the employer of its right to an administrative review or *de novo* hearing before an administrative law judge.

(2) *Emergency situations.* Notwithstanding paragraph (f)(1) of this section, in emergency situations the RA may waive the time period specified in this section on behalf of employers who have not made use of temporary alien agricultural workers (H–2 or H–2A) for the prior year's agricultural season or for any employer which has other good and substantial cause (which may include unforeseen changes in market conditions), provided that the RA has an opportunity to obtain sufficient labor market information on an expedited basis to make the labor certification determination required by § 216 of the INA (8 U.S.C. 1186). In making this determination, the RA will accept information offered by and may consult with representatives of the U.S. Department of Agriculture.

(g) *Length of job opportunity*. The employer shall set forth on the application sufficient information concerning the job opportunity to demonstrate to the RA that the need for the worker is ''of a temporary or seasonal nature'', as defined at § 655.100(c)(2) of this part. Job opportunities of 12 months or more are presumed to be permanent in nature. Therefore, the RA shall not grant a temporary alien agricultural labor certification where the job opportunity has been or would be filled by an H–2A worker for a cumulative period, including temporary alien agricultural labor certifications and extensions, of 12 months or more, except in extraordinary circumstances.

[52 FR 20507, June 1, 1987, as amended at 64 FR 34966, June 29, 1999]

§ 655.102 Contents of job offers.

(a) *Preferential treatment of aliens prohibited.* The employer's job offer to U.S. workers shall offer the U.S. workers no less than the same benefits, wages, and working conditions which the employer is offering, intends to offer, or will provide to H–2A workers. Conversely, no job offer may impose on U.S. workers any restrictions or obligations which will not be imposed on the employer's H–2A workers. This does not relieve the employer from providing to H–2A workers at least the same level of minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(b) *Minimum benefits, wages, and working conditions.* Except when higher benefits, wages or working conditions are required by the provisions of paragraph (a) of this section, DOL has determined that in order to protect similarly employed U.S. workers from adverse effect with respect to benefits, wages, and working conditions, every job offer which must accompany an H–2A application always shall include each of the following minimum benefit, wage, and working condition provisions:

(1) *Housing.* The employer shall provide to those workers who are not reasonably able to return to their residence within the same day housing, without charge to the worker, which may be, at the employer's option, rental or public accommodation type housing.

(i) *Standards for employer-provided housing.* Housing provided by the employer shall meet the full set of DOL Occupational Safety and Health Administration standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404–654.417 of this chapter, whichever are applicable, except as provided for under paragraph (b)(1)(iii)

of this section. Requests by employers, whose housing does not meet the applicable standards, for conditional access to the intrastate or interstate clearance system, shall be processed under the procedures set forth at §654.403 of this chapter.

(ii) *Standards for range housing.* Housing for workers principally engaged in the range production of livestock shall meet standards of the DOL Occupational Safety and Health Administration for such housing. In the absence of such standards, range housing for sheepherders and other workers engaged in the range production of livestock shall meet guidelines issued by ETA.

(iii) *Standards for other habitation.* Rental, public accomodation, or other substantially similar class of habitation must meet local standards for such housing. In the absence of applicable local standards, State standards shall apply. In the absence of applicable local or State standards, Occupational Safety and Health Administration standards at 29 CFR 1910.142 shall apply. Any charges for rental housing shall be paid directly by the employer to the owner or operator of the housing. When such housing is to be supplied by an employer, the employer shall document to the satisfaction of the RA that the housing complies with the local, State, or federal housing standards applicable under this paragraph (b)(1)(iii).

(iv) *Charges for public housing.* If public housing provided for migrant agricultural workers under the auspices of a local, county, or State government is secured by an employer, and use of the public housing unit normally requires charges from migrant workers, such charges shall be paid by the employer directly to the appropriate individual or entity affiliated with the housing's management.

(v) *Deposit charges.* Charges in the form of deposits for bedding or other similar incidentals related to housing shall not be levied upon workers by employers who provide housing for their workers. However, employers may require workers to reimburse them for damage caused to housing by the individual workers found to have been responsible for damage which is not the result of normal wear and tear related to habitation.

(vi) *Family housing.* When it is the prevailing practice in the area of intended employment and the occupation to provide family housing, family housing shall be provided to workers with families who request it.

(2) *Workers' compensation.* The employer shall provide, at no cost to the worker, insurance, under a State workers' compensation law or otherwise, covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law, if any, for comparable employment. The employer shall furnish the name of the insurance carrier and the insurance policy number, or, if appropriate, proof of State law coverage, to the RA prior to the issuance of a labor certification.

(3) *Employer-provided items.* Except as provided below, the employer shall provide, without charge including deposit charge, to the worker all tools, supplies, and equipment required to perform the duties assigned; the employer may charge the worker for reasonable costs related to the worker's refusal or negligent failure to return any property furnished by the employer or due to such worker's willful damage or destruction of such property. Where it is a common practice in the particular area, crop activity and occupation for workers to provide tools and equipment, with or without the employer reimbursing the workers for the cost of providing them, such an arrangement is permissible if approved in advance by the RA.

(4) *Meals.* Where the employer has centralized cooking and eating facilities designed to feed workers, the employer shall provide each worker with three meals a day. When such facilities are not available, the employer either shall provide each worker with three meals a day or shall furnish free and convenient cooking and kitchen facilities to the workers which will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer shall state the charge, if any, to the worker for such

meals. Until a new amount is set pursuant to this paragraph (b)(4), the charge shall not be more than $5.26 per day unless the RA has approved a higher charge pursuant to §655.111 of this part. Each year the charge allowed by this paragraph (b)(4) will be changed by the same percentage as the 12-month percent change in the Consumer Price Index for All Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments shall be effective on the date of their publication by the Director as a notice in the FEDERAL REGISTER.

(5) *Transportation; daily subsistence*—(i) *Transportation to place of employment.* The employer shall advance transportation and subsistence costs (or otherwise provide them) to workers when it is the prevailing practice of non-H–2A agricultural employers in the occupation in the area to do so, or when such benefits are extended to H–2A workers. The amount of the transportation payment shall be no less (and shall not be required to be more) than the most economical and reasonable similar common carrier transportation charges for the distances involved. If the employer has not previously advanced such transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means and if the worker completes 50 percent of the work contract period, the employer shall pay the worker for costs incurred by the worker for transportation and daily subsistence from the place from which the worker has come to work for the employer to the place of employment. The amount of the daily subsistence payment shall be at least as much as the employer will charge the worker for providing the worker with three meals a day during employment. If no charges will be made for meals and free and convenient cooking and kitchen facilities will be provided, the amount of the subsistence payment shall be no less than the amount permitted under paragraph (b)(4) of this section.

(ii) *Transportation from place of employment.* If the worker completes the work contract period, the employer shall provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, came to work for the employer, or, if the worker has contracted with a subsequent employer who has not agreed in that contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the employer shall provide or pay for such expenses; except that, if the worker has contracted for employment with a subsequent employer who, in that contract, has agreed to pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the employer is not required to provide or pay for such expenses.

(iii) *Transportation between living quarters and worksite.* The employer shall provide transportation between the worker's living quarters (*i.e.,* housing provided by the employer pursuant to paragraph (b)(1) of this section) and the employer's worksite without cost to the worker, and such transportation will be in accordance with applicable laws and regulations. This paragraph (b)(5)(iii) is applicable to the transportation of workers eligible for housing, pursuant to paragraph (b)(1) of this section.

(6) *Three-fourths guarantee*—(i) *Offer to worker.* The employer shall guarantee to offer the worker employment for at least three-fourths of the workdays of the total periods during which the work contract and all extensions thereof are in effect, beginning with the first workday after the arrival of the worker at the place of employment and ending on the expiration date specified in the work contract or in its extensions, if any. If the employer affords the U.S. or H–2A worker during the total work contract period less employment than that required under this paragraph (b)(6), the employer shall pay such worker the amount which the worker would have earned had the worker, in fact, worked for the guaranteed number of days. For purposes of this paragraph (b)(6), a workday shall mean the number of hours in a workday as stated in the job order and shall

exclude the worker's Sabbath and federal holidays. An employer shall not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays if each workday did not consist of a full number of hours of work time specified in the job order. The work shall be offered for at least three-fourths of the workdays (that is, 3/4 x (number of days) x (specified hours)). Therefore, if, for example, the contract contains 20 eight-hour workdays, the worker shall be offered employment for 120 hours during the 20 workdays. A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, however, the worker shall not be required to work for more than the number hours specified in the job order for a workday, or on the worker's Sabbath or Federal holidays.

(ii) *Guarantee for piece-rate-paid worker.* If the worker will be paid on a piece rate basis, the employer shall use the worker's average hourly piece rate earnings or the AEWR, whichever is higher, to calculate the amount due under the guarantee.

(iii) *Failure to work.* Any hours which the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to do so pursuant to paragraph (b)(6)(i) of this section and all hours of work actually performed (including voluntary work over 8 hours in a workday or on the worker's Sabbath or federal holidays) may be counted by the employer in calculating whether the period of guaranteed employment has been met.

(iv) *Displaced H–2A worker.* The employer shall not be liable for payment under this paragraph (b)(6) with respect to an H–2A worker whom the RA certifies is displaced because of the employer's compliance with §655.103(e) of this part.

(7) *Records.* (i) The employer shall keep accurate and adequate records with respect to the workers' earnings including field tally records, supporting summary payroll records and records showing the nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee at paragraph (b)(6) of this section); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions made from the worker's wages;

(ii) If the number of hours worked by the worker is less than the number offered in accordance with the three-fourths guarantee at paragraph (b)(6) of this section, the records shall state the reason or reasons therefore.

(iii) Upon reasonable notice, the employer shall make available the records, including field tally records and supporting summary payroll records for inspection and copying by representatives of the Secretary of Labor, and by the worker and representatives designated by the worker; and

(iv) The employer shall retain the records for not less than three years after the completion of the work contract.

(8) *Hours and earnings statements.* The employer shall furnish to the worker on or before each payday in one or more written statements the following information:

(i) The worker's total earnings for the pay period;

(ii) The worker's hourly rate and/or piece rate of pay;

(iii) The hours of employment which have been offered to the worker (broken out by offers in accordance with and over and above the guarantee);

(iv) The hours actually worked by the worker;

(v) An itemization of all deductions made from the worker's wages; and

(vi) If piece rates are used, the units produced daily.

(9) *Rates of pay.* (i) If the worker will be paid by the hour, the employer shall pay the worker at least the adverse effect wage rate in effect at the time the work is performed, the prevailing hourly wage rate, or the legal federal or State minimum wage rate, whichever

is highest, for every hour or portion thereof worked during a pay period; or

(ii)(A) If the worker will be paid on a piece rate basis and the piece rate does not result at the end of the pay period in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the appropriate hourly rate, the worker's pay shall be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had been paid at the appropriate hourly wage rate for each hour worked; and the piece rate shall be no less than the piece rate prevailing for the activity in the area of intended employment; and

(B) If the employer who pays by the piece rate requires one or more minimum productivity standards of workers as a condition of job retention,

(*1*) Such standards shall be specified in the job offer and be no more than those required by the employer in 1977, unless the RA approves a higher minimum; or

(*2*) If the employer first applied for H–2 agricultural or H–2A temporary alien agricultural labor certification after 1977, such standards shall be no more than those normally required (at the time of the first application) by other employers for the activity in the area of intended employment, unless the RA approves a higher minimum.

(10) *Frequency of pay.* The employer shall state the frequency with which the worker will be paid (in accordance with the prevailing practice in the area of intended employment, or at least twice monthly whichever is more frequent).

(11) *Abandonment of employment; or termination for cause.* If the worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, and the employer notifies the local office of such abandonment or termination, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of any worker for whom the employer would have otherwise been required to pay such expenses under paragraph (b)(5)(ii) of this section, and that worker is not entitled to the ''three-fourths guarantee'' (see paragraph (b)(6) of this section).

(12) *Contract impossibility.* If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, hurricane, or other Act of God which makes the fulfillment of the contract impossible the employer may terminate the work contract. In the event of such termination of a contract, the employer shall fulfill the three-fourths guarantee at paragraph (b)(6) of this section for the time that has elapsed from the start of the work contract to its termination. In such cases the employer will make efforts to transfer the worker to other comparable employment acceptable to the worker. If such transfer is not effected, the employer shall:

(i) Offer to return the worker, at the employer's expense, to the place from which the worker disregarding intervening employment came to work for the employer,

(ii) Reimburse the worker the full amount of any deductions made from the worker's pay by the employer for transportation and subsistence expenses to the place of employment, and

(iii) Notwithstanding whether the employment has been terminated prior to completion of 50 percent of the work contract period originally offered by the employer, pay the worker for costs incurred by the worker for transportation and daily subsistence from the place from which the worker, without intervening employment, has come to work for the employer to the place of employment. Daily subsistence shall be computed as set forth in paragraph (b)(5)(i) of this section. The amount of the transportation payment shall be no less (and shall not be required to be more) than the most economical and reasonable similar common carrier transportation charges for the distances involved.

(13) *Deductions.* The employer shall make those deductions from the worker's paycheck which are required by law. The job offer shall specify all deductions not required by law which the employer will make from the worker's

paycheck. All deductions shall be reasonable. The employer may deduct the cost of the worker's transportation and daily subsistence expenses to the place of employment which were borne directly by the employer. In such cases, the job offer shall state that the worker will be reimbursed the full amount of such deductions upon the worker's completion of 50 percent of the worker's contract period. However, an employer subject to the Fair Labor Standards Act (FLSA) may not make deductions which will result in payments to workers of less than the federal minimum wage permitted by the FLSA as determined by the Secretary at 29 CFR part 531.

(14) *Copy of work contract.* The employer shall provide to the worker, no later than on the day the work commences, a copy of the work contract between the employer and the worker. The work contract shall contain all of the provisions required by paragraphs (a) and (b) of this section. In the absence of a separate, written work contract entered into between the employer and the worker, the required terms of the job order and application for temporary alien agricultural labor certification shall be the work contract.

(c) *Appropriateness of required qualifications.* Bona fide occupational qualifications specified by an employer in a job offer shall be consistent with the normal and accepted qualifications required by non-H–2A employers in the same or comparable occupations and crops, and shall be reviewed by the RA for their appropriateness. The RA may require the employer to submit documentation to substantiate the appropriateness of the qualification specified in the job offer; and shall consider information offered by and may consult with representatives of the U.S. Department of Agriculture.

(d) *Positive recruitment plan.* The employer shall submit in writing, as a part of the application, the employer's plan for conducting independent, positive recruitment of U.S. workers as required by §§ 655.103 and 655.105(a) of this part. Such a plan shall include a description of recruitment efforts (if any) made prior to the actual submittal of the application. The plan shall describe how the employer will engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location(s)) no less than that of non-H–2A agricultural employers of comparable or smaller size in the area of employment. When it is the prevailing practice in the area of employment and for the occupation for non-H–2A agricultural employers to secure U.S. workers through farm labor contractors and to compensate farm labor contractors with an override for their services, the employer shall describe how it will make the same level of effort as non-H–2A agricultural employers and provide an override which is no less than that being provided by non-H–2A agricultural employers.

§ 655.103 Assurances.

As part of the temporary alien agricultural labor certification application, the employer shall include in the job offer a statement agreeing to abide by the conditions of this subpart. By so doing, the employer makes each of the following assurances:

(a) *Labor disputes.* The specific job opportunity for which the employer is requesting H–2A certification is not vacant because the former occupant is on strike or being locked out in the course of a labor dispute.

(b) *Employment-related laws.* During the period for which the temporary alien agricultural labor certification is granted, the employer shall comply with applicable federal, State, and local employment-related laws and regulations, including employment-related health and safety laws.

(c) *Rejections and terminations of U.S. workers.* No U.S. worker will be rejected for or terminated from employment for other than a lawful job-related reason, and notification of all rejections or terminations shall be made to the local office.

(d) *Recruitment of U.S. workers.* The employer shall independently engage in positive recruitment until the foreign workers have departed for the employer's place of employment and shall cooperate with the ES System in the active recruitment of U.S. workers by:

(1) Assisting the ES System to prepare local, intrastate, and interstate

job orders using the information supplied on the employer's job offer;

(2) Placing advertisements (in a language other than English, where the RA determines appropriate) for the job opportunities in newspapers of general circulation and/or on the radio, as required by the RA:

(i) Each such advertisement shall describe the nature and anticipated duration of the job opportunity; offer at least the adverse effect wage rate; give the ¾ guarantee; state that work tools, supplies and equipment will be provided by the employer; state that housing will also be provided, and that transportation and subsistence expenses to the worksite will be provided or paid by the employer upon completion of 50% of the work contract, or earlier, if appropriate; and

(ii) Each such advertisement shall direct interested workers to apply for the job opportunity at a local employment service office in their area;

(3) Cooperating with the ES System and independently contacting farm labor contractors, migrant workers and other potential workers in other areas of the State and/or Nation by letter and/or telephone; and

(4) Cooperating with the ES System in contacting schools, business and labor organizations, fraternal and veterans' organizations, and nonprofit organizations and public agencies such as sponsors of programs under the Job Training Partnership Act throughout the area of intended employment and in other potential labor supply areas in order to enlist them in helping to find U.S. workers.

(e) *Fifty-percent rule.* From the time the foreign workers depart for the employer's place of employment, the employer, except as provided for by § 655.106(e)(1) of this part, shall provide employment to any qualified, eligible U.S. worker who applies to the employer until 50% of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed. In addition, the employer shall offer to provide housing and the other benefits, wages, and working conditions required by § 655.102 of this part to any such U.S. worker and shall not treat less favorably than H–2A workers any U.S. worker referred or transferred pursuant to this assurance.

(f) *Other recruitment.* The employer shall perform the other specific recruitment and reporting activities specified in the notice from the RA required by § 655.105(a) of this part, and shall engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location) no less than that of non-H–2A agricultural employers of comparable or smaller size in the area of employment. When it is the prevailing practice in the area of employment and for the occupation for non-H–2A agricultural employers to secure U.S. workers through farm labor contractors and to compensate farm labor contractors with an override for their services, the employer shall make the same level of effort as non-H–2A agricultural employers and shall provide an override which is no less than that being provided by non-H–2A agricultural employers. Where the employer has centralized cooking and eating facilities designed to feed workers, the employer shall not be required to provide meals through an override. The employer shall not be required to provide for housing through an override.

(g) *Retaliation prohibited.* The employer shall not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, and shall not cause any person to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, any person who has with just cause:

(1) Filed a complaint under or related to § 216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA;

(2) Instituted or caused to be instituted any proceeding under or related to § 216 of the INA, or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA (8 U.S.C. 1186);

(3) Testified or is about to testify in any proceeding under or related to § 216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to § 216 of the

INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to §216 of the INA; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by §216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to §216 of the INA.

(h) *Fees.* The application shall include the assurance that fees will be paid in a timely manner, as follows:

(1) *Amount.* The fee for each employer receiving a temporary alien agricultural labor certification is $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee for an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. In the case of a joint employer association receiving a temporary alien agricultural labor certification, the fee for each employer-member receiving a temporary alien agricultural labor certification shall be $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee for an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. The joint employer association will not be charged a separate fee. Fees shall be paid by a check or money order made payable to ''Department of Labor'', and are nonrefundable. In the case of employers of H–2A workers which are members of a joint employer association applying on their behalf, the aggregate fees for all employers of H–2A workers under the application may be paid by one check or money order.

(2) *Timeliness.* Fees received by the RA within 30 calendar days after the date of the temporary alien agricultural labor certification determination are timely.

[52 FR 20507, June 1, 1987, as amended by 55 FR 29358, July 19, 1990]

§ 655.104 Determinations based on acceptability of H–2A applications.

(a) *Local office activities.* The local office, using the job offer portion of the H–2A application, shall promptly prepare a local job order and shall begin to recruit U.S. workers in the area of intended employment. The RA should notify the State or local office by telephone no later than seven calendar days after the application was received by the RA if the application has been accepted for consideration. Upon receiving such notice or seven calendar days after the application is received by the local office, whichever is earlier, the local office shall promptly prepare an agricultural clearance order which will permit the recruitment of U.S. workers by the Employment Service System on an intrastate and interstate basis.

(b) *Regional office activities.* The RA, upon receipt of the H–2A application, shall promptly review the application to determine whether it is acceptable for consideration under the timeliness and adverse effect criteria of §§655.101–655.103 of this part. If the RA determines that the application does not meet the requirements of §§655.101–655.103, the RA shall not accept the application for consideration on the grounds that the availability of U.S. workers cannot be adequately tested because the benefits, wages and working conditions do not meet the adverse effect criteria; however, if the RA determines that the application is not timely in accordance with §655.101 of this part and that neither the first-year employer provisions of §655.101(c)(5) nor the emergency provisions of §655.101(f) apply, the RA may determine not to accept the application for consideration because there is not sufficient time to test the availability of U.S. workers.

(c) *Rejected applications.* If the application is not accepted for consideration, the RA shall notify the applicant in writing (by means normally assuring next-day delivery) within seven calendar days of the date the application was received by the RA with a copy to the local office. The notice shall:

(1) State all the reasons the application is not accepted for consideration, citing the relevant regulatory standards;

(2) Offer the applicant an opportunity for the resubmission within five calendar days of a modified application, stating the modifications needed in order for the RA to accept the application for consideration;

(3) Offer the applicant an opportunity to request an expedited administrative review of or a *de novo* administrative hearing before an administrative law judge of the nonacceptance; the notice shall state that in order to obtain such a review or hearing, the employer, within seven calendar days of the date of the notice, shall file by facsimile (fax), telegram, or other means normally assuring next day delivery a written request to the Chief Administrative Law Judge of the Department of Labor (giving the address) and simultaneously serve a copy on the RA; the notice shall also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the RA's action; and

(4) State that if the employer does not request an expedited administrative-judicial review or a *de novo* hearing before an administrative law judge within the seven calendar days no further consideration of the employer's application for temporary alien agricultural labor certification will be made by any DOL official.

(d) *Appeal procedures.* If the employer timely requests an expedited administrative review or *de novo* hearing before an administrative law judge pursuant to paragraph (c)(3) of this section, the procedures at § 655.112 of this part shall be followed.

(e) *Required modifications.* If the application is not accepted for consideration by the RA, but the RA's written notification to the applicant is not timely as required by § 655.101 of this part, the certification determination will not be extended beyond 20 calendar days before the date of need. The notice will specify that the RA's temporary alien agricultural labor certification determination will be made no later than 20 calendar days before the date of need, provided that the applicant submits the modifications to the application which are required by the RA within five calendar days and in a manner specified by the RA which will enable the test of U.S. worker availability to be made as required by § 655.101 of this part within the time available for such purposes.

[42 FR 45899, Sept. 13, 1977, as amended at 59 FR 41875, Aug. 15, 1994]

§ 655.105 Recruitment period.

(a) *Notice of acceptance of application for consideration; required recruitment.* If the RA determines that the H–2A application meets the requirements of §§ 655.101–655.103 of this part, the RA shall promptly notify the employer (by means normally assuring next-day delivery) in writing with copies to the State agency. The notice shall inform the employer and the State agency of the specific efforts which will be expected from them during the following weeks to carry out the assurances contained in § 655.103 with respect to the recruitment of U.S. workers. The notice shall require that the job order be laced into intrastate clearance and into interstate clearance to such States as the RA shall determine to be potential sources of U.S. workers. The notice may require the employer to engage in positive recruitment efforts within a multi-State region of traditional or expected labor supply where the RA finds, based on current information provided by a State agency and such information as may be offered and provided by other sources, that there are a significant number of able and qualified U.S. workers who, if recruited, would likely be willing to make themselves available for work at the time and place needed. In making such a finding, the RA shall take into account other recent recruiting efforts in those areas and will attempt to avoid requiring employers to futilely recruit in areas where there are a significant number of local employers recruiting for U.S. workers for the same types of occupations. Positive recruitment is in addition to, and shall be conducted within the same time period as, the circulation through the interstate clearance system of an agricultural clearance order. The obligation to engage in such positive recruitment shall terminate on the date H–2A workers depart for the employer's place of work. In determining what positive recruitment shall be required, the RA will ascertain the normal recruitment practices of non-H–2A agricultural employers in the area and the kind and degree of recruitment efforts which the

potential H–2A employer made to obtain H–2A workers. The RA shall ensure that the effort, including the location(s) of the positive recruitment required of the potential H–2A employer, during the period after filing the application and before the date the H–2A workers depart their prior location to come to the place of employment, shall be no less than: (1) The recruitment efforts of non-H–2A agricultural employers of comparable or smaller size in the area of employment; and (2) the kind and degree of recruitment efforts which the potential H–2A employer made to obtain H–2A workers.

(b) *Recruitment of U.S. workers.* After an application for temporary alien agricultural labor certification is accepted for processing pursuant to paragraph (a) of this section, the RA, under the direction of the ETA national office and with the assistance of other RAs with respect to areas outside the region, shall provide overall direction to the employer and the State agency with respect to the recruitment of U.S. workers.

(c) *Modifications.* At any time during the recruitment effort, the RA, with the Director's concurrence, may require modifications to a job offer when the RA determines that the job offer does not contain all the provisions relating to minimum benefits, wages, and working conditions, required by §655.102(b) of this part. If any such modifications are required after an application has been accepted for consideration by the RA, the modifications must be made; however, the certification determination shall not be delayed beyond the 20 calendar days prior to the date of need as a result of such modification.

(d) *Final determination.* By 20 calendar days before the date of need specified in the application, except as provided for under §§655.101(c)(2) and 655.104(e) of this part for untimely modified applications, the RA, when making a determination of the availability of U.S. workers, shall also make a determination as to whether the employer has satisfied the recruitment assurances in §655.103 of this part. If the RA concludes that the employer has not satisfied the requirements for recruitment of U.S. workers, the RA shall deny the temporary alien agricultural labor certification, and shall immediately notify the employer in writing with a copy to the State agency and local office. The notice shall contain the statements specified in §655.104(d) of this part.

(e) *Appeal procedure.* With respect to determinations by the RA pursuant to this section, if the employer timely requests an expedited administrative review or a *de novo* hearing before an administrative law judge, the procedures in §655.112 of this part shall be followed.

§655.106 Referral of U.S. workers; determinations based on U.S. worker availability and adverse effect; activities after receipt of the temporary alien agricultural labor certification.

(a) *Referral of able, willing, and qualified eligible U.S. workers.* With respect to the referral of U.S. workers to job openings listed on a job order accompanying an application for temporary alien agricultural labor certification, no U.S. worker-applicant shall be referred unless such U.S. worker has been made aware of the terms and conditions of and qualifications for the job, and has indicated, by accepting referral to the job, that she or he meets the qualifications required and is able, willing, and eligible to take such a job.

(b) (1) *Determinations.* If the RA, in accordance with §655.105 of this part, has determined that the employer has complied with the recruitment assurances and the adverse effect criteria of §655.102 of this part, by the date specified pursuant to §655.101(c)(2) of this part for untimely modified applications or 20 calendar days before the date of need specified in the application, whichever is applicable, the RA shall grant the temporary alien agricultural labor certification request for enough H–2A workers to fill the employer's job opportunities for which U.S. workers are not available. In making the temporary alien agricultural labor certification determination, the RA shall consider as available any U.S. worker who has made a firm commitment to work for the employer, including those workers committed by other authorized persons such as farm labor contractors and family heads. Such a

firm commitment shall be considered to have been made not only by workers who have signed work contracts with the employer, but also by those whom the RA determines are likely to sign a work contract. The RA shall count as available any U.S. worker who has applied to the employer (or on whose behalf an application has been made), but who was rejected by the employer for other than lawful job-related reasons or who has not been provided with a lawful job-related reason for rejection by the employer, as determined by the RA. The RA shall not grant a temporary alien agricultural labor certification request for any H–2A workers if the RA determines that:

(i) Enough able, willing, and qualified U.S. workers have been identified as being available to fill all the employer's job opportunities;

(ii) The employer, since the time the application was accepted for consideration under § 655.104 of this part, has adversely affected U.S. workers by offering to, or agreeing to provide to, H–2A workers better wages, working conditions or benefits (or by offering to, or agreeing to impose on alien workers less obligations and restrictions) than those offered to U.S. workers;

(iii) The employer during the previous two-year period employed H–2A workers and the RA has determined, after notice and opportunity for a hearing, that the employer at any time during that period substantially violated a material term or condition of a temporary alien agricultural labor certification with respect to the employment of U.S. or H–2A workers;

(iv) The employer has not complied with the workers' compensation requirements at § 655.102(b)(2) of this part; or

(v) The employer has not satisfactorily complied with the positive recruitment requirements specified by this subpart.

Further, the RA, in making the temporary alien agricultural labor certification determination, will subtract from any temporary alien agricultural labor certification the specific verified number of job opportunities involved which are vacant because of a strike or other labor dispute involving a work stoppage, or a lockout, in the occupation at the place of employment (and for which H–2A workers have been requested). Upon receipt by the RA of such labor dispute information from any source, the RA shall verify the existence of the strike, labor dispute, or lockout and the vacancies directly attributable through the receipt by the RA of a written report from the State agency written following an investigation by the State agency (made under the oversight of the RA) of the situation and after the RA has consulted with the Director prior to making such a determination.

(2) *Fees.* A temporary alien agricultural labor certification determination granting an application shall include a bill for the required fees. Each employer (except joint employer associations) of H–2A workers under the application for temporary alien agricultural labor certification shall pay in a timely manner a nonrefundable fee upon issuance of the temporary alien agricultural labor certification granting the application (in whole or in part), as follows:

(i) *Amount.* The fee for each employer receiving a temporary alien agricultural labor certification is $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee to an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. In the case of a joint employer association receiving a temporary alien agricultural labor certification, each employer-member receiving a temporary alien agricultural labor certification shall pay a fee of $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee to an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. The joint employer association will not be charged a separate fee. The fees shall be paid by check or money order made payable to ''Department of Labor''. In the case of employers of H–2A workers which are members of a joint employer association applying on their behalf, the aggregate fees for all employers of H–2A workers under the application may be paid by one check or money order.

(ii) *Timeliness.* Fees received by the RA no more than 30 calendar days after the date of the temporary alien agricultural labor certification determination are timely.

(c) *Changes to temporary alien agricultural labor certifications; temporary alien agricultural labor certifications involving employer associations*—(1) *Changes.* Temporary alien agricultural labor certifications are subject to the conditions and assurances made during the application process. Any changes in the level of benefits, wages, and working conditions an employer may wish to make at any time during the work contract period must be approved by the RA after written application by the employer, even if such changes have been agreed to by an employee. Temporary alien agricultural labor certifications shall be for the specific period of time specified in the employer's job offer, which shall be less than twelve months; shall be limited to the employer's specific job opportunities; and may not be transferred from one employer to another, except as provided for by paragraph (c)(2) of this section.

(2) *Associations*—(i) *Applications.* If an association is requesting a temporary alien agricultural labor certification as a joint employer, the temporary alien agricultural labor certification granted under this section shall be made jointly to the association and to its employer members. Except as provided in paragraph (c)(2)(iii) of this section, such workers may be transferred among its producer members to perform work for which the temporary alien agricultural labor certification was granted, provided the association controls the assignment of such workers and maintains a record of such assignments. All temporary alien agricultural labor certifications to associations may be used for the certified job opportunities of any of its members. If an association is requesting a temporary alien agricultural labor certification as a sole employer, the temporary alien agricultural labor certification granted pursuant to this section shall be made to the association only.

(ii) *Referrals and transfers.* For the purposes of complying with the ''fifty-percent rule'' at §655.103(e) of this part, any association shall be allowed to refer or transfer workers among its members (except as provided in paragraph (c)(2)(iii) of this section), and an association acting as an agent for its members shall not be considered a joint employer merely because of such referral or transfer.

(iii) *Ineligible employer-members.* Workers shall not be transferred or referred to an association's member, if that member is ineligible to obtain any or any additional workers, pursuant to §655.110 of this part.

(3) *Extension of temporary alien agricultural labor certification*—(i) *Short-term extension.* An employer who seeks an extension of two weeks or less of the temporary alien agricultural labor certification shall apply for such extension to INS. If INS grants such an extension, the temporary alien agricultural labor certification shall be deemed extended for such period as is approved by INS. No extension granted under this paragraph (c)(3)(i) shall be for a period longer than the original work contract period of the temporary alien agricultural labor certification.

(ii) *Long-term extension.* For extensions beyond the period which may be granted by INS pursuant to paragraph (c)(3)(i) of this section, an employer, after 50 percent of the work contract period has elapsed, may apply to the RA for an extension of the period of the temporary alien agricultural labor certification, for reasons related to weather conditions or other external factors beyond the control of the employer (which may include unforeseen changes in market conditions), provided that the employer's need for an extension is supported in writing by the employer, with documentation showing that the extension is needed and could not have been reasonably foreseen by the employer. The RA shall grant or deny the request for extension of the temporary alien agricultural labor certification based on available information, and shall notify the employer of the decision on the request in writing. The RA shall not grant an extension where the total work contract period, including past temporary alien labor certifications for the job opportunity and extensions, would be 12 months or more, except in extraordinary circumstances. The RA shall not grant an extension

where the temporary alien agricultural labor certification has already been extended by INS pursuant to paragraph (c)(3)(i) of this section.

(d) *Denials of applications.* If the RA does not grant the temporary alien agricultural labor certification (in whole or in part) the RA shall notify the employer by means reasonably calculated to assure next-day delivery. The notification shall contain all the statements required in § 655.104(c) of this part. If a timely request is made for an administrative-judicial review or a *de novo* hearing by an administrative law judge, the procedures of § 655.112 of this part shall be followed.

(e) *Approvals of applications*—(1) *Continued recruitment of U.S. workers.* After a temporary agricultural labor certification has been granted, the employer shall continue its efforts to recruit U.S. workers until the actual date the H–2A workers depart for the employer's place of employment.

(i) Unless the local employment office is informed in writing of a different date, the local office shall deem the third day immediately preceding the employer's first date of need to be the date the H–2A workers depart for the employer's place of employment. The employer may notify the local office in writing if the workers depart prior to that date.

(ii)(A) If the H–2A workers do not depart for the place of employment on or before the first date of need (or by the stated date of departure, if the local office has been advised of a different date), the employer shall notify the local employment office in writing (or orally, confirmed in writing) as soon as the employer knows that the workers will not depart by the first date of need, and in no event later than such date of need. At the same time, the employer shall notify the local office of the workers' expected departure date, if known. No further notice is necessary if the workers depart by the stated date of departure.

(B) If the employer did not notify the local office of the expected departure date pursuant to paragraph (e)(1)(ii)(A) of this section, or if the H–2A workers do not leave for the place of employment on or before the stated date of departure, the employer shall notify the local employment office in writing (or orally, confirmed in writing) as soon as the employer becomes aware of the expected departure date, or that the workers did not depart by the stated date and the new expected departure date, as appropriate.

(2) *Requirement for Active Job Order.* The employer shall keep an active job order on file until the ''50-percent rule'' assurance at § 655.103(e) of this part is met, except as provided by paragraph (f) of this section.

(3) *Referrals by ES System.* The ES system shall continue to refer to the employer U.S. workers who apply as long as there is an active job order on file.

(f) *Exceptions.* (1) *''Fifty-percent rule'' inapplicable to small employers.* The assurance requirement at § 655.103(e) of this part does not apply to any employer who:

(i) Did not, during any calendar quarter during the preceding calendar year, use more than 500 ''man-days'' of agricultural labor, as defined in section 3(u) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(u)), and so certifies to the RA in the H–2A application; and

(ii) Is not a member of an association which has applied for a temporary alien agricultural labor certification under this subpart for its members; and

(iii) Has not otherwise ''associated'' with other employers who are applying for H–2A workers under this subpart, and so certifies to the RA.

(2) *Displaced H–2A workers.* An employer shall not be liable for payment under § 655.102(b)(6) of this part with respect to an H–2A worker whom the RA certifies is displaced due to compliance with § 655.103(e) of this part.

(g) *Withholding of U.S. workers prohibited.* (1) *Complaints.* Any employer who has reason to believe that a person or entity has willfully and knowingly withheld U.S. workers prior to the arrival at the job site of H–2A workers in order to force the hiring of U.S. workers under § 655.103(e) of this part may submit a written complaint to the local office. The complaint shall clearly identify the person or entity whom the employer believes has withheld the U.S. workers, and shall specify sufficient facts to support the allegation (*e.g.,* dates, places, numbers and names of U.S. workers) which will permit an

investigation to be conducted by the local office.

(2) *Investigations.* The local office shall inform the RA by telephone that a complaint under the provisions of paragraph (g) of this section has been filed and shall immediately investigate the complaint. Such investigation shall include interviews with the employer who has submitted the complaint, the person or entity named as responsible for withholding the U.S. workers, and the individual U.S. workers whose availability has purportedly been withheld. In the event the local office fails to conduct such interviews, the RA shall do so.

(3) *Reports of findings.* Within five working days after receipt of the complaint, the local office shall prepare a report of its findings, and shall submit such report (including recommendations) and the original copy of the employer's complaint to the RA.

(4) *Written findings.* The RA shall immediately review the employer's complaint and the report of findings submitted by the local office, and shall conduct any additional investigation the RA deems appropriate. No later than 36 working hours after receipt of the employer's complaint and the local office's report, the RA shall issue written findings to the local office and the employer. Where the RA determines that the employer's complaint is valid and justified, the RA shall immediately suspend the application of §655.103(e) of this part to the employer. Such suspension of §655.103(e) of this part under these circumstances shall not take place, however, until the interviews required by paragraph (g)(2) of this section have been conducted. The RA's determination under the provisions of this paragraph (g)(4) shall be the final decision of the Secretary, and no further review by any DOL official shall be given to it.

(h) *Requests for new temporary alien agricultural labor certification determinations based on nonavailability of able, willing, and qualified U.S. workers*—(1) *Standards for requests.* If a temporary alien agricultural labor certification application has been denied (in whole or in part) based on the RA's determination of the availability of able, willing, and qualified U.S. workers, and, on or after 20 calendar days before the date of need specified in the temporary alien agricultural labor certification determination, such U.S. workers identified as being able, willing, qualified, and available are, in fact, not able, willing, qualified, or available at the time and place needed, the employer may request a new temporary alien agricultural labor certification determination from the RA. The RA shall expeditiously, but in no case later than 72 hours after the time a request is received, make a determination on the request.

(2) *Filing requests.* The employer's request for a new determination shall be made directly to the RA. The request may be made to the RA by telephone, but shall be confirmed by the employer in writing as required by paragraphs (h)(2)(i) or (ii) of this section.

(i) *Workers not able, willing, qualified, or eligible.* If the employer asserts that any worker who has been referred by the ES System or by any other person or entity is not an eligible worker or is not able, willing, or qualified for the job opportunity for which the employer has requested H–2A workers, the burden of proof is on the employer to establish that the individual referred is not able, willing, qualified, or eligible because of lawful job-related reasons. The employer's burden of proof shall be met by the employer's submission to the RA, within 72 hours of the RA's receipt of the request for a new determination, of a signed statement of the employer's assertions, which shall identify each rejected worker by name and shall state each lawful job-related reason for rejecting that worker.

(ii) *U.S. workers not available.* If the employer telephonically requests the new determination, asserting solely that U.S. workers are not available, the employer shall submit to the RA a signed statement confirming such assertion. If such signed statement is not received by the RA within 72 hours of the RA's receipt of the telephonic request for a new determination, the RA may make the determination based solely on the information provided telephonically and the information (if any) from the local office.

(3) *Regional office review*—(i) *Expeditious review.* The RA expeditiously shall

review the request for a new determination. The RA may request a signed statement from the local office in support of the employer's assertion of U.S. worker nonavailability or referred U.S. workers not being able, willing, or qualified because of lawful job-related reasons.

(ii) *New determination.* If the RA determines that the employer's assertion of nonavailability is accurate and that no able, willing, or qualified U.S. worker has been refused or is being refused employment for other than lawful job-related reasons, the RA shall, within 72 hours after receipt of the employer's request, render a new determination. Prior to making a new determination, the RA promptly shall ascertain (which may be through the ES System or other sources of information on U.S. worker availability) whether able, willing, and qualified replacement U.S. workers are available or can be reasonably expected to be present at the employer's establishment within 72 hours from the date the employer's request was received.

(iii) *Notification of new determination.* If the RA cannot identify sufficient able, willing, and qualified U.S. workers who are or who are likely to be available, the RA shall grant the employer's new determination request (in whole or in part) based on available information as to replacement U.S. worker availability. The RA's notification to the employer on the new determination shall be in writing (by means normally assuring next-day delivery), and the RA's determination under the provisions of this paragraph (h)(3) shall be the final decision of the Secretary, and no further review shall be given to an employer's request for a new H–2A determination by any DOL official. However, this does not preclude an employer from submitting subsequent requests for new determinations, if warranted, based on subsequent facts concerning purported nonavailability of U.S. workers or referred workers not being eligible workers or not able, willing, or qualified because of lawful job-related reasons.

[52 FR 20507, June 1, 1987, as amended at 55 FR 29358, July 19, 1990; 64 FR 34966, June 29, 1999]

§ 655.107 Adverse effect wage rates (AEWRs).

(a) *Computation and publication of AEWRs.* Except as otherwise provided in this section, the AEWRs for all agricultural employment (except for those occupations deemed inappropriate under the special circumstances provisions of § 655.93 of this part) for which temporary alien agricultural labor certification is being sought shall be equal to the annual weighted average hourly wage rate for field and livestock workers (combined) for the region as published annually by the U.S. Department of Agriculture (USDA) based on the USDA quarterly wage survey. The Director shall publish, at least once in each calendar year, on a date or dates to be determined by the Director, AEWRs for each State (for which USDA publishes regional data), calculated pursuant to this paragraph (a) as a notice or notices in the FEDERAL REGISTER.

(b) *Higher prevailing wage rates.* If, as the result of a State agency prevailing wage survey determination, the prevailing wage rate in an area and agricultural activity (as determined by the State agency survey and verified by the Director) is found to be higher that the AEWR computed pursuant to paragraph (a) of this section, the higher prevailing wage rate shall be offered and paid to all workers by employers seeking temporary alien agricultural labor certification for that agricultural activity and area.

(c) *Federal minimum wage rate.* In no event shall an AEWR computed pursuant to this section be lower than the hourly wage rate published in 29 U.S.C. 206(a)(1) and currently in effect.

[52 FR 20507, June 1, 1987, as amended at 54 FR 28046, July 5, 1989]

§ 655.108 H–2A applications involving fraud or willful misrepresentation.

(a) *Referral for investigation.* If possible fraud or willful misrepresentation involving a temporary alien agricultural labor certification application is discovered prior to a final temporary alien agricultural labor certification determination or if it is learned that the employer or agent (with respect to an application) is the subject of a criminal indictment or information

filed in a court, the RA shall refer the matter to the INS and DOL Office of the Inspector General for investigation. The RA shall continue to process the application and may issue a temporary alien agricultural labor certification.

(b) *Continued processing.* If a court finds an employer or agent not guilty of fraud or willful misrepresentation, or if the Department of Justice decides not to prosecute an employer or agent, the RA shall not deny the temporary alien agricultural labor certification application on the grounds of fraud or willful misrepresentation. The application, of course, may be denied for other reasons pursuant to this subpart.

(c) *Terminated processing.* If a court or the INS determines that there was fraud or willful misrepresentation involving a temporary alien agricultural labor certification application, the application is thereafter invalid, consideration of the application shall be terminated and the RA shall return the application to the employer or agent with the reasons therefor stated in writing.

§ 655.110 Employer penalties for noncompliance with terms and conditions of temporary alien agricultural labor certifications.

(a) *Investigation of violations.* If, during the period of two years after a temporary alien agricultural labor certification has been granted (in whole or in part), the RA has reason to believe that an employer violated a material term or condition of the temporary alien agricultural labor certification, the RA shall, except as provided in paragraph (b) of this section, investigate the matter. If, after the investigation, the RA determines that a substantial violation has occurred, the RA, after consultation with the Director, shall notify the employer that a temporary alien agricultural certification request will not be granted for the next period of time in a calendar year during which the employer would normally be expected to request a temporary alien agricultural labor certification, and any application subsequently submitted by the employer for that time period will not be accepted by the RA. If multiple or repeated substantial violations are involved, the RA's notice to the employer shall specify that the prospective denial of the temporary alien agricultural labor certification will apply not only to the next anticipated period for which a temporary alien agricultural labor certification would normally be requested, but also to any periods within the coming two or three years; two years for two violations, or repetitions of the same violations, and three years for three or more violations, or repetitions thereof. The RA's notice shall be in writing, shall state the reasons for the determinations, and shall offer the employer an opportunity to request an expedited administrative review or a *de novo* hearing before an administrative law judge of the determination within seven calendar days of the date of the notice. If the employer requests an expedited administrative review or a *de novo* hearing before an administrative law judge, the procedures in § 655.112 of this part shall be followed.

(b) *Employment Standards Administration investigations.* The RA may make the determination described in paragraph (a) of this section based on information and recommendations provided by the Employment Standards Administration, after an Employment Standards Administration investigation has been conducted in accordance with the Employment Standards Administration procedures, that an employer has not complied with the terms and conditions of employment prescribed as a condition for a temporary alien agricultural labor certification. In such instances, the RA need not conduct any investigation of his/her own, and the subsequent notification to the employer and other procedures contained in paragraph (a) of this section will apply. Penalties invoked by the Employment Standards Administration for violations of temporary alien agricultural labor certification terms and conditions shall be treated and handled separately from sanctions available to the RA, and an employer's obligations for compliance with the Employment Standards Administration's enforcement penalties shall not absolve an employer from sanctions applied by ETA under this section (except as noted in paragraph (a) of this section).

(c) *Less than substantial violations*—(1) *Requirement of special procedures.* If, after investigation as provided for under paragraph (a) of this section, or an Employment Standards Administration notification as provided under paragraph (b) of this section, the RA determines that a less than substantial violation has occurred, but the RA has reason to believe that past actions on the part of the employer may have had and may continue to have a chilling or otherwise negative effect on the recruitment, employment, and retention of U.S. workers, the RA may require the employer to conform to special procedures before and after the temporary alien labor certification determination (including special on-site positive recruitment and streamlined interviewing and referral techniques) designed to enhance U.S. worker recruitment and retention in the next year as a condition for receiving a temporary alien agricultural labor certification. Such requirements shall be reasonable, and shall not require the employer to offer better wages, working conditions and benefits than those specified in § 655.102 of this part, and shall be no more than deemed necessary to assure employer compliance with the test of U.S. worker availability and adverse effect criteria of this subpart. The RA shall notify the employer in writing of the special procedures which will be required in the coming year. The notification shall state the reasons for the imposition of the requirements, state that the employer's agreement to accept the conditions will constitute inclusion of them as bona fide conditions and terms of a temporary alien agricultural labor certification, and shall offer the employer an opportunity to request an administrative review or a *de novo* hearing before an administrative law judge. If an administrative review or *de novo* hearing is requested, the procedures prescribed in § 655.112 of this part shall apply.

(2) *Failure to comply with special procedures.* If the RA determines that the employer has failed to comply with special procedures required pursuant to paragraph (c)(1) of this section, the RA shall send a written notice to the employer, stating that the employer's otherwise affirmative temporary alien agricultural labor certification determination will be reduced by twenty-five percent of the total number of H–2A aliens requested (which cannot be more than those requested in the previous year) for a period of one year. Notice of such a reduction in the number of workers requested shall be conveyed to the employer by the RA in the RA's written temporary alien agricultural labor certification determination required by § 655.101 of this part (with the concurrence of the Director). The notice shall offer the employer an opportunity to request an administrative review or a *de novo* hearing before an administrative law judge. If an administrative review or *de novo* hearing is requested, the procedures prescribed in § 655.112 of this part shall apply, provided that if the administrative law judge affirms the RA's determination that the employer has failed to comply with special procedures required by paragraph (c)(1) of this section, the reduction in the number of workers requested shall be twenty-five percent of the total number of H–2A aliens requested (which cannot be more than those requested in the previous year) for a period of one year.

(d) *Penalties involving members of associations.* If, after investigation as provided for under paragraph (a) of this section, or notification from the Employment Standards Administration under paragraph (b) of this section, the RA determines that a substantial violation has occurred, and if an individual producer member of a joint employer association is determined to have committed the violation, the denial of temporary alien agricultural labor certification penalty prescribed in paragraph (a) shall apply only to that member of the association unless the RA determines that the association or other association member participated in, had knowledge of, or had reason to know of the violation, in which case the penalty shall be invoked against the association or other association member as well.

(e) *Penalties involving associations acting as joint employers.* If, after investigation as provided for under paragraph (a) of this section, or notification from the Employment Standards

Administration under paragraph (b) of this section, the RA determines that a substantial violation has occurred, and if an association acting as a joint employer with its members is determined to have committed the violation, the denial of temporary alien agricultural labor certification penalty prescribed in paragraph (a) of this section shall apply only to the association, and shall not be applied to any individual producer member of the association unless the RA determines that the member participated in, had knowledge of, or reason to know of the violation, in which case the penalty shall be invoked against the association member as well.

(f) *Penalties involving associations acting as sole employers.* If, after investigation as provided for under paragraph (a) of this section, or notification from the Employment Standards Administration under paragraph (b) of this section, the RA determines that a substantial violation has occurred, and if an association acting as a sole employer is determined to have committed the violation, no individual producer member of the association shall be permitted to employ certified H–2A workers in the crop and occupation for which the H–2A workers had been previously certified for the sole employer association unless the producer member applies for temporary alien agricultural labor certification under the provisions of this subpart in the capacity of an individual employer/applicant or as a member of a joint employer association, and is granted temporary alien agricultural labor certification by the RA.

(g) *Types of violations*—(1) *Substantial violation.* For the purposes of this subpart, a substantial violation is one or more actions of commission or omission on the part of the employer or the employer's agent, with respect to which the RA determines:

(i)(A) That the action(s) is/are significantly injurious to the wages, benefits, or working conditions of 10 percent or more of an employer's U.S. and/or H–2A workforce; and that:

(*1*) With respect to the action(s), the employer has failed to comply with one or more penalties imposed by the Employment Standards Administration for violation(s) of contractual obligations found by that agency (if applicable), or with one or more decisions or orders of the Secretary or a court pursuant to §216 of the INA (8 U.S.C. 1186), this subpart, or 29 CFR part 501 (Employment Standards Administration enforcement of contractual obligations); or

(*2*) The employer has engaged in a pattern or practice of actions which are significantly injurious to the wages, benefits, or working conditions of 10 percent or more of an employer's U.S. and/or H–2A workforce;

(B) That the action(s) involve(s) impeding an investigation of an employer pursuant to §216 of the INA (8 U.S.C. 1186), this subpart, or 29 CFR part 501 (Employment Standards Administration enforcement of contractual obligations);

(C) That the employer has not paid the necessary fee in a timely manner;

(D) That the employer is not currently eligible to apply for a temporary alien agricultural labor certification pursuant to §655.210 of this part (failure of an employer to comply with the terms of a temporary alien agricultural labor certification in which the application was filed under subpart C of this part prior to June 1, 1987); or

(E) That there was fraud involving the application for temporary alien agricultural labor certification of that the employer made a material misrepresentation of fact during the application process; and

(ii) That there are no extenuating circumstances involved with the action(s) described in paragraph (g)(1)(i) of this section (as determined by the RA).

(2) *Less than substantial violation.* For the purposes of this subpart, a less than substantial violation is an action of commission or omission on the part of the employer or the employer's agent which violates a requirement of this subpart, but is not a substantial violation.

§ 655.111 Petition for higher meal charges.

(a) *Filing petitions.* Until a new amount is set pursuant to this paragraph (a), the RA may permit an employer to charge workers up to $6.58 for

providing them with three meals per day, if the employer justifies the charge and submits to the RA the documentation required by paragraph (b) of this section. In the event the employer's petition for a higher meal charge is denied in whole or in part, the employer may appeal such denial. Such appeals shall be filed with the Chief Administrative Law Judge. Administrative law judges shall hear such appeals according to the procedures in 29 CFR part 18, except that the appeal shall not be considered as a complaint to which an answer is required. The decision of the administrative law judge shall be the final decision of the Secretary. Each year the maximum charge allowed by this paragraph (a) will be changed by the same percentage as the twelve-month percent change for the Consumer Price Index for all Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments shall be effective on the date of their publication by the Director as a notice in the FEDERAL REGISTER. However, an employer may not impose such a charge on a worker prior to the effective date contained in the RA's written confirmation of the amount to be charged.

(b) *Required documentation.* Documentation submitted shall include the cost of goods and services directly related to the preparation and serving of meals, the number of workers fed, the number of meals served and the number of days meals were provided. The cost of the following items may be included: Food; kitchen supplies other than food, such as lunch bags and soap; labor costs which have a direct relation to food service operations, such as wages of cooks and restaurant supervisors; fuel, water, electricity, and other utilities used for the food service operation; and other costs directly related to the food service operation. Charges for transportation, depreciation, overhead and similar charges may not be included. Receipts and other cost records for a representative pay period shall be available for inspection by the RA for a period of one year.

§ 655.112 Administrative review and de novo hearing before an administrative law judge.

(a) *Administrative review*—(1) *Consideration.* Whenever an employer has requested an administrative review before an administrative law judge of a decision not to accept for consideration a temporary alien agricultural labor certification application, of the denial of a temporary alien agricultural labor certification, or of a penalty under § 655.110 of this part, the RA shall send a certified copy of the ETA case file to the Chief Administrative Law Judge by means normally assuring next-day delivery. The Chief Administrative Law Judge shall immediately assign an administrative law judge (which may be a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by part 656 of this chapter, but which shall hear and decide the appeal as set forth in this section) to review the record for legal sufficiency. The administrative law judge shall not remand the case and shall not receive additional evidence.

(2) *Decision.* Within five working days after receipt of the case file the administrative law judge shall, on the basis of the written record and after due consideration of any written submissions submitted from the parties involved or *amici curiae,* either affirm, reverse, or modify the RA's denial by written decision. The decision of the administrative law judge shall specify the reasons for the action taken and shall be immediately provided to the employer, RA, the Director, and INS by means normally assuring next-day delivery. The administrative law judge's decision shall be the final decision of the Secretary and no further review shall be given to the temporary alien agricultural labor certification application or the temporary alien agricultural labor certification determination by any DOL official.

(b) *De novo hearing*—(1) *Request for hearing; conduct of hearing.* Whenever an employer has requested a *de novo* hearing before an administrative law judge of a decision not to accept for consideration a temporary alien agricultural labor certification application, of the denial of a temporary alien

agricultural labor certification, or of a penalty under § 655.110 of this part, the RA shall send a certified copy of the case file to the Chief Administrative Law Judge by means normally assuring next-day delivery. The Chief Administrative Law Judge shall immediately assign an administrative law judge (which may be a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by part 656 of this chapter, but which shall hear and decide the appeal as set forth in this section) to conduct the *de novo* hearing. The procedures contained in 29 CFR part 18 shall apply to such hearings, except that:

(i) The appeal shall not be considered to be a complaint to which an answer is required,

(ii) The administrative law judge shall ensure that, at the request of the employer, the hearing is scheduled to take place within five working days after the administrative law judge's receipt of the case file, and

(iii) The administrative law judge's decision shall be rendered within ten working days after the hearing.

(2) *Decision*. After a *de novo* hearing, the administrative law judge shall either affirm, reverse, or modify the RA's determination, and the administrative law judge's decision shall be provided immediately to the employer, RA, Director, and INS by means normally assuring next-day delivery. The administrative law judge's decision shall be the final decision of the Secretary, and no further review shall be given to the temporary alien agricultural labor certification application or the temporary alien agricultural labor certification determination by any DOL official.

[52 FR 20507, June 1, 1987, as amended at 59 FR 41876, Aug. 15, 1994]

§ 655.113 Job Service Complaint System; enforcement of work contracts.

Complaints arising under this subpart may be filed through the Job Service Complaint System, as described in 20 CFR part 658, subpart E. Complaints which involve worker contracts shall be referred by the local office to the Employment Standards Administration for appropriate handling and resolution. See 29 CFR part 501. As part of this process, the Employment Standards Administration may report the results of its investigation to ETA for consideration of employer penalties under § 655.110 of this part or such other action as may be appropriate.

Subpart C—Labor Certification Process for Logging Employment and Non-H–2A Agricultural Employment

SOURCE: 43 FR 10313, Mar. 10, 1978, unless otherwise noted.

§ 655.200 General description of this subpart and definition of terms.

(a) This subpart applies to applications for temporary alien agricultural labor certification filed before June 1, 1987, and to applications for temporary alien labor certification for logging employment.

(b) An employer who desires to use foreign workers for temporary employment must file a temporary labor certification application including a job offer for U.S. workers with a local office of a State employment service agency. The employer should file an application a minimum of 80 days before the estimated date of need for the workers. If filed 80 days before need, sufficient time is allowed for the 60-day recruitment period required by the regulations and a determination by the Regional Administrator (RA) as to the availability of U.S. workers 20 days before the date of need. Shortly after the application has been filed, the RA makes a determination as to whether or not the application has been filed in enough time to recruit U.S. workers and whether or not the job offer for U.S. workers offers wages and working conditions which will not adversely affect the wages and working conditions of similarly employed U.S. workers, as prescribed in the regulations in this subpart. If the application does not meet the regulatory wage and working condition standards, the RA shall deny the temporary labor certification application and offer the employer an administrative-judicial review of the denial by a Department of Labor Hearing Officer. If the application is not timely, the RA has discretion, as set forth

in these regulations, to either deny the application or permit the process to proceed reasonably with the employer recruiting U.S. workers upon such terms as will accomplish the purposes of the INA and the INS regulations. Where the application is timely and meets the regulatory standards, the State employment service agency, the employer, and the Department of Labor recruit U.S. workers for 60 days. At the end of the 60 days, the RA grants the temporary labor certification if the RA finds that (1) the employer has not offered foreign workers higher wages or better working conditions (or less restrictions) than that offered to U.S. workers, and (2) U.S. workers are not available for the employer's job opportunities. If the temporary labor certification is denied, the employer may seek an administrative-judicial review of the denial by a Department of Labor Hearing Officer as provided in these regulations. The Department of Labor thereafter advises the Immigration and Naturalization Service (INS) of approvals and denials of temporary labor certifications. The INS may accept or reject this advice. 8 CFR 214.2(h)(3). The INS makes the final decision as to whether or not to grant visas to the foreign workers. 8 U.S.C. 1184(a).

(c) *Definitions for terms used in this subpart. Administrator* means the chief official of the United States Employment Service or the Administrator's designee.

Adverse effect rate means the wage rate which the Administrator has determined must be offered and paid to foreign and U.S. workers for a particular occupation and/or area so that the wages of similarly employed U.S. workers will not be adversely affected. The Administrator may determine that the prevailing wage rate in the area and/or occupation is the adverse effect rate, if the use (or non-use) of aliens has not depressed the wages of similarly employed U.S. workers. The Administrator may determine that a wage rate higher than the prevailing wage rate is the adverse effect rate if the Administrator determines that the use of aliens has depressed the wages of similarly employed U.S. workers.

Agent means a legal person, such as an association of employers, which (1) is authorized to act as an agent of the employer for temporary labor certification purposes, and (2) which is not itself an employer, or a joint employer, as defined in this section.

Area of intended employment means the area within normal commuting distance of the place (address) of intended employment. If the place of intended employment is within a Standard Metropolitan Statistical Area (SMSA), any place within the SMSA is deemed to be within normal commuting distance of the place of intended employment.

Employer means a person, firm, corporation or other association or organization (1) which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a worker at a place within the United States and (2) which has an employer relationship with respect to employees under this subpart as indicated by the fact that it hires, pays, fires, supervises and otherwise controls the work of such employees. An association of employers shall be considered an employer if it has all of the indicia of an employer set forth in this definition. Such an association, however, shall be considered as a joint employer with the employer member if it shares with the employer member one or more of the definitional indicia.

Employment and Training Administration (ETA) means the agency within the Department of Labor (DOL) which includes the United States Employment Service (USES).

Hearing Officer means a Department of Labor official, whether Administrative Law Judge or Hearing Officer, who is authorized to conduct administrative hearings.

Immigration and Naturalization Service (INS) means the component of the U.S. Department of Justice which makes the determination under the Immigration and Nationality Act (INA) on whether or not to grant a visa to an alien seeking to perform temporary agricultural or logging work in the United States.

Job opportunity means a job opening for temporary, full-time employment

at a place in the United States to which U.S. workers can be referred.

Local office means an office of a State employment service agency which serves a particular geographic area within a State.

Regional Administrator, Employment and Training Administration (RA) means the chief official of the Employment and Training Administration (ETA) in a Department of Labor (DOL) regional office.

Secretary means the Secretary of Labor or the Secretary's designee.

State agency means the State employment service agency.

Temporary labor certification means the advice given by the Secretary of Labor to the Immigration and Naturalization Service, pursuant to the regulations of that agency at 8 CFR 214.2(h)(3)(i), that (1) there are not sufficient U.S. workers who are qualified and available to perform the work and (2) the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers.

United States Employment Service (USES) means the agency of the U.S. Department of Labor, established under the Wagner-Peyser Act of 1933, which is charged with administering the national system of public employment offices and carrying out the functions of the Secretary under the Immigration and Nationality Act.

United States workers means any worker who, whether U.S. national, citizen or alien, is legally permitted to work permanently within the United States.

(Approved by the Office of Management and Budget under control number 1205–0015)

[43 FR 10313, Mar. 10, 1978, as amended at 49 FR 18295, Apr. 30, 1984; 52 FR 20524, June 1, 1987]

§ 655.201 Temporary labor certification applications.

(a) (1) An employer who anticipates a labor shortage of workers for agricultural or logging employment may request a temporary labor certification for temporary foreign workers by filing, or by having an agent file, in duplicate, a temporary labor certification application, signed by the employer, with a local office in the area of intended employment.

(2) If the temporary labor certification application is filed by an agent, however, the agent may sign the application if the application is accompanied by a letter from each employer the agent represents, signed by the employer, which authorizes the agent to act on the employer's behalf and which states that the employer assumes full responsibility for the accuracy of the application, for all representations made by the agent on the employer's behalf, and for the fulfillment of all legal requirements arising under this subpart.

(3) If an association of employers files the application, the association shall identify and submit documents to verify whether, in accordance with the definitions at § 655.200, it is: (i) The employer, (ii) a joint employer with its member employers, or (iii) the agent of its employer members.

(b) Every temporary labor certification application shall include:

(1) A copy of the job offer which will be used by the employer (or each employer) for the recruitment of both U.S. and foreign workers. The job offer for each employer shall state the number of workers needed by the employer, and shall be signed by the employer. The job offer shall comply with the requirements of §§ 655.202 and 653.108 of this chapter;

(2) The assurances required by § 655.203; and

(3) The specific estimated date of need of workers.

(c) The entire temporary labor certification application shall be filed with the local office in duplicate and in sufficient time to allow the State agency to attempt to recruit U.S. workers locally and through the Employment Service intrastate and interstate clearance system for 60 calendar days prior to the estimated date of need. Section 655.206 requires the RA to grant or deny the temporary labor certification application by the end of the 60 calendar days, or 20 days from the estimated date of need, whichever is later. That section also requires the RA to offer employers an expedited administrative-judicial review in cases of denials of the temporary labor certification

applications. Following an administrative-judicial review, the employer has a right to contest any denial before the INS pursuant to 8 CFR 214.2(h)(3)(i). Finally, employers need time, after the temporary labor certification determination, to complete the process for bringing foreign workers into the United States, or to bring an appeal of a denial of an application for the labor certification. Therefore, employers should file their temporary labor certification applications at least 80 days before the estimated date of need specified in the application.

(d) Applications may be amended at any time prior to RA determination to increase the number of workers requested in the original application for labor certification by not more than 15 percent without requiring an additional recruitment period for U.S. workers. Requests for increases beyond 15 percent may be approved only when it is determined that, based on past experience, the need for additional workers could not be foreseen and that a critical need for the workers would exist prior to the expiration of an additional recruitment period.

(e) If a temporary labor certification application, or any part thereof, does not satisfy the time requirements specified in paragraph (c) of this section, and if the exception in paragraph (d) of this section does not apply, the local office shall immediately send both copies directly to the appropriate Regional Administrator (RA). The RA may then advise the employer and the INS in writing that the temporary labor certification cannot be granted because, pursuant to the regulations at paragraph (c) of this section, there is not sufficient time to test the availability of U.S. workers. The notice of denial to the employer shall inform the employer of the right to administrative-judicial review and to ultimately petition INS for the admission of the aliens. In emergency situations, however, the RA may waive the time period specified in this section on behalf of employers who have not made use of temporary alien workers for the prior year's harvest or for other good and substantial cause, provided the RA has sufficient labor market information to make the labor certification determinations required by 8 CFR 214.2(h)(3)(i).

(Approved by the Office of Management and Budget under control number 1205–0015)

[43 FR 10313, Mar. 10, 1978, as amended at 49 FR 18295, Apr. 30, 1984]

§ 655.202 Contents of job offers.

(a) So that the employment of aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers, each employer's job offer to U.S. workers must offer U.S. workers at least the same benefits which the employer is offering, intends to offer, or will afford, to temporary foreign workers. Conversely, no job offer may impose on U.S. workers any restrictions or obligations which will not be imposed on the employer's foreign workers. For example, if the employer intends to advance transportation costs to foreign workers either directly or indirectly (by having them paid by the foreign government involved), the employer must offer to advance the transportation costs of U.S. workers.

(b) Except when higher benefits, wages or working conditions are required by the provisions of paragraph (a) of this section, the Administrator has determined that, in order to protect similarly employed U.S. workers from adverse effect with respect to wages and working conditions, every job offer for U.S. workers must always include the following minimal benefit, wage, and working condition provisions:

(1) The employer will provide the worker with housing without charge to the worker. The housing will meet the full set of standards set forth at 29 CFR 1910.142 or the full set of standards set forth at part 654, subpart E of this chapter, whichever is applicable under the criteria of 20 CFR 654.401; except that, for mobile range housing for sheepherders, the housing shall meet existing Departmental guidelines. When it is the prevailing practice in the area of intended employment to provide family housing, the employer will provide such housing to such workers.

(2) (i) If the job opportunity is covered by the State workers' compensation law, the worker will be eligible for

workers' compensation for injury and disease arising out of and in the course of worker's employment; or

(ii) If the job opportunity is not covered by the State workers' compensation law, the employer will provide at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment;

(3) The employer will provide without cost to the worker all tools, supplies and equipment required to perform the duties assigned and, if any of these items are provided by the worker, the employer will reimburse the worker for the cost of those so provided;

(4) The employer will provide the worker with three meals a day, except that where under prevailing practice or longstanding arrangement at the establishment workers prepare their meals, employers need furnish only free and convenient cooking and kitchen facilities. Where the employer provides the meals, the job offer shall state the cost to the worker for such meals. Until a new amount is set pursuant to this paragraph (b)(4), the cost shall not be more than $4.94 per day unless the RA has approved a higher cost pursuant to §655.211 of this part. Each year the charge allowed by this paragraph (b)(4) will be changed by the 12-month percent change for the Consumer Price Index for All Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments shall be effective on their publication by the Administrator in the FEDERAL REGISTER.

(5) (i) The employer will provide or pay for the worker's transportation and daily subsistence from the place, from which the worker, without intervening employment, will come to work for the employer, to the place of employment, subject to the deductions allowed by paragraph (b)(13) of this section. The amount of the daily subsistence payment shall be at least as much as the amount the employer willl charge the worker for providing the worker with three meals a day during employment;

(ii) If the worker completes the work contract period, the employer will provide or pay for the worker's transportation and daily subsistence from the place of employment to the place, from which the worker, without intervening employment, came to work for the employer, unless the worker has contracted for employment with a subsequent employer who, in that contract, has agreed to pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite; and

(iii) The employer will provide transportation between the worker's living quarters and the employer's worksite without cost to the worker, and such transportation will be in accordance with applicable laws and regulations;

(6) (i) The employer guarantees to offer the worker employment for at least three-fourths of the workdays of the total period during which the work contract and all extensions thereof are in effect, beginning with the first workday after the arrival of the worker at the place of employment and ending on the termination date specified in the work contract, or in its extensions if any. For purposes of this paragraph, a workday shall mean any period consisting of 8 hours of work time. An employer shall not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays. The work must be offered for at least three-fourths of the 8 hour workdays. (That is, ¾ × (number of days × 8 hours.)) Therefore, if, for example, the contract contains 20 workdays, the worker must be offered employment for 120 hours during the 20 workdays. A worker may be offered more than 8 hours of work on a single workday. For purposes of meeting the guarantee, however, the worker may not be required to work for more than 8 hours per workday, or on the worker's Sabbath or Federal holidays;

(ii) If the worker will be paid on a piece rate basis, the employer will use the worker's average hourly earnings to calculate the amount due under the guarantee; and

(iii) Any hours which the worker fails to work when the worker has been offered an opportunity to do so pursuant to paragraph (b)(6)(i) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday, or on the worker's Sabbath or Federal holidays) may be counted by the employer in calculating whether the period of guaranteed employment has been met;

(7) (i) The employer will keep accurate and adequate records with respect to the workers' earnings, including field tally records, supporting summary payroll records, and records showing: The nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with, and over and above, the guarantee); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay; the worker's earnings per pay period; and the amount of and reasons for any and all deductions made from the worker's wages;

(ii) If the number of hours worked by the worker is less than the number offered in accordance with the guarantee, the records will state the reason or reasons therefor;

(iii) The records, including field tally records and supporting summary payroll records, will be made available for inspection and copying by representatives of the Secretary of Labor, and by the worker and the worker's representatives; and

(iv) The employer will retain the records for not less than three years after the completion of the contract;

(8) The employer will furnish to the worker at or before each payday, in one or more written statements:

(i) The worker's total earnings for the pay period;

(ii) The worker's hourly rate or piece rate of pay;

(iii) The hours of employment which have been offered to the worker (broken out by offers in accordance with, and over and above, the guarantee);

(iv) The hours actually worked by the worker;

(v) An itemization of all deductions made from the worker's wages; and

(vi) If piece rates are used, the units produced daily;

(9) (i) If the worker will be paid by the hour, the employer will pay the worker at least the adverse effect rate; or

(ii)(A) If the worker will be paid on a piece rate basis, and the piece rate does not result at the end of the pay period in average hourly earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the adverse effect rate, the worker's pay will be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had been paid at the adverse effect rate.

(B) If the employer who pays on a piece rate basis requires one or more minimum productivity standards of workers as a condition of job retention, (1) such standards shall be no more than those applied by the employer in 1977, unless the RA approves a higher minimum; or (2) if the employer first applied for temporary labor certification after 1977, such standards shall be no more than those normally required (at the time of that first application) by other employers for the activity in the area of intended employment, unless the RA approves a higher minimum.

(10) The frequency with which the worker will be paid (in accordance with the prevailing practice in the area of intended employment, or at least biweekly whichever is more frequent);

(11) If the worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of any worker for whom the employer would have otherwise been required to pay such expenses under paragraph (b)(5)(ii) of this section;

(12) If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire or other Act of God which makes the fulfillment of the contract impossible, and the RA so certifies, the employer may terminate

the work contract. In such cases the employer will make efforts to transfer the worker to other comparable employment acceptable to the worker. If such transfer is not effected, the worker (i) will be returned to the place from which the worker, without intervening employment, came to work for the employer at the employer's expense; and

(ii) Will be reimbursed the full amount of any deductions made from the worker's pay by the employer for transportation and subsistence expenses to the place of employment borne directly or indirectly by the employer;

(13) The employer will make those deductions from the worker's paycheck which are required by law. The job offer shall specify all deductions, not required by law, which the employer will make from the worker's paycheck. All deductions shall be reasonable. The employer may deduct the cost of the worker's transportation and daily subsistence expenses to the place of employment which were borne directly by the employer; in such cases, however, the job offer shall state that the worker will be reimbursed the full amount of such deductions upon the worker's completion of 50 percent of the worker's contract period; and

(14) The employer will provide the worker a copy of the work contract between the employer and the worker. The work contract shall contain all of the provisions required by paragraphs (a) and (b) of this section.

(Approved by the Office of Management and Budget under control number 1205–0015)

[43 FR 10313, Mar. 10, 1978, as amended at 45 FR 14185, Mar. 4, 1980; 49 FR 18295, Apr. 30, 1984; 51 FR 30351, Aug. 26, 1986; 52 FR 11466, Apr. 9, 1987]

§ 655.203 Assurances.

As part of the temporary labor certification application, the employer shall include assurances, signed by the employer, that:

(a) The job opportunity is not:

(1) Vacant because the former occupant is on strike or being locked out in the course of a labor dispute; or

(2) At issue in a labor dispute involving a work stoppage;

(b) During the period for which the temporary labor certification is granted, the employer will comply with applicable Federal, State and local employment-related laws, including employment related health and safety laws;

(c) The job opportunity is open to all qualified U.S. workers without regard to race, color, national origin, sex, or religion, and is open to U.S. workers with handicaps who are qualified to perform the work. No U.S. worker will be rejected for employment for other than a lawful job related reason;

(d) The employer will cooperate with the employment service system in the active recruitment of U.S. workers until the foreign workers have departed for the employer's place of employment by;

(1) Allowing the employment service system to prepare local, intrastate and interstate job orders using the information supplied on the employer's job offer;

(2) Placing at least two advertisements for the job opportunities in local newspapers of general circulation.

(i) Each such advertisement shall describe the nature and anticipated duration of the job opportunity; offer at least the adverse effect wage rate; give the ¾ guarantee; state that work tools, supplies and equipment will be provided by the employer; state that housing will also be provided, and that transportation and subsistence expenses to the worksite will be provided or paid for by the employer;

(ii) Each advertisement shall direct interested workers to apply for the job opportunity at a local employment service office in their area;

(3) Cooperating with the employment service system in contacting farm labor contractors, migrant workers and other potential workers in other areas of the State and/or Nation by letter and/or telephone;

(4) Cooperating with the employment service system in contacting schools, business and labor organizations, fraternal and veterans organizations, and non-profit organizations and public agencies such as sponsors of programs under the Comprehensive Employment and Training Act, throughout the area of intended employment, in order to enlist them in helping to find U.S. workers; and

(5) If the employer, or an association of employers of which the employer is a member, intends to negotiate and/or contract with the Government of a foreign nation or any foreign association, corporation or organization in order to secure foreign workers, making the same kind and degree of efforts to secure U.S. workers;

(e) From the time the foreign workers depart for the employer's place of employment, the employer will provide employment to any qualified U.S. worker who applies to the employer until fifty percent of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed. In addition, the employer will offer to provide housing, and the other benefits, wages, and working conditions required by §655.202, to any such U.S. worker; and

(f) Performing the other specific recruitment activities specified in the notice from the RA required by §655.205(a).

§655.204 Determinations based on temporary labor certification applications.

(a) Within two working days after the temporary labor certification application has been filed with it, the local office shall mail the duplicate application directly to the appropriate RA.

(b) The local office, using the job offer portion of its copy of the temporary labor certification application, shall promptly prepare a local job order and shall begin to recruit U.S. workers in the area of intended employment.

(c) The RA, upon receipt of the duplicate temporary labor certification application, shall promptly review the application to determine whether it meets the requirements of §§655.201–655.203 in order to determine whether the employer's application is (1) timely, and (2) contains offers of wages, benefits, and working conditions required to ensure that similarly employed U.S. workers will not be adversely affected. If the RA determines that the temporary labor certification application is not timely in accordance with §655.201 of this subpart, the RA may promptly deny the temporary labor certification on the grounds that, in accordance with that regulation, there is not sufficient time to adequately test the availability of U.S. workers. If the RA determines that the application does not meet the requirements of §§655.202–655.203 because the wages, working conditions, benefits, assurances, job offer, etc. are not as required, the RA shall deny the certification on the grounds that the availability of U.S. workers cannot be adequately tested because the wages or benefits, etc. do not meet the adverse effect criteria.

(d) If the certification is denied, the RA shall notify the employer in writing of the determination, with a copy to the local office and the Administrator. The notice shall:

(1) State the reasons for the denial, citing the relevant regulations; and

(2) Offer the employer an opportunity to request an expedited administrative-judicial review of the denial by a Department of Labor (DOL) Hearing Officer. The notice shall state that in order to obtain such a review, the employer must, within five calendar days of the date of the notice, file by facsimile (fax), telegram, or other means normally assuring next day delivery a written request for such a review to the Chief Administrative Law Judge of the Department of Labor (giving the address) and simultaneously serve a copy on the Regional Administrator. The notice shall also state that the employer's request for review should contain any legal arguments which the employer believes will rebut the basis of the RA's denial of certification; and

(3) State that, if the employer does not request an expedited administrative-judicial review before a DOL Hearing Officer within the five days:

(i) The RA will advise the INS that the certification cannot be granted, giving the reasons therefor, and that an administrative-judicial review of the denial was offered to the employer but not accepted, and enclosing, for INS review, the entire temporary labor certification application file; and

(ii) The employer has the opportunity to submit evidence to the INS to rebut the bases of the RA's determination in accordance with the INS regulation at 8 CFR 214.2(h)(3)(i) but

that no further review of the employer's application for temporary labor certification may be made by any Department of Labor official.

(e) If the employer timely requests an expedited administrative-judicial review pursuant to paragraph (d)(2) of this section, the procedures of § 655.212 shall be followed.

[43 FR 10313, Mar. 10, 1978, as amended at 59 FR 41876, Aug. 15, 1994]

§ 655.205 Recruitment period.

(a) If the RA determines that the temporary labor certification application meets the requirements of §§ 655.201 through 655.203, the RA shall promptly notify the employer in writing, with copies to the State agency and local office. The notice shall inform the employer and the State agency of the specific efforts which will be expected from them during the following weeks to carry out the assurances contained in § 655.203 with respect to the recruitment of U.S. workers. The notice shall require that the job order be placed both into intrastate clearance and into interstate clearance to such States as the RA shall determine to be potential sources of U.S. workers.

(b) Thereafter, the RA, under the direction of the ETA national office and with the assistance of other RAs with respect to areas outside the region, shall provide overall direction to the employer and the State agency with respect to the recruitment of U.S. workers.

(c) By the 60th day of the recruitment period, or 20 days before the date of need specified in the application, whichever is later, the RA, when making a determination of the availability of U.S. workers, shall also make a determination as to whether the employer has satisfied the recruitment assurances in § 655.203. If the RA concludes that the employer has not satisfied the requirement for recruitment of U.S. workers, the RA shall deny the temporary labor certification, and shall immediately notify the employer in writing with a copy to the State agency and local office. The notice shall contain the statements specified in § 655.204(d).

(d) If the employer timely requests an expedited administrative-judicial review before a DOL Hearing Officer, the procedures in § 655.212 shall be followed.

§ 655.206 Determinations of U.S. worker availability and adverse effect on U.S. workers.

(a) If the RA, in accordance with § 655.205 has determined that the employer has complied with the recruitment assurances, the RA, by 60th day of the recruitment period, or 20 days before the date of need specified in the application, whichever is later, shall grant the temporary labor certification for enough aliens to fill the employer's job opportunities for which U.S. workers are not available. In making this determination the RA shall consider as available for a job opportunity any U.S. worker who has made a firm commitment to work for the employer, including those workers committed by other authorized persons such as farm labor contractors and family heads; such a firm commitment shall be considered to have been made not only by workers who have signed work contracts with the employer, but also by those whom the RA determines are very likely to sign such a work contract. The RA shall also count as available any U.S. worker who has applied to the employer (or on whose behalf an application has been made), but who was rejected by the employer for other than lawful job-related related reasons unless the RA determines that:

(1) Enough qualified U.S. workers have been found to fill all the employer's job opportunities; or

(2) The employer, since the time of the initial determination under § 655.204, has adversely affected U.S. workers by offering to, or agreeing to provide to, alien workers better wages, working conditions, or benefits (or by offering or agreeing to impose on alien workers less obligations and restrictions) than that offered to U.S. workers.

(b) (1) Temporary labor certifications shall be considered subject to the conditions and assurances made during the application process. Temporary labor

certifications shall be for a limited duration such as for ''the 1978 apple harvest season'' or ''until November 1, 1978'', and they shall never be for more than eleven months. They shall be limited to the employer's specific job opportunities; therefore, they may not be transferred from one employer to another.

(2) If an association of employers is itself the employer, as defined in § 655.200, certifications shall be made to the association and may be used for any of the job opportunities of its employer members and workers may be transferred among employer members.

(3) If an association of employers is a joint employer with its employer members, as defined in § 655.200, the certification shall be made jointly to the association and the employer members. In such cases workers may be transferred among the employer members provided the employer members and the association agree in writing to be jointly and severally liable for compliance with the temporary labor certification obligations set forth in this subpart.

(c) If the RA denies the temporary labor certification in whole or part, the RA shall notify the employer in writing by means normally assuring next-day delivery. The notice shall contain all of the statements required in § 655.204(d). If a timely request is made for an administrative-judicial review by a DOL Hearing Officer, the procedures of § 655.212 shall be followed.

(d) (1) After a temporary labor certification has been granted, the employer shall continue its efforts to actively recruit U.S. workers until the foreign workers have departed for the employer's place of employment. The employer, however, must keep an active job order on file until the assurance at § 655.203(e) is met.

(2) The ES system shall continue to actively recruit and refer U.S. workers as long as there is an active job order on file.

[43 FR 10313, Mar. 10, 1978, as amended at 59 FR 41876, Aug. 15, 1995]

§ 655.207 Adverse effect rates.

(a) Except as otherwise provided in this section, the adverse effect rates for all agricultural and logging employment shall be the prevailing wage rates in the area of intended employment.

(b)(1) For agricultural employment (except sheepherding) in the States listed in paragraph (b)(2) of this section, and for Florida sugarcane work, the adverse effect rate for each year shall be computed by adjusting the prior year's adverse effect rate by the percentage change (from the second year previous to the prior year) in the U.S. Department of Agriculture's (USDA's) average hourly wage rates for field and livestock workers (combined) based on the USDA Quarterly Wage Survey. The Administrator shall publish, at least once in each calendar year, on a date or dates he shall determine, adverse effect rates calculated pursuant to this paragraph (b) as a notice or notices in the FEDERAL REGISTER.

(2) *List of States.* Arizona, Colorado, Connecticut, Florida (other than sugar cane work), Maine, Maryland, Massachusetts, New Hamsphire, New York, Rhode Island, Texas, Vermont, Virginia, and West Virginia. Other States may be added as appropriate.

(3) *Transition.* Notwithstanding paragraphs (b) (1) and (2) of this section, the 1986 adverse effect rate for agricultural employment (except sheepherding) in the following States, and for Florida sugarcane work, shall be computed by adjusting the 1981 adverse effect rate (computed pursuant to 20 CFR 655.207(b)(1), 43 FR 10317; March 10, 1978) by the percentage change between 1980 and 1985 in the U.S. Department of Agriculture annual average hourly wage rates for field and livestock workers (combined) based on the USDA Quarterly survey: The States listed at 20 CFR 655.207(b)(2) (1985).

(c) In no event shall an adverse effect rate for any year be lower than the hourly wage rate published in 29 U.S.C. 206(a)(1) and currently in effect.

[43 FR 10313, Mar. 10, 1978, as amended at 44 FR 32212, June 5, 1979; 48 FR 40175, Sept. 2, 1983; 50 FR 25708, June 21, 1985; 51 FR 24141, July 2, 1986; 52 FR 11466, Apr. 9, 1987]

§ 655.208 Temporary labor certification applications involving fraud or willful misrepresentation.

(a) If possible fraud or willful misrepresentation involving a temporary labor certification application is discovered prior to a final temporary labor certification determination, or if it is learned that the employer or agent (with respect to an application) is the subject of a criminal indictment or information filed in a court, the RA shall refer the matter to the INS for investigation and shall notify the employer or agent in writing of this referral. The RA shall continue to process the application and may issue a qualified temporary labor certification.

(b) If a court finds an employer or agent innocent of fraud or willful misrepresentation, or if the Department of Justice decides not to prosecute an employer or agent, the RA shall not deny the temporary labor certification application on the grounds of fraud or willful misrepresentation. The application, of course, may be denied for other reasons pursuant to this subpart.

(c) If a court or the INS determines that there was fraud or willful misrepresentation involving a temporary labor certification application, the application shall be deemed invalidated, processing shall be terminated, and the application shall be returned to the employer or agent with the reasons therefor stated in writing.

§ 655.209 Invalidation of temporary labor certifications.

After issuance, temporary labor certifications are subject to invalidation by the INS upon a determination, made in accordance with that agency's procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the temporary labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a Regional Administrator, Employment and Training Administration or to the Administrator, the Regional Administrator or Administrator as appropriate, shall notify the INS in writing.

§ 655.210 Failure of employers to comply with the terms of a temporary labor certification.

(a) If, after the granting of a temporary labor certification, the RA has probable cause to believe that an employer has not lived up to the terms of the temporary labor certification, the RA shall investigate the matter. If the RA concludes that the employer has not complied with the terms of the labor certification, the RA may notify the employer that it will not be eligible to apply for a temporary labor certification in the coming year. The notice shall be in writing, shall state the reasons for the determination, and shall offer the employer an opportunity to request a hearing within 30 days of the date of the notice. If the employer requests a hearing within the 30-day period, the RA shall follow the procedures set forth at § 658.421(i) (1), (2) and (3) of this chapter. The procedures contained in §§ 658.421(j), 658.422 and 658.423 of this chapter shall apply to such hearings.

(b) No other penalty shall be imposed by the employment service on such an employer other than as set forth in paragraph (a) of this section.

§ 655.211 Petition for higher meal charges.

(a) Until a new amount is set pursuant to this paragraph (a), the RA may permit an employer to charge workers up to $6.17 for providing them with three meals per day, if the employer justifies the charge and submits to the RA the documentary evidence required by paragraph (b) of this section. A denial in whole or in part shall be reviewable as provided in § 655.212 of this part. Each year the maximum charge allowed by this paragraph (a) will be changed by the 12-month percent change for the Consumer Price Index for All Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments shall be effective on their publication by the Administrator in the FEDERAL REGISTER.

(b) Evidence submitted shall include the cost of goods and services directly related to the preparation and serving

of meals, the number of workers fed, the number of meals served and the number of days meals were provided. The cost of the following items may be included: Food; kitchen supplies other than food, such as lunch bags and soap; labor costs which have a direct relation to food service operations, such as wages of cooks and restaurant supervisors; fuel, water, electricity, and other utilities used for the food service operations; other costs directly related to the food service operation. Charges for transportation, depreciation, overhead, and similar charges may not be included. Receipts and other cost records for a representative pay period shall be available for inspection by the Secretary's representatives for a period of one year.

(Approved by the Office of Management and Budget under control number 1205–0015)

[43 FR 10313, Mar. 10, 1978, as amended at 49 FR 18295, Apr. 30, 1984; 51 FR 30351, Aug. 26, 1986]

§ 655.212 Administrative-judicial reviews.

(a) Whenever an employer has requested an administrative-judicial review of a denial of an application or a petition in accordance with §§ 655.204(d), 655.205(d), 655.206(c), or 655.211, the Chief Administrative Law Judge shall immediately assign a Hearing Officer to review the record for legal sufficiency, and the Regional Administrator shall send a certified copy of the case file to the Chief Administrative Law Judge by means normally assuring next day delivery. The Hearing Officer shall not have authority to remand the case and shall not receive additional evidence. Any countervailing evidence advanced after decision by the Regional Administrator shall be subject to provisions of 8 CFR 214.2(h)(3)(i).

(b) The Hearing Officer, within five working days after receipt of the case file shall, on the basis of the written record and due consideration of any written memorandums of law submitted, either affirm, reverse or modify the RA's denial by written decision. The decision of the Hearing Officer shall specify the reasons for the action taken and shall be immediately provided to the employer, RA, Administrator, and INS by means normally assuring next-day delivery. The Hearing Officer's decision shall be the final decision of the Department of Labor and no further review shall be given to the temporary labor certification determination by any Department of Labor official.

[59 FR 41876, Aug. 15, 1994]

§ 655.215 Territory of Guam.

Subpart C of this part does not apply to temporary employment in the Territory of Guam, and the Department of Labor does not certify to the Immigration and Naturalization Service (INS) the temporary employment of nonimmigrant aliens under H–2B visas in the Territory of Guam. Pursuant to INS regulations, that function is performed by the Governor of Guam, or the Governor's designated representative within the Territorial Government.

[56 FR 56876, Nov. 6, 1991]

Subpart D—Attestations by Facilities Using Nonimmigrant Aliens as Registered Nurses

SOURCE: 59 FR 882, 897, Jan. 6, 1994, unless otherwise noted.

§ 655.300 Purpose and scope of subparts D and E.

(a) *Purpose.* The Immigration and Nationality Act (INA) establishes the H–1A program to provide relief for the nursing shortage crisis. Subpart D of this part sets forth the procedure by which health care facilities seeking to use nonimmigrant registered nurses may submit attestations to the Department of Labor relating to the effects of the nursing shortage on their operations, their efforts to recruit and retain United States workers as registered nurses and certain information on wages and working conditions for nurses at the facility. Subpart E of this part sets forth complaint, investigation, and penalty provisions with respect to such attestations.

(b) *Procedure.* The INA establishes a procedure for health care facilities to follow in seeking admission to the United States for, or use of, nonimmigrant nurses under H–1A visas.

The procedure is designed to reduce reliance on nonimmigrant nurses in the future, and calls of the health care facility to attest, and be able to demonstrate, that, *e.g.,* there would be substantial disruption to health services without the nonimmigrant nurses and that it is taking timely and significant steps to develop, recruit, and retain U.S. nurses. Subparts D and E of this part set forth the specific requirements for those procedures.

(c) *Applicability.* (1) Subparts D and E of this part apply to all facilities that seek the temporary admission or use of nonimmigrants as registered nurses.

(2) During the period that the provisions of appendix 1603.D.4 of Annex 1603 of the North American Free Trade Agreement (NAFTA) apply, subparts D and E of this part shall apply to the entry of a nonimmigrant who is a citizen of Mexico under and pursuant to the provisions of section D of Annex 1603 of NAFTA.

§655.301 Overview of process.

This section provides a context for the attestation process, to facilitate understanding by health care facilities that may seek nonimmigrant nurses under H–1A visas.

(a) *Federal agencies' responsibilities.* The United States Department of Labor (DOL), Department of Justice, and Department of State are involved in the H–1A visa process. Within DOL, the Employment and Training Administration (ETA) and the Employment Standards Administration (ESA) have responsibility for different aspects of the process.

(b) *Health care facility's attestation responsibilities.* Each health care facility seeking one or more H–1A nurses shall, as the first step, submit an attestation on *Form ETA 9029,* as described in §655.310 of this part, to the designated regional office of the Employment and Training Administration (ETA) of DOL. If the attestation is found to meet the requirements set at §655.310 (a) through (k) of this part, ETA shall accept the attestation for filing, shall return the cover form of the accepted attestation to the health care facility, and shall notify the Immigration and Naturalization Service (INS) of the Department of Justice of the filing. As discussed in §655.310 of this part, if the facility proposes to utilize alternative methods to comply with Attestation Elements I and/or IV, or asserts that taking a second timely and significant step under Element IV would be unreasonable, or claims a bona fide medical emergency exemption from Element IV as a worksite using one or more H–1A nurses through a nursing contractor only, additional supporting information and ETA review shall be required.

(c) *Visa petitions.* Upon ETA's acceptance of the filing, the health care facility may then file with INS H–1A visa petitions for the admission of H–1A nurses, or to extend the stay of alien nurses currently working at the facility. the facility shall attach a copy of the accepted attestation form (Form ETA 9029) to the visa petition filed with INS. At the same time that the facility files a visa petition with INS, it shall also send a copy of the visa petition with INS, it shall also send a copy of the visa petition to the Chief, Division of Foreign Labor Certifications, U.S. Employment Service, Employment and Training Administration, Department of Labor, 200 Constitution Avenue, NW., room N–4456, Washington, DC 20210.

(d) *Visa issuance.* INS assures that the nonimmigrants possess the required qualifications and credentials to be employed as nurses. See 8 U.S.C. 1182(m)(1)). The Department of State is responsible for issuing the visa.

(e) *Board of Alien Labor Certification Appeals (BALCA) review of attestations accepted and not accepted for filing.* The decision whether or not to accept for filing an attestation which ETA has reviewed, that is: an attestation where the facility is attesting to alternative methods of compliance with Element I and/or Element IV; an attestation where the facility is claiming that taking a second timely and significant step would not be reasonable; and/or an attestation where a facility that is not an employer of H–1A nurses is claiming a bond fide medical emergency as the basis for requesting a waiver of Element IV; may be appealed by any interested party to the BALCA.

(f) *Complaints.* Complaints concerning misrepresentation in the attestation or failure of the health care facility to

carry out the terms of the attestation may be filed with the Wage and Hour Division (Division), Employment Standards Administration (ESA) of DOL, according to the procedures set forth in subpart E of this part. Complaints of ''misrepresentation'' may include assertions that a facility's attestations of compliance failed to meet the regulatory standards for attestation elements under which the attestation was accepted by ETA for filing without ETA review. The Division shall then investigate, and, where appropriate, after an opportunity for a hearing, assess sanctions and penalties. Subpart E of this part also provides that interested parties may obtain an administrative law judge hearing and may seek the Secretary's review of the administrative law judge's decision.

§ 655.302 Definitions.

For the purposes of subparts D and E of this part:

Accepted for filing means that the attestation and supporting documentation submitted by the health care facility have been received by the Employment and Training Administration of the Department of Labor (DOL) and have been found to be in compliance with the attestation requirements in § 655.310 of this part.

Act and *INA* mean the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq.*

Administrative law judge means an official appointed pursuant to 5 U.S.C. 3105.

Administrator means the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor, and such authorized representatives as may be designated to perform any of the functions of the Administrator under subparts D and E of this part.

Attorney General means the chief official of the U.S. Department of Justice or the Attorney General's designee.

Board of Alien Labor Certification Appeals (BALCA) means a panel of one or more administrative law judges who serve on the permanent Board of Alien Labor Certification Appeals established by 20 CFR Part 656. BALCA consists of administrative law judges assigned to the Department of Labor and designated by the Chief Administrative Law Judge to be members of the Board of Alien Labor Certification Appeals.

Bona fide medical emergency means a situation in which the services of one or more H–1A contract nurses are necessary at a worksite facility (which itself does not employ an H–1A nurse) to prevent death or serious impairment of health, and, because of the danger to life or health, nursing services for such situation are not elsewhere available in the geographic area.

Certifying Officer means a Department of Labor official, or such official's designee, who makes determinations about whether or not H–1A attestations are acceptable for filing.

Chief Administrative Law Judge means the chief official of the Office of the Administrative Law Judges of the Department of Labor or the Chief Administrative Law Judge's designee.

Chief, Division of Foreign Labor Certifications, USES means the chief official of the Division of Foreign Labor Certifications within the United States Employment Service, Employment and Training Administration, Department of Labor, or the designee of the Chief, Division of Foreign Labor Certifications, USES.

Date of filing means the date an attestation is ''accepted for filing'' by ETA.

Department and *DOL* mean the United States Department of Labor.

Director means the chief official of the United States Employment Service (USES), Employment and Training Administration, Department of Labor, or the Director's designee.

Division means the Wage and Hour Division of the Employment Standards Administration, DOL.

Employer means a person, firm, corporation, or other association or organization involved in the direct provision of health care services, which:

(1) Suffers or permits a person to work;

(2) Has a location within the United States to which U.S. workers may be referred for employment;

(3) Proposes to employ workers at a place within the United States; and

(4) Has an employer-employee relationship with respect to employees under subpart D and E of this part, as indicated by the fact that it may hire,

pay, fire, supervise or otherwise control the work of such employee.

Employment means full-time work by an employee for an employer/health care facility other than oneself. ''Full-time work'' means work where the nurse is regularly scheduled to work 40 hours or more per week, unless the facility documents as part of its attestation that it is common practice for the occupation at the facility or for the occupation in the geographic area for nurses to work fewer hours per week.

Employment and Training Administration (ETA) means the agency within the Department of Labor (DOL) which includes the United States Employment Service (USES).

Employment Standards Administration (ESA) means the agency within the Department of Labor (DOL) which includes the Wage and Hour Division.

Facility means a user of nursing services with either a single site or a group of contiguous locations at which it provides health care services. ''Facility'' includes an employer of registered nurses which provides health care services in a home or other setting, such as a hospital, nursing home, or other site of employment, not owned or operated by the employer (*e.g.*, a visiting nurse association or a nursing contractor). ''Facility'' also includes a private household which employs or seeks to employ one or more H–1A nurses, but does not include a private household which uses H–1A nurses only through a nursing contractor. Groups of structures which form a campus or separate buildings across the street from one another are a single facility. However, separate buildings or areas which are not physically connected or in immediate proximity are a single health care facility if they are in reasonable geographic proximity, used for the same purpose, and share the same nursing staff and equipment. An example is an entity which manages a nursing home and a hospital in the same area and which regularly shifts or rotates the nurses between the two. Non-contiguous sites, even within the same geographic area, which do not share the same nursing staff and operational purposes are not a single facility. For example, hospitals which are located on opposite sides of a municipality, but which are managed or owned by a single entity, are separate facilities if they do not regularly share nursing staff and operational purpose.

Geographic area means the area within normal commuting distance of the place (address) of the intended worksite. If the geographic area does not include a sufficient number of facilities to make a prevailing wage determination, the term ''geographic area'' shall be expanded (by the State employment service, unless directed not to do so by the Director) with respect to the attesting facility to include a sufficient number of facilities to permit a prevailing wage determination to be made. If the place of the intended worksite is within a Metropolitan Statistical Area (MSA), any place within the MSA may be deemed to be within normal commuting distance of the place of intended employment.

Governor means the chief elected official of a State or the Governor's designee.

H–1A nurse means any nonimmigrant alien admitted to the United States to perform services as a nurse under section 101(a)(15)(H)(i)(a) of the Act (8 U.S.C. 1101(a)(15)(H)(i)(a)).

Immigration and Naturalization Service (INS) means the component of the Department of Justice which makes the determination under the Act on whether to grant visa petitions to petitioners seeking the admission of nonimmigrant nurses under H–1A visas.

Layoff means any involuntary separation of one or more staff nurses without cause/prejudice. If a staff nurse is separated from one specialized activity and is offered retraining and retention at the same facility in another activity involving direct patient care at the same wage and status, but refuses such training and retention, such separation shall not constitute a layoff. The layoff provision applies to staff nurses only, not to other health occupations. If the position occupied by the staff nurse is covered by a collective bargaining agreement, the collective bargaining agreement definition of ''layoff'' (if any) shall apply to that position.

Lockout means a labor dispute involving a work stoppage, wherein an employer withholds work from its employees in order to gain a concession from them.

Nurse means a person who is or will be authorized by a State Board of Nursing to engage in registered nursing practice in a State or U.S. territory or possession at a facility which provides health care services. A staff nurse means a nurse who provides nursing care directly to patients. In order to qualify under this definition of ''nurse'' the alien shall:

(1) Have obtained a full and unrestricted license to practice nursing in the country where the alien obtained nursing education, or have received nursing education in the United States or Canada;

(2) Have passed the examination given by the Commission on Graduates for Foreign Nursing Schools (CGFNS), or have obtained a full and unrestricted (permanent) license to practice as a registered nurse in the state of intended employment, or have obtained a full and unrestricted (permanent) license in any state or territory of the United States and received temporary authorization to practice as a registered nurse in the state of intended employment; and,

(3) Be fully qualified and eligible under the laws (including such temporary or interim licensing requirements which authorize the nurse to be employed) governing the place of intended employment to practice as a registered nurse immediately upon admission to the United States, and be authorized under such laws to be employed by the employer. For purposes of this paragraph, the temporary or interim licensing may be obtained immediately after the alien enters the United States and registers to take the first available examination for permanent licensure.

Nursing contractor means an entity that employs registered nurses and supplies these nurses, on a temporary basis and for a fee, to health care facilities or private homes.

Prevailing wage means the average wage paid to similarly employed registered nurses within the geographic area.

Secretary means the Secretary of Labor or the Secretary's designee.

Similarly employed means employed by the same type of facility (acute care or long-term care) and working under like conditions, such as the same shift, on the same days of the week, and in the same specialty area.

State means one of the 50 States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam.

State employment security agency (SESA) means the State agency designated under section 4 of the Wagner-Peyser Act to cooperate with USES in the operation of the national system of public employment offices.

Strike means a labor dispute wherein employees engage in a concerted stoppage or work (including stoppage by reason of the expiration of a collective-bargaining agreement) or engage in any concerted slowdown or other concerted interruption of operations.

United States Employment Service (USES) means the agency of the Department of Labor, established under the Wagner-Peyser Act, which is charged with administering the national system of public employment offices.

United States (U.S.) nurse means any nurse who is a U.S. citizen; is a U.S. national; is lawfully admitted for permanent residence; is granted the status of an alien admitted for temporary residence under 8 U.S.C. 1160(a), 1161(a), or 1255a(a)(1); is admitted as a refugee under 8 U.S.C. 1157; or is granted asylum under 8 U.S.C. 1158.

United States (U.S.) worker means any worker who is a U.S. citizen; is a U.S. national; is lawfully admitted for permanent residence; is granted the status of an alien lawfully admitted for temporary residence under 8 U.S.C. 1160(a), 1161(a), or 1255(a)(1); is admitted as a refugee under 8 U.S.C. 1157; or is granted asylum under 8 U.S.C. 1158.

United States is defined at 8 U.S.C. 1101(a)(38).

Worksite means the health care facility or home where the nurse is involved in the practice of nursing. It is possible, in the case of nursing contractors, that the employer's physical location and the worksite facility's physical location will differ.

§ 655.310 Attestations.

(a) *Who may submit attestations?* Any entity meeting the definition of ''facility'' in § 655.302, may submit an attestation. The attestation shall include: a completed Form ETA 9029, which shall be signed by the chief executive officer of the facility (or the chief executive officer's designee); and explanatory statements prescribed in paragraphs (c) through (k) of this section. A nursing contractor that seeks to employ nonimmigrant nurses shall file its own attestation (including *Form ETA 9029* and explanatory statements) as prescribed by this section, and, as part of its own attestation, shall attest that it shall refer H–1A nurses only to facilities that, with the exception of private households which themselves do not employ H–1A nurses, have current and valid attestations on file with ETA. Subparts D and E of this part shall apply both to the nursing contractor and to the worksite facility.

(b) *Where should attestations be submitted?* Attestations shall be submitted, by U.S. mail or private carrier, to the U.S. Department of Labor ETA Regional Office which has jurisdiction over the geographic area where the H–1A nurse will be employed, as designated by the Chief, Division of Foreign Labor Certifications, USES. The addresses of the Certifying Officers are set forth in the instructions to *Form ETA 9029*.

(c) *What should be submitted?*—(1) *Form ETA 9029 and* explanatory statements.

(i) A completed and dated original *Form ETA 9029*, containing the required attestation elements and the original signature of the chief executive officer of the facility, shall be submitted, along with two copies of the completed, (signed, and dated) *Form ETA 9029*. (Copies of *Form ETA 9029* are available at the address listed in paragraph (b) of this section.) In addition, explanations, where required, for the required attestation elements as to what documentation is available at the facility and how such documentation indicates compliance with the regulatory standards as prescribed in paragraphs (d) through (i) of this section. In addition,

(A) If the facility is a nursing contractor, the special attestation element in paragraph (j) of this section; or

(B) If the facility is a worksite (other than a private household which itself does not employ, seek to employ, or file a visa petition on behalf of an H–1A nurse), which will use H–1A nurses only through a nursing contractor, the special attestation element in paragraph (k) of this section, shall be submitted in triplicate with the *Form ETA 9029*.

(ii) If the facility is proposing to meet alternative standards for substantial disruption (Element I) and/or the taking of timely and significant steps (Element IV), an explanation of the standards being proposed and an explanation of how these proposed standards are of comparable significance to those set forth in the statute shall be submitted in triplicate. If the facility is attesting that it can only take one timely and significant step (Element IV), it shall submit an explanation, in triplicate, demonstrating that taking a second step is unreasonable. If the facility uses H–1A nurses only through a nursing contractor, but claims a bona fide medical emergency exemption from Element IV, it shall submit a written explanation, in triplicate, demonstrating the existence of such an emergency. DOL may request additional explanation and/or documentation from a facility in the process of determining acceptability in cases described in this paragraph (c)(1)(ii).

(2) *Attestation elements.* The attestation elements referenced in paragraph (c)(1) of this section are mandated by section 212(m)(2)(A) of the Act (8 U.S.C. 1182(m)(2)(A)). Section 212(m)(2)(A) of the Act requires covered facilities to attest as follows:

(i) The attestation referred to in section 101(a)(15)(H)(i)(a) of the Act, with respect to a facility for which an alien will perform services, is an attestation as to the following:

(A) There would be a substantial disruption through no fault of the facility in the delivery of health care services of the facility without the services of such an alien or aliens.

(B) The employment of the aliens will not adversely affect the wages and working conditions of registered nurses similarly employed.

(C) The aliens employed by the facility will be paid the wage rate for registered nurses similarly employed by the facility.

(D) Either—(*1*) The facility has taken and is taking timely and significant steps designed to recruit and retain sufficient registered nurses who are United States citizens or immigrants who are authorized to perform nursing services, in order to remove as quickly as reasonably possible the dependence of the facility on nonimmigrant registered nurses, or

(*2*) The facility is subject to an approved State plan for the recruitment and retention of nurses (described in section 212(m)(3) of the Act; 8 U.S.C. 1182(m)(3)).

(E) There is not a strike or lockout in the course of a labor dispute, and the employment of such an alien is not intended or designed to influence an election for a bargaining representative for registered nurses of the facility.

(F) At the time of the filing of the petition for registered nurses under section 101(a)(15)(H)(i)(a) of the Act, notice of the filing has been provided by the facility to the bargaining representative of the registered nurses at the facility or, where there is no such bargaining representative, notice of the filing has been provided to registered nurses at the facility through posting in conspicuous locations.

(ii) A facility is considered not to meet paragraph (c)(2)(i)(A) of this section (relating to an attestation of a substantial disruption in delivery of health care services) if the facility, within the previous year, has laid off registered nurses. A facility which lays off a registered nurse *other than a staff nurse* still meets the ''no layoff' requirement if, in its attestation, it attests that it will not replace the nurse with an H–1A nurse (either through promotion or otherwise) for a period of 1 year after the date of the layoff. Nothing in paragraph (c)(2)(i)(D) of this section shall be construed as requiring a facility to have taken significant steps described in such paragraph before December 18, 1989 (*i.e.,* the date of enactment of the Immigration Nursing Relief Act of 1989).

(d) *The first attestation element: substantial disruption.* The facility shall attest that ''there would be substantial disruption through no fault of the facility in the delivery of health care services of the facility without the services of such an alien or aliens.'' This element shall be met if the facility provides the following information:

(1) *Layoffs.* The facility shall attest that it has not laid off nurses during the 12-month period prior to submitting the attestation. A facility which lays off a registered nurse *other than a staff nurse* still meets the ''no layoff'' requirement if, in its attestation it attests that it will not replace the nurse with an H–1A nurse (either through promotion or otherwise) for a period of 1 year after the date of the layoff.

(2) *Nursing shortage.* (i) The facility shall attest to one of the following:

(A) It has a current nurse vacancy rate of 7 percent or more. An explanatory statement does not have to be submitted for this attestation element, but documentation to support this attestation shall be maintained at the facility and shall be available for review in accordance with § 655.350(b).

(B) It is unable to utilize 7 percent or more of its total beds due to a shortage of nurses. An explanatory statement does not have to be submitted for this attestation element, but supporting documentation for this attestation shall be maintained at the facility and shall be available for review in accordance with § 655.350(b).

(C) It has had to eliminate or curtail the delivery of essential health care services due to a shortage of nurses, and provide brief explanatory information about the essential services eliminated or curtailed by the facility due to a nursing shortage, what documentation is available at the facility to substantiate this attestation, where this documentation is located and can be reviewed, and the applicable time period of the documentation.

(D) It has been unable to effect established plans to provide needed new health care services in the community due to a shortage of nurses, and provide brief explanatory information about needed new services that have not been implemented by the facility due to a nursing shortage and which

will be implemented with the availability of H–1A nurses, what documentation is available at the facility to substantiate this attestation, where this documentation is located and can be reviewed, and the applicable time period of the documentation.

(ii) *Other substantial disruption.* When an attesting facility finds that the indicators in paragraphs (d)(2)(i) (A) through (D) of this section cannot be demonstrated, or that such indicators are inappropriate to that facility, but that without the services of H–1A nurses, substantial disruption in the delivery of health care services of the facility still would occur due to a shortage or nurses, the facility shall provide an explanation of how a shortage of nurses has caused a ''substantial disruption'' in the delivery of its health care services. Such explanation shall be sufficient to provide a clear showing of ''substantial disruption'' in the delivery of specific health care services due to a shortage of nurses, and shall clearly explain why the indicators in paragraphs (d)(2)(i) (A) through (D) of this section cannot be met by or are inappropriate to that facility. In addition to the documentation required to be maintained by attesting facilities described in paragraph (d)(3) of this section, facilities attesting under this paragraph also shall maintain and make available for inspection (as described elsewhere in this section) such additional documentation as is necessary to substantiate such claim of substantial disruption.

(3) *Documentation of facility's nursing positions.* The attesting facility shall maintain and make available for inspection (as described in § 655.350(b)) documentation substantiating:

(i) The total number of nursing positions at the facility;

(ii) The number of nursing vacancies at the facility during a 12-month period ending no later than 3 months prior to submittal of the attestation;

(iii) The number of nurses who left the facility during the same 12-month period;

(iv) The number of nurses hired by the facility during the same 12-month period;

(v) The overall staffing pattern for nursing positions at the facility; and

(vi) A description of the facility's efforts to recruit U.S. nurses during the same 12-month period. The documentation on numbers of nurses, maintained for the purposes of this paragraph (d)(3), shall be broken out by numbers of U.S. nurses, nurses admitted under H–1 visas, nurses admitted under H–1A visas, nurses admitted under other nonimmigrant visas, and other nurses.

(e) *The second attestation element: no adverse effect.* The facility shall attest that ''the employment of the alien will not adversely affect the wages and working conditions of registered nurses similarly employed.''

(1) *Wages.* To meet the requirement of no adverse effect on wages, the facility shall attest that it shall pay each nurse of the facility at least the prevailing wage for the occupation in the geographic area. The facility shall pay the higher of the wage required pursuant to this paragraph (e) or the wage required pursuant to paragraph (f) of this section (*i.e.*, the third attestation element: facility wage).

(i) *State employment security determination.* The facility does not independently determine the prevailing wage. The State employment security agency (SESA) shall determine the prevailing wage for similarly employed nurses in the geographic area in accordance with administrative guidelines or regulations issued by ETA. The facility shall request the appropriate prevailing wage from the SESA not more than 90 days prior to the date the attestation is submitted to ETA. Once a facility obtains a prevailing wage determination from the SESA and files an attestation supported by that prevailing wage determination, the facility shall be deemed to have accepted the prevailing wage determination as accurate and appropriate (both to the occupational classification and wage) and thereafter shall not contest the legitimacy of the prevailing wage determination in an investigation or enforcement action. A facility may challenge a SESA prevailing wage determination through the Employment Service complaint system. See 20 CFR part 658, Subpart E. A facility which

challenges a SESA prevailing wage determination shall obtain in final ruling from the Employment Service prior to filing an attestation. Any such challenge shall not require the SESA to divulge any employer wage data which was collected under the promise of confidentiality.

(ii) *Collectively bargained wage rates.* Where wage rates for nurses at a facility are the result of arms-length collective bargaining, those rates shall be considered ''prevailing'' for that facility for the purposes of this subpart.

(iii) *Total compensation package.* The prevailing wage finding under this paragraph (e)(1) relates to wages only. However, each item in the total compensation package for U.S., H–1A, and other nurses employed by the facility shall be the same within a given facility, including such items as housing assistance and other perquisites.

(iv) *Documentation of pay and total compensation.* The facility shall maintain documentation summarizing its pay schedule and compensation package for nurses. See § 655.350(b). The summary shall cover each category of nursing position in which H–1A nurses are or will be hired or promoted into and each category of nursing position in which H–1A nurses (or nurses admitted on H–1 visas) have been hired or promoted into. Categories of nursing positions not covered by the documentation shall not be covered by the attestation, and, therefore, such positions shall not be filled or held by H–1A nurses.

(2) *Working conditions.* To meet the requirement of no adverse effect on working conditions, the facility shall attest that it shall afford equal treatment to U.S. and H–1A nurses with the same seniority, with respect to such working conditions as the number and scheduling of hours worked (including shifts, straight days, weekends); vacations; wards and clinical rotations; and overall staffing-patient patterns.

(f) *The third attestation element: facility/employer wage.* The facility employing or seeking to employ the alien shall attest that ''the alien employed by the facility will be paid the wage rate for registered nurses similarly employed by the facility.'' The facility shall maintain documentation substantiating compliance with this attestation which shall include a description of the factors taken into consideration by the facility in making compensation decisions for nurses and the facility pay schedule for nurses maintained pursuant to paragraph (e)(1) of this section. See § 655.350(b). The facility shall pay the higher of the wage required pursuant to this paragraph (f) or the wage required pursuant to paragraph (e) of this section (*i.e.,* the second attestation element: no adverse effect).

(g) *The fourth attestation element: timely and significant steps; or State plan.* The facility may satisfy the fourth attestation element by satisfying Alternative I in paragraph (g)(1) of this section or by satisfying Alternative II in paragraph (g)(2) of this section.

(1) *Alternative I: Timely and significant steps.* The facility shall attest that it ''has taken and is taking timely and significant steps designed to recruit and retain sufficient registered nurses who are United States citizens or immigrants who are authorized to perform nursing services, in order to remove as quickly as reasonably possible the dependence of the facility on nonimmigrant registered nurses.'' The facility shall take at least two such steps, unless it demonstrates that taking a second step is not reasonable. The steps described in this paragraph (g)(1) shall not be considered to be an exclusive list of the significant steps that may be taken to meet the conditions of this paragraph (g)(1). Nothing in this subpart or subpart E of this part shall require a facility to take more than one step, if the facility can demonstrate that taking a second step is not reasonable. The facility is not required to have taken any of these steps prior to December 18, 1989. A facility choosing to take timely and significant steps other than those specifically described in paragraph (g)(1)(i)(A) of this section shall submit with its attestation a description of the steps it is proposing to take and an explanation of how the proposed steps are of comparable timeliness and significance to those described in paragraph (g)(1)(i)(A) of this section. A facility claiming that a second step is unreasonable shall submit an explanation of

why such second step would be unreasonable.

(i) *Descriptions of steps*—(A) *Statutory steps.* Each of the actions described in this paragraph (g)(1)(i)(A) shall be considered a significant step reasonably designed to recruit and retain U.S. nurses. A facility choosing any one of the following steps shall attest that its program(s) meets the regulatory requirements set forth for each and provide an explanation of how the requirements are satisfied by the program(s). In addition, the attesting facility shall maintain and make available for inspection (as described in §655.350(b) of this part) documentation specified in the particular step selected and/or documentation which provides a complete description of the nature and operation of its program(s) sufficient to substantiate its attestation and full compliance with the requirements for the particular step selected. Section 212(m)(2)(E) of the INA provides that a violation shall be found if a facility fails to meet a condition attested to. Thus, a facility shall be held responsible for all timely and significant steps to which it attests.

(*1*) *Step One: ''Operating a training program for registered nurses at the facility or financing (or providing participation in) a training program for registered nurses elsewhere.''* Training programs may include either courses leading to a higher degree (*i.e.*, beyond an associate or a baccalaureate degree), or continuing education courses. If the program includes courses leading to a higher degree, they shall be courses which are part of a program accepted for degree credit by a college or university and accredited by a State Board of Nursing or a State Board of Higher Education (or its equivalent), as appropriate. If the program includes continuing education courses, they shall be courses which meet criteria established to qualify the nurses taking the courses to earn continuing education units accepted by a State Board of Nursing (or its equivalent). In either type of program, financing by the facility, either directly or arranged through a third party, shall cover the total tuition costs of such training. The number of U.S. nurses for whom such training actually is provided shall be no less than half of the number of nurses who left the facility during the 12-month period prior to submission of the attestation. (U.S. nurses to whom such training was offered, but who rejected such training, may be counted towards those provided training, but the facility, in such case, shall maintain documentation of such offer and rejection). See §655.350(b).

(*2*) *Step Two: ''Providing career development programs and other methods of facilitating health care workers to become registered nurses.''* This may include programs leading directly to a degree in nursing, or career ladder/career path programs which could ultimately lead to a degree in nursing. A facility choosing this step shall maintain as documentation a description of the content and eligibility requirements for both types of programs and an explanation of how the requirements of this paragraph (g)(1)(i)(A)(*2*) are satisfied by each program. Any such degree program shall be, at a minimum, either through an accredited community college (leading to an associate's degree), 4-year college (a bachelor's degree), or diploma school, and the course of study shall be one accredited by a State Board of Nursing (or its equivalent). For career ladder or career path programs, the facility shall maintain documentation that the programs are normally part of a course of study or training which prepares a U.S. worker for enrolling in formal direct training leading to a degree in nursing, either through an accredited community college, a 4-year college, or a diploma school. See §655.350(b) of this part. Financing by the facility, either directly or arranged through a third party, shall cover the total costs of such programs. U.S. workers participating in such programs shall be working or have worked in health care occupations or health care facilities. The number of U.S. workers for whom such training is provided shall be equal to no less than half the average number of vacancies for nurses during the 12-month period prior to the submission of the attestation.

(*3*) *Step Three: ''Paying registered nurses wages at a rate higher than currently being paid to registered nurses similarly employed in the geographic area.''* A

facility choosing this step shall maintain documentation showing that its entire schedule of wages for nurses is at least 5 percent higher than the prevailing wages as determined by the SESA pursuant to paragraph (e)(1)(i) of this section, and it shall attest that such differentials shall be maintained throughout the period of the attestation's effectiveness.

(*4*) *Step Four: ''Providing adequate support services to free registered nurses from administrative and other non-nursing duties.''* Non-nursing duties include such activities as housekeeping duties; food preparation and delivery; transporting patients; providing occupational and respiratory therapy; answering telephones; running errands for patients; and clerical tasks. A facility choosing this step shall not require nurses at the facility to perform non-nursing duties. However, it is understood that on an infrequent non-recurring basis, nurses at the facility may perform one or more of the tasks encompassed by the duties listed above in this paragraph (g)(1)(i)(A)(*4*) or other non-nursing duties. Facilities choosing this step shall maintain documentation showing what steps they have taken to ensure that nursing jobs do not include any of these duties and that such activity by nurses at the facility occurs without regularity and infrequently. Such a facility also shall maintain documentation with respect to any other steps being taken to relieve nurses from non-nursing duties, or to enhance the nursing function, such as computerizing certain writing and routine functions performed by nurses.

(*5*) *Step Five: ''Providing reasonable opportunities for meaningful salary advancement by registered nurses.''* Documentation for this step shall include documentation of systems for salary advancement based on factors such as merit, education, and specialty, and/or salary advancement based on length of service with other bases for wage differentials remaining constant.

(*i*) *Merit, education, and specialty.* For salary advancement based on factors such as merit, education, and specialty, the facility shall maintain and make available for inspection documentation that it provides opportunities for professional development of its nurses which lead to salary advancement, *e.g.*, opportunities for continuing education; in-house educational instruction; special committees, task forces, or projects considered of a professional development nature; participation in professional organizations; and writing for professional publications. Such opportunities shall be available to all the facility's nurses.

(*ii*) *Length of service.* For salary advancement based on length of service, the facility shall maintain and make available for inspection documentation that it has clinical ladders in place which provide, annually, salary increases of 3 percent or more for a period of no less than 10 years, over and above the costs of living and merit, education, and specialty increases and differentials.

(B) *Other possible steps.* The Act indicates that the five steps described in paragraphs (g)(1)(i)(A) (*1*) through (*5*) of this section are not an exclusive list of timely and significant steps which might qualify. Facilities are encouraged to be innovative in devising other timely and significant steps, but these shall be of timeliness and significance comparable to those in paragraphs (g)(1)(i)(A) (*1*) through (*5*) of this section to qualify. A facility may attest that it has taken and is taking other such steps and explain in its attestation what these steps are, their nature and scope, how they are effected and how they meet the statutory test of timeliness and significance comparable to those Steps One through Five described above. A facility choosing alternative steps shall attest that its program(s) meet(s) the statutory requirements of timeliness and significance in promoting the development, recruitment and retention of U.S. nurses, explaining how these requirements are satisfied by such program(s). In addition, the attesting facility shall maintain and make available for inspection (as described in § 655.350(b)) documentation which provides a complete description of the nature and operation of its program(s) sufficient to substantiate its attestation and full compliance with the requirements of this paragraph (g)(1)(i)(B). Examples of such steps which—depending on the circumstances, the size and nature of

the attesting facility, the nature and scope of the step(s) described, the number of persons affected, and other such factors—may meet these requirements are:

(*1*) *Monetary incentives*—providing monetary incentives to nurses, through bonuses and merit pay plans not included in the base compensation package, for additional education, and for efforts leading to increased recruitment and retention of U.S. nurses. Such monetary incentives can be based on actions by nurses such as: Innovations to achieve better patient care, increased productivity, reduced waste, better safety; obtaining additional certification in a nursing specialty; unused sick leave; recruiting other U.S. nurses; staying with the facility for a given number of years; taking less desirable assignments (other than shift differential); participating in professional organizations, on task forces and on special committees; or contributing to professional publications. Facilities attesting to this step shall have a documented system for providing significant financial rewards in the form of bonuses or salary advancement to nurses participating in the activities described in this paragraph.

(*2*) *Special perquisites*—providing nurses with special perquisites for dependent care or housing assistance of a nature and/or extent that constitute a ''significant'' factor in inducing employment and retention of U.S. nurses.

(*3*) *Work schedule options*—providng nurses with non-mandatory work schedule options for part-time work, job-sharing, compressed work week or non-rotating shifts (provided, however, that H–1A nurses are employed only in full-time work) of a nature and/or extent that constitute a ''significant'' factor in inducing employment and retention of U.S. nurses.

(*4*) *Other training options*—providing training opportunities to become registered nurses to U.S. workers not currently in health care occupations by means of financial assistance (*e.g.*, scholarship, loan or pay-back programs) to such persons.

(ii) *Unreasonableness of second step.* The steps described in this paragraph (g)(1) shall not be considered to be an exclusive list of the significant steps that may be taken to meet the conditions of this paragraph (g)(1). Nothing in this subpart or subpart E of this part shall require a facility to take more than one step, if the facility can demonstrate that taking a second step is not reasonable. However, a facility shall make every effort to take at least two steps. A facility taking only one step shall provide an explanation with its attestation, and maintain documentation at the facility, relating to why taking a second step is not reasonable. The taking of a second step may be considered unreasonable if it would result in the facility's financial inability to continue providing the same quality and quantity of health care or if the provision of nursing services would otherwise be jeopardized by the taking of such a step. If the single step which is taken is one of the statutorily defined steps described in paragraphs (g)(1)(i)(A)(*1*) through (g)(1)(i)(A)(*5*) of this section, the facility shall explain with its attestation, and maintain documentation at the facility, with respect to each of the four statutory steps (described in paragraphs (g)(1)(i)(A)(*1*) through (g)(1)(i)(A)(*5*) of this section) not taken, relating to why it would be unreasonable for the facility to take such step and also shall explain with its attestation, and shall maintain and make available for inspection (as described in §655.350(b)) documentation demonstrating why it would be unreasonable for the facility to take any other steps designed to recruit, develop and retain sufficient U.S. nurses to meet its staffing needs. If the single step which is taken is not one of the five statutory steps described in paragraphs (g)(1)(i)(A)(*1*) through (g)(1)(i)(A)(*5*) of this section, the facility shall, with respect to each of the five statutory steps not taken, explain with its attestation, and maintain documentation and make available for inspection (as described in §655.350(b)) documentation, demonstrating why it would be unreasonable for the facility to take such step; the facility also shall explain with its attestation, and make available for inspection (as described in §655.350(b)) documentation demonstrating why it would be unreasonable for the facility to take any

other steps designed to recruit and retain sufficient U.S. nurses to meet its staffing needs. On the basis of the explanation submitted by the facility, the Certifying Officer shall determine whether the requirements of this paragraph (g)(1)(ii) have been met. See paragraph (m) of this section regarding such determinations and administrative appeals therefrom.

(iii) *Alternative to criteria for each specific step.* Instead of complying with the specific criteria for each of the steps in the second and succeeding years, a facility may include in its prior year's attestation, in addition to the actions taken under Steps One through Five, that it shall reduce the number of alien (H–1 and H–1A visaholders) nurses it utilizes within 1 year from the date of attestation by at least 10 percent, without reducing the quality or quantity of services provided. If this goal is achieved (as demonstrated by documentation maintained by the facility and made available for inspection, and indicated in its subsequent year's attestation), the facility's subsequent year's attestation may simply include the *Form ETA 9029*, an explanation demonstrating that this goal has been achieved and an attestation that it shall again reduce the number of alien nurses it utilizes within 1 year from the date of attestation by at least 10 percent. This alternative is designed to permit a facility to achieve the objectives of the Act, without subjecting the facility to detailed requirements and criteria as to the specific means of achieving that objective. The first, second, and succeeding years shall be consecutive.

(2) *Alternative II: subject to approved annual State plan.* As an alternative to attesting to the timely and significant steps set forth in paragraph (g)(1) of this section, the facility may attest that it ''is subject to an approved State plan for the recruitment and retention of nurses.'' The contents of the annual State plan are described in more detail in § 655.315. For an individual facility to meet the requirements of this paragraph (g)(2), the annual State plan shall provide for the taking of timely and significant steps by that facility, and the facility shall maintain appropriate documentation with respect to those steps. See § 655.350(b). To qualify for this Alternative II, the annual State plan shall have been approved prior to the date the facility submits its attestation to ETA for filing.

(h) *The fifth attestation element: No strike or lockout; no intention or design to influence bargaining representative election.* The facility shall attest that ''there is not a strike or lockout in the course of a labor dispute, and the employment of such an alien is not intended or designated to influence an election for a bargaining representative for registered nurses of the facility.'' Labor disputes for purposes for this attestation element relate only to those involving nurses providing nursing services; other health service occupations are not included. This attestation element applies to strikes and lockouts and elections of bargaining representatives at both the facility employing the nurse and, in the case of nursing contractors, at the worksite facility.

(1) *Notice of strike or lockout.* In order to remain in compliance with the no strike or lockout portion of this attestation element, if a strike or lockout of nurses at the facility occurs during the 1 year's validity of the attestation, the facility, within 3 days of the occurrence of the strike or lockout, shall submit to the ETA National Office, by U.S. mail or private carrier, written notice of the strike or lockout.

(2) *ETA notice to INS.* Upon receiving from a facility a notice described in paragraph (h)(1) of this section, ETA shall examine the documentation, and may consult with the union at the facility or other appropriate entities. If ETA determines that the strike or lockout is covered under 8 CFR 214.2(h)(17), INS's *Effect of strike* regulation for ''H'' visaholders, ETA shall certify to INS, in the manner set forth in that regulation, that a strike or other labor dispute involving a work stoppage of nurses is in progress at the facility.

(i) *The sixth attestation element: notice of filing.* The facility shall attest that at the time of filing of the petition for registered nurses under section 101(a)(15)(H)(i)(a) of the Act, notice of filing has been provided by the facility to the bargaining representative of the

registered nurses at the facility or, where there is no such bargaining representative, notice of the filing has been provided to registered nurses at the facility through posting in conspicuous locations. The requirement applies to providing notice of filing both for attestations submitted to ETA and for visa petitions filed with INS.

(1) *Notification of bargaining representative.* No later than the date the attestation is mailed to DOL to be considered for filing, the facility shall notify the bargaining representative (if any) for nurses at the facility that the attestation is being submitted to DOL, and shall state in that notice that the attestation is available at the facility (explaining how it can be inspected or obtained) and at the national office of ETA for review by interested parties. No later than the date the facility transmits a visa petition for H–1A nurses to INS, the facility shall notify the bargaining representative (if any) for nurses at the facility that the visa petition is being submitted to INS, and shall state in that notice that the attestation and visa petition are available at the facility (explaining how they can be inspected or obtained) and at the national office of ETA for review by interested parties. Notices under this paragraph (i)(1) shall include the following statement: ''Complaints alleging misrepresentation of material facts in the attestation or failure to comply with the terms of the attestation may be filed with any office of the Wage and Hour Division of the United States Department of Labor.''

(2) *Posting notice.* If there is no bargaining representative for nurses at the facility, when the facility submits and attestation to ETA, and each time the facility files an H–1A visa petition with INS, the facility shall post a written notice at the facility (and, in addition, at the worksite facility, if at a different location, such as in the case of nursing contractors), stating that the attestation and/or visa petition(s) have been filed and are available at the facility (explaining how these documents can be inspected or obtained) and at the national office of ETA for review by interested parties. In order for the facility to remain in compliance with this paragraph (i)(2), all such notices shall remain posted during the validity period of the attestation and the attestations and petitions shall be available for examination at the facility throughout this period of time. The notice of posting shall provide information concerning the availability of these documents for examination at the facility and at the national office of ETA, and shall include the following statement: ''Complaints alleging misrepresentation of material facts in the attestation or failure to comply with the terms of the attestation may be filed with any office the Wage and Hour Division of the United States Department of Labor.'' Such posted notices shall be clearly visible and unobstructed while posted, shall be posted in conspicuous places, where the facility's U.S. nurses readily can read the posted notice on the way to or from their duties. Appropriate locations for posting such notices include locations in the immediate proximity of mandatory Fair Labor Standards Act wage and hour notices and Occupational Safety and Health Act occupational safety and health notices.

(j) *Special provisions for nursing contractors.* A nursing contractor submitting an attestation for filing as a facility shall attest, in addition to the first through sixth attestation elements, that it will refer H–1A nurses only to facilities that (with the exception of private households which themselves do not employ H–1A nurses) have valid attestations on file with ETA. The nursing contractor shall obtain from each such worksite facility a copy of that facility's *Form ETA 9029,* accepted for filing by ETA and then currently on file with ETA. The nursing contractor shall maintain a copy of such worksite facility's accepted attestation on file at the nursing contractor's principal office during the validity period of the nursing contractor's attestation or the period of time that any H–1A nurse in its employ is providing nursing services at the worksite facility, whichever is longer.

(k) *Special provisions for worksite facilities which are not employers of H–1A nurses and are not controlled by employers of H–1A nurses.* A facility (other than a private household) which obtains the services of an H–1A nurse by

contracting with a nursing contractor, but which is itself neither the employer of any H–1A nurse nor controlled by the employer of any H–1A nurse (see paragraph (k)(1) of this section), shall file an attestation with ETA pursuant to this subpart. Such a worksite facility may request from ETA a waiver of specific elements of the attestation to avoid duplicative attestations, in cases of temporary, emergency circumstances, with respect to information not within the knowledge of the attestor, or for other good cause. The attesting worksite facility shall be to ably demonstrate the existence of the circumstances or good cause which are asserted as the basis(es) for the request for a waiver of a particular element of the attestation, but need not submit such evidence with its request for waiver, except evidence with respect to a bona fide medical emergency (see paragraph (k)(3)(iii) of this section).

(1) *Worksites employing, seeking to employ, or filing visa petitions on behalf of H–1A nurses.* An attestation with respect to which waiver is requested or granted pursuant to this paragraph (k) is not valid (*i.e.,* is not ''on file and in effect'') for a worksite facility employing, seeking to employ, or filing a visa petition on behalf of H–1A nurses. Only an attestation meeting the requirements of paragraphs (a) through (i) of this section (and paragraph (j) of this section, in the case of a nursing contractor) can serve as the basis for a petition for an H–1A visa. A worksite facility which uses H–1A nurses only through a nursing contractor and, as part of its attestation, requests waiver of one or more attestation elements nevertheless shall file a complete attestation in order to be able to use such attestation as a basis for itself filing a visa petition for an H–1A nurse. Thus, a worksite facility should consider its future needs for H–1A nurses in filing attestations and requests for waiver pursuant to this paragraph (k).

(2) *Inapplicability of third attestation element: facility/employer wage.* If a worksite facility uses H–1A nurses only through a nursing contractor, the third attestation element (facility/employer wage; see paragraph (f) of this section) is not applicable to that facility, since the worksite facility is not the employer of the H–1A nurse and does not guarantee the H–1A nurse's wage. The third attestation element is required only for the employer of the H–1A nurse(s), *i.e.,* the third attestation element shall be included in the attestation of and met by the H–1A nurse's employer (*i.e.,* the nursing contractor).

(3) *Waiver of attestation elements.* ETA may consider, pursuant to this paragraph (k)(3) requests for waiver of certain attestation elements by a worksite facility which uses or will use an H–1A nurse provided by a nursing contractor (*i.e.,* an ''H–1A contract nurse''), but which worksite facility itself does not employ, seek to employ, or file a visa petition on behalf of an H–1A nurse. Paragraphs (k)(3) (i) through (iii) of this section set forth different conditions for waiver depending on the number of workdays of H–1A contract nurse services the worksite facility will use. For the purposes of this paragraph (k)(3), a ''workday'' shall consist of one H–1A contract nurse working for one normal shift in a day. Thus, for example, three normal shifts worked by each of a group of five H–1A contract nurses totals 15 workdays.

(i) *Minimal use of H–1A contract nurses by a worksite.* Where the attesting worksite facility attests in its request for waiver pursuant to this paragraph (k)(3) that it will use no more than a total of 15 workdays of H–1A contract nurse services in any 3-month period of the attestation's 1-year period of validity to meet emergency needs on a temporary basis, ETA may waive the first (substantial disruption), second (adverse effect), and fourth (timely and significant steps or State plan) elements of the attesting worksite facility's attestation. See paragraphs (d), (e), and (g) of this section; see also paragraphs (f) and (k)(2) of this section, with respect to the inapplicability of third attestation element (facility/employer wage). ETA shall not waive pursuant to this paragraph (k)(3)(i) the fifth attestation element (strike, lockout, or intent or design to influence bargaining representative election) or the sixth attestation element (notice). See paragraphs (h) and (i) of this section.

(ii) *Short-term use of H–1A contract nurses.* Where the attesting worksite facility attests in its request for waiver pursuant to this paragraph (k)(3) that it will use no more than a total of 60 workdays of H–1A contract nurse services in any 3-month period of the attestation's 1-year period of validity to meet temporary needs, ETA may waive the nursing shortage component of the first element (substantial disruption; see paragraphs (d)(2) and (d)(3) of this section) and may waive the fourth (timely and significant steps or State plan; see paragraph (g) of this section) element of the attesting worksite facility's attestation. See also paragraphs (f) and (k)(2) of this section, with respect to the inapplicability of third attestation element (facility/employer wage). ETA shall not waive pursuant to this paragraph (k)(3)(ii) the no-layoff component of the first attestation element (substantial disruption; see paragraph (d)(1) of this section); the second attestation element (adverse effect); the fifth attestation element (strike, lockout, or intent to influence a bargaining representative election); or the sixth attestation element (notice). See paragraphs (d), (e), (h), and (i) of this section.

(iii) *Long-term use of H–1A contract nurse services.* Where the attesting worksite facility attests in its request for waiver pursuant to this paragraph (k)(3) that it will use more than 60 workdays of H–1A contract nurse services in any 3-month period of the attestation's 1-year period of validity, ETA shall not waive any attestation element, except that, if the attestor documents a bona fide medical emergency warranting a waiver of the fourth attestation element (timely and significant steps or State plan) ETA may waive such element. See paragraph (g) of this section.

(l) *Agents of worksite facilities.* A worksite facility (including a worksite facility which itself employs or seeks to employ an H–1A nurse) may authorize a nursing contractor to act as its agent in preparing and filing the worksite facility's attestation; however, a worksite facility using an agent for preparation and filing of the attestation is responsible for the contents of such attestation and remains liable for any violations which may be disclosed in any investigation under Subpart E of this Part, and the chief executive officer of the worksite facility shall sign the original attestation, as required by paragraph (c)(1)(i) of this section.

(m) *Actions on attestations submitted for filing.* An attestation which meets the established criteria set forth in this § 655.310 shall be accepted for filing by ETA on the date it is signed by the Certifying Officer. ETA shall then follow the procedures set forth in paragraph (m)(1) of this section. An attestation submitted by a facility proposing alternative criteria or steps for the first and/or the fourth attestation elements, and/or proposing to take only one timely and significant step, and/or claiming a bona fide medical emergency exemption from the fourth attestation element shall be reviewed by ETA, and a determination shall be made by the Certifying Officer whether to accept or reject the attestation for filing. See paragraphs (d)(2)(ii), (g)(1)(i)(B), (g)(1)(ii), and (k)(3)(iii) of this section. The Certifying Officer may request additional explanation and/or documentation from the facility in making this determination. If the Certifying Officer does not contact the facility for such information or make any determination within 30 days of receiving the attestation, the attestation shall become accepted for filing. Upon the facility's submitting the attestation to ETA and providing the notice required by the sixth attestation element (see § 655.310(i)), the attestation shall be available for public examination at the health care facility itself. When ETA accepts the attestation for filing, the Certifying Officer shall forward the attestation to the ETA National Office, where it shall be available for public examination. Information contesting an attestation received by ETA prior to the determination to accept or reject the attestation for filing shall not be made part of ETA's administrative record on the attestation, but shall be referred to ESA to be processed as a complaint pursuant to Subpart E of this part, and, if such attestation nevertheless is accepted by ETA for filing, the complaint will be handled by ESA under that subpart.

(1) *Acceptance.* (i) If the attestation (and any explanatory statements that may be required) meet the requirements of this subpart, ETA shall accept the attestation for filing, shall, in the case of a facility intending to file a visa petition as the employer of an H–1A nurse, notify INS in writing of the filing, shall return to the facility one copy of the attestation form submitted by the facility, with ETA's acceptance indicated thereon, and shall forward one copy of the attestation with ETA's acceptance indicated thereon to the ETA National Office. The facility may then file a visa petition with INS for alien nurses in accordance with INS regulations.

(ii) DOL is not the guarantor of the accuracy, truthfulness or adequacy of an attestation accepted for filing.

(2) *Appeals of acceptances.* If an attestation which is subject to a determination under paragraph (d)(2)(ii), (g)(1)(i)(B), (g)(1)(ii), or (k)(3)(iii) of this section is accepted for filing, any interested party may appeal ETA's determination(s) on the element(s) that have been reviewed. Appeals of acceptances shall be filed with the BALCA, no later than 30 days after the date of acceptance, and will be considered under the procedures set forth at § 655.320.

(3) *Appeals of rejections.* If the attestation is not accepted for filing, which may occur as a result of a determination under paragraph (d)(2)(ii), (g)(1)(i)(B), (g)(1)(ii), or (k)(3)(iii) of this section, ETA shall notify the facility in writing, specifying the reasons for rejection and quoting the language of § 655.320(a)(1). Any interested party may appeal such rejection to the BALCA, no later than 30 days after the date of rejection. Appeals of rejections shall be filed and considered under the procedures set forth at § 655.320.

(n) *Effective date and validity of filed attestations.* An attestation becomes filed and effective as of the date it is accepted and signed by the Certifying Officer and accepted thereby for filing. Such attestation is valid for the 12-month period beginning on the date of acceptance for filing, unless suspended or invalidated pursuant to § 655.320 or subpart E. The filed attestation expires at the end of the 12-month period of validity.

(o) *Suspension or invalidation of filed attestation.* Suspension or invalidation of an attestation may result from a BALCA decision reversing an ETA acceptance for filing; from investigations by the Administrator, Wage and Hour Division, of the facility's misrepresentation in or failure to carry out its attestation; or from a discovery by ETA that it made an error in its review of the attestation (in those cases where ETA performs such review pursuant to paragraph (d)(2)(ii), (g)(1)(i)(B), (g)(1)(ii), (k)(3)(iii) of this section) and that the explanation and documentation provided and maintained by the facility does not or did not meet the criteria set forth at § 655.310 (a) through (k). If an attestation is suspended or invalidated, DOL shall notify INS.

(1) *Result of BALCA or Wage and Hour Division action.* If an attestation is suspended or invalidated as a result of a BALCA decision overruling an acceptance of the attestation for filing, or is suspended or invalidated as a result of a Wage and Hour Division action pursuant to subpart E, such suspension or invalidation may not be separately appealed, but shall be merged with appeals of BALCA's or the Wage and Hour Division's determination on the underlying violation.

(2) *Result of ETA action.* If, after accepting an attestation for filing, ETA discovers that it erroneously accepted that attestation for filing, and, as a result, ETA suspends or invalidates that acceptance, the facility may appeal such suspension or invalidation pursuant to § 655.320 as if that suspension or invalidation were a decision to reject the attestation for filing.

(p) *Facility's responsibilities during suspension and after invalidation or expiration of filed attestation.* A facility shall comply with the terms of its attestation, even if such attestation is suspended, invalidated, or expired, as long as any H–1A nurse is at the facility, unless the attestation is superseded by a subsequent attestation accepted for filing by ETA.

(q) *Facilities subject to penalties.* No attestation shall be accepted for filing from a nursing contractor or other facility which has failed to comply with

any penalty, sanction, or other remedy assessed in a final agency action following an investigation by the Wage and Hour Division pursuant to subpart E.

(Approved by the Office of Management and Budget under control number 1205–0305)

[59 FR 882, 897, Jan. 6, 1994, as amended at 59 FR 5487, Feb. 4, 1994]

§ 655.315 State plans.

A State may submit an annual plan for the recruitment and retention of U.S. citizens and permanent resident aliens who are authorized to perform nursing services in the State.

(a) *Who should prepare and file the annual plan?* The Governor of each State that chooses to submit an annual State plan shall be responsible for the preparation and filing of the annual plan. The Governor may designate any public and/or private organization(s) to assist the Governor in the development of the annual plan.

(b) *When and where should the annual plan be filed?* If a State determines to file an annual State plan, the Governor shall submit the original plan, signed by the Governor, by U.S. mail or private carrier, to ETA at the following address: Director, U.S. Employment Service, Employment and Training Administration, Department of Labor, 200 Constitution Avenue, NW., room N–4456, Washington, DC 20210. An annual State plan may be filed with ETA at any time. However, for an individual facility legitimately to attest to being subject to an annual State plan for the purposes of the fourth attestation element, Alternative II (see § 655.310(g)(2)), such annual State plan shall have been approved prior to the date the attestation was submitted to ETA for filing and be in current effect. Therefore, if the Governor is aware that a facility within the State plans to submit an attestation for filing with ETA, the annual State plan should be mailed to ETA at least 35 days prior to the facility's submission of its attestation to ETA.

(c) *What overall issues shall the annual State plan address?* The annual State plan shall address the overall issue of supply of and demand for nurses within the State, with particular emphasis on measures to develop a sufficient supply of U.S. nurses to meet projected demand. The State, as opposed to individual facilities, is in a position to—and may be expected to—address broad issues and perform such functions as conducting a Statewide needs assessment; overall management, facilitation and coordination among various interested entities within the State; and undertaking more regionally based approaches. The State is also in a position to devote resources which individual facilities may be lacking.

(d) *How should the annual State plan address the timely and significant steps?* The annual State plan shall address all of the timely and significant steps in § 655.310(g)(1)(i)(A)(*1*) through (g)(1)(i)(A)(*5*) generically, without regard to the specific criteria therein, on a Statewide basis. However, for the annual State plan to satisfy Alternative II of the fourth attestation requirement for an individual facility (see § 655.310(g)(2)), the annual State plan shall indicate which of those timely and significant steps relate to individual facilities, and that each individual facility shall take such a step (either one step or more, as appropriate) to meet the appropriate specific criteria as set forth in § 655.310(g)(1).

(e) *What other components may the annual State plan include?* An annual State plan may include the following components:

(1) The cooperation of high schools and colleges may be enlisted in counseling health workers and other individuals to enter the nursing profession.

(2) Geographic and salary data may be made available to assist in linking nurses to facilities.

(3) Publications of vacancies and programs may be made in industry and State newsletters.

(4) Training films and videotapes, as well as information on housing and relocation services, may be developed and distributed.

(5) Measures may be taken to encourage other health professionals to become nurses, such as: setting up home study programs with State licensing boards to allow work credits for purposes of meeting educational or State clinical requirements; entering into cooperative agreements for providing

health care insurance and other job-related elements which would allow greater flexibility for those attempting to combine careers and school; providing monetary grants or long-term loans to persons preparing to become nurses.

(6) Steps may be taken to encourage nurses who have left the nursing field to return to nursing, by providing such inducements as child care, holiday schedule adjustments, and substantial salary increases.

(7) The State may profile and publicize those facilities with special model programs.

(8) The annual State plan may place demands on facilities for comprehensive plans to reduce reliance on foreign nurses.

(f) *Approval and disapproval of annual State plans.* Determinations of approval and disapproval of annual State plans shall be made by the Director, USES. The annual State plan shall be reviewed by ETA, in consultation with the Department of Health and Human Services, and a determination to approve or disapprove the annual State plan made within 30 calendar days of ETA's receipt of the plan.

(1) If the annual State plan is approved, the Director shall notify the Governor in writing.

(2) If the annual State plan is disapproved, the Director shall notify the Governor in writing, specifying the reason(s) for disapproval. The notice shall state that within 30 calendar days of the date of the notice of disapproval, the Governor may correct the deficiencies noted in the disapproval and resubmit the annual State plan to ETA; and shall inform the state of its right to an appeal, by quoting the language of § 655.320(a).

(g) An approved annual State plan shall be valid for 12-month period beginning on the date of its approval by DOL.

(Approved by the Office of Management and Budget under control number 1205–0305)

§ 655.320 Appeals of acceptance and rejection of attestations submitted for filing and of State plans.

(a) *Appeal right*—(1) *Attestations; when to file appeals from acceptances and rejections.* On the basis that the explanation and documentation provided and maintained by the facility does not or did not meet the criteria set forth at § 655.310(d)(2)(ii), (g)(1)(i)(B)(*5*), (g)(1)(ii), or (k)(3)(iii), an interested party may appeal an acceptance or rejection by ETA of an attestation submitted by a facility for filing in those cases where DOL performed an attestation review function under those provisions. The appeal shall be limited to ETA's determinations on the element(s) reviewed and shall not be an appeal as to any other element(s) in the attestation. An interested party may also appeal ETA's invalidation or suspension of a filed attestation due to a discovery by ETA that it made an error in its reviewing of the attestation (see § 655.310(o). In the case of an appeal of an acceptance, the facility shall be a party to the appeal; in the case of the appeal of a rejection, invalidation, or suspension, the collective bargaining representative (if any) representing nurses at the facility shall be a party to the appeal. Appeals shall be in writing; shall set forth the grounds for the appeal; shall state if *de novo* consideration by BALCA is requested; and shall be mailed by certified mail within 30 calendar days of the date of the action from which the appeal is taken (*i.e.*, the acceptance, rejection, suspension or invalidation of the attestation).

(2) *Annual State plans; when to file appeals from disapprovals.* A Governor of a State may appeal ETA's disapproval of an annual State plan. Individual facilities in the State may file briefs as *amici curiae.* Appeals shall be in writing and shall be mailed by certified mail within 30 calendar days of the disapproval of the annual State plan.

(3) *Where to file appeals.* Appeals made pursuant to this section shall be in writing and shall be mailed by certified mail to: Director, U.S. Employment Service, Employment and Training Administration, Department of Labor, 200 Constitution Avenue, NW., Room N–4456, Washington, DC 20210.

(4) *Complaints.* Appeals under this paragraph (a) shall not encompass questions of misrepresentation by a health care facility or nonperformance by such a facility of its attestation. Such complaints shall be filed with an

office of the Wage and Hour Division, United States Department of Labor.

(b) *Transmittal to BALCA; case file.* Upon receipt of an appeal pursuant to this section, the Certifying Officer (or, in the case of State plans, the Director, USES), shall send to BALCA a certified copy of the ETA case file, containing the attestation and supporting documentation and any other information or data considered by ETA in taking the action being appealed. The administrative law judge chairing BALCA shall assign a panel of one or more administrative law judges who serve on BALCA to review the record for legal sufficiency and to consider and rule on the appeal.

(c) *Consideration on the record; de novo hearings*—(1) *General.* BALCA shall not remand, dismiss, or stay the case, except as provided in paragraph (c)(2) of this section, but may otherwise consider the appeal on the record or in a *de novo* hearing (on its own motion or on a party's request). Interested parties and *amici curiae* may submit briefs in accordance with a schedule set by BALCA. The ETA official making the determination from which the appeal was taken shall be represented by the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, Department of Labor, or the Associate Solicitor's designee. If BALCA determines to hear the appeal on the record without a *de novo* hearing, BALCA shall render a decision within 30 calendar days after BALCA's receipt of the case file. If BALCA determines to hear the appeal through a *de novo* hearing, the procedures contained in 29 CFR part 18 shall apply to such hearings, except that:

(i) The appeal shall not be considered to be a complaint to which an answer is required;

(ii) BALCA shall ensure that, at the request of the appellant, the hearing is scheduled to take place within a reasonable period after BALCA's receipt of the case file (see also the time period described in paragraph (c)(1)(iv) of this section);

(iii) Technical rules of evidence, such as the Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B), shall not apply to any hearing conducted pursuant to this subpart, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by BALCA in conducting the hearing; BALCA may exclude irrelevant, immaterial, or unduly repetitious evidence; the certified copy of the case file transmitted to BALCA by the Certifying Officer (or, in the case of State plans, the Director, USES), shall be part of the evidentiary record of the case and need not be removed into evidence; and

(iv) BALCA's decision shall be rendered within 120 calendar days after BALCA's receipt of the case file.

(2) *Dismissals and stays.* If the BALCA determines that the appeal is solely a question of misrepresentation by the facility or is solely a complaint of the facility's nonperformance of the attestation, BALCA shall dismiss the case and refer the matter to the Administrator, Wage and Hour Division, for action under subpart E. If the BALCA determines that the appeal is partially a question of misrepresentation by the facility or is partially a complaint of the facility's nonperformance of the attestation, BALCA shall refer the matter to the Administrator, Wage and Hour Division, for action under Subpart E of this part and shall stay BALCA consideration of the case pending final agency action on such referral. During such stay, the 120-day period described in paragraph (c)(1)(iv) of this section shall be suspended.

(d) *BALCA's decision.* After consideration on the record or a *de novo* hearing, BALCA shall either affirm or reverse ETA's decision, and shall so notify the appellant; the Director, if the affirmation or denial involves a State plan; Certifying Officer; Chief, Division of Foreign Labor Certifications; and any other parties. See §655.450 custody of the record of the appeal.

(e) *Decisions on attestations.* With respect to an appeal of the acceptance, rejection, suspension or invalidation of an attestation, the decision of BALCA shall be the final decision of the Secretary, and no further review shall be

given to the matter by any DOL official.

(f) *Decisions on annual State plans.* With respect to an appeal of the disapproval of an annual State plan, the decision of BALCA shall be the final decision by the Secretary, unless a petition for review of the BALCA decision is filed with the Secretary and the Secretary determines to review the decision.

(1) *Filing of petition for review.* The Director or the State desiring review of the decision and order of BALCA may petition the Secretary to review the decision and order. To be effective, such petition shall be received by the Secretary within 30 days of the date of the decision and order. Copies of the petition shall be served on all parties and on BALCA.

(2) *Form of petition for review.* No particular form is prescribed for any petition for Secretary's review permitted by this paragraph (f). However, any such petition shall:

(i) Be dated;

(ii) Be typewritten or legibly written;

(iii) Specify the issue or issues stated in the BALCA decision and order giving rise to such petition;

(iv) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;

(v) Be signed by the party filing the petition or by an authorized representative of such party;

(vi) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(vii) Attach copies of BALCA's decision and order, and any other record documents which would assist the Secretary in determining whether review is warranted.

(3) *Notice of determination to review.* Whenever the Secretary determines to review the decision and order of BALCA on an annual State plan, a notice of the Secretary's determination to do so shall be served upon BALCA and upon all parties to the proceeding within 30 days after the Secretary's receipt of the petition for review.

(4) *Hearing record.* Upon receipt of the Secretary's notice, BALCA shall within 15 days forward the complete hearing record to the Secretary.

(5) *Contents of Secretary's notice.* The Secretary's notice shall specify:

(i) The issue or issues to be reviewed;

(ii) The form in which submissions shall be made by the parties; and

(iii) The time within which such submissions shall be made.

(6) *Filing of documents.* All documents submitted to the Secretary pursuant to this paragraph (f) shall be filed with the Secretary of Labor, U.S. Department of Labor, Washington, DC 20210, Attention: Executive Director, Office of Administrative Appeals, Room S–4309. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Secretary until actually received by the Secretary. All documents, including documents filed by mail, shall be received by the Secretary either on or before the due date.

(7) *Service of documents.* Copies of all documents filed with the Secretary pursuant to this paragraph (f) shall be served simultaneously upon all other parties involved in the proceeding. Service upon the Director shall be in accordance with paragraph (a)(3) of this section.

(8) *Secretary's decision.* The Secretary's final decision pursuant to this paragraph (f) shall be issued within 180 days from the date of the notice of intent to review. The Secretary's decision shall be served upon all parties and BALCA.

(9) *Transmittal of record.* Upon issuance of the Secretary's decision under this paragraph (f), the Secretary shall transmit the entire record to the Chief Administrative Law Judge for custody pursuant to § 655.450.

§ 655.350 Public access.

(a) *Public examination at ETA.* ETA shall make available for public examination in Washington, DC, a list of facilities which have filed attestations, and such facilities' visa petitions (if any) for H–1A nurses, and for each such facility, a copy of the facility's attestation and any explanatory statements it has received; the annual State plan (if any) which relates to the facility's attestation; and a copy of each of the facility's H–1A visa petitions (if any) to

INS. A copy of the latter shall be transmitted to ETA by the facility at the same time it is submitted to INS. The facility shall also forward to ETA a copy of the INS visa petition approval notice within 5 days after it is received from INS.

(b) *Public examination at facility.* For the duration of the attestation's validity and thereafter for so long as the facility uses any H–1 or H–1A nurse under the attestation, the facility shall maintain a separate file containing the attestation and required documentation, and shall make this file available to any interested parties within 72 hours upon written or oral request. If a party requests a copy of the file, the facility shall provide it and any charge for such copy shall not exceed the cost of reproduction.

(c) *Notice to public.* ETA periodically shall publish a notice in the FEDERAL REGISTER announcing the names and addresses of facilities which have submitted attestations; facilities which have attestations on file; facilities which have submitted attestations which have been rejected for filing; facilities which have had attestations suspended; States which have submitted annual State plans; States which have approved annual State plans; and States which have submitted annual State plans which were disapproved.

(Approved by the Office of Management and Budget under control number 1205–0305)

[59 FR 882, 897, Jan. 6, 1994, as amended at 59 FR 5487, Feb. 4, 1994]

Subpart E—Enforcement of H–1A Attestations

SOURCE: 59 FR 882, 897, Jan. 6, 1994, unless otherwise noted.

§ 655.400 Enforcement authority of Administrator, Wage and Hour Division.

(a) The Administrator shall perform all the Secretary's investigative and enforcement functions under 8 U.S.C. 1182(m) and subparts D and E of this part.

(b) The Administrator, either pursuant to a complaint or otherwise, shall conduct such investigations as may be appropriate and, in connection therewith, enter and inspect such places and such records (and make transcriptions thereof), question such persons and gather such information as deemed necessary by the Administrator to determine compliance regarding the matters to which a health care facility has attested under section 212(m) of the INA (8 U.S.C. 1182(m)) and subparts D and E of this part.

(c) A facility being investigated shall make available to the Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. No facility shall interfere with any official of the Department of Labor performing an investigation, inspection or law enforcement function pursuant to 8 U.S.C. 1182(m) or subparts D or E of this part. In the event of such interference, the Administrator may deem the interference to be a violation and take such further actions as the Administrator considers appropriate. (*Note:* Federal criminal statutes prohibit certain interference with a Federal officer in the performance of official duties. 18 U.S.C. 111 and 1114.)

(d) A facility subject to subparts D and E of this part shall at all times cooperate in administrative and enforcement proceedings. No facility shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person because such person has:

(1) Filed a complaint or appeal under or related to section 212(m) of the INA (8 U.S.C. 1182(m)) or subpart D or E of this part;

(2) Testified or is about to testify in any proceeding under or related to section 212(m) of the INA (8 U.S.C. 1182(m)) or subpart D or E of this part;

(3) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by section 212(m) of the INA (8 U.S.C. 1182(m)) or subpart D or E of this part.

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to the Act or to subparts D or E of this part or any other DOL regulation promulgated pursuant to 8 U.S.C. 1182(m).

In the event of such intimidation or restraint as are described in paragraph

(d)(1), (2), (3), or (4) of this section, the Administrator may deem the conduct to be a violation and take such further actions as the Administrator considers appropriate.

(e) A facility subject to subpart D and E of this part shall maintain a separate file containing its attestation and required documentation, and shall make that file or copies thereof available to interested parties, as required by § 655.350(b). In the event of a facility's failure to maintain the file, to provide access, or to provide copies, the Administrator may deem the conduct to be a violation and take such further actions as the Administrator considers appropriate.

(f) No health care facility shall seek to have an H–1A nurse, or any other nurse similarly employed by the employer, or any other employee waive rights conferred under the Act or under subpart D or E of this part. In the event of such waiver, the Administrator may deem the conduct to be a violation and take such further actions as the Administrator considers appropriate. Any agreement by an employee purporting to waive or modify any rights inuring to said person under the Act or subpart D or E of this part may be void as contrary to public policy, except that a waiver or modification of rights or obligations hereunder in favor of the Secretary shall be valid for purposes of enforcement of the provisions of the Act or subpart D and E of this part. This prohibition of waivers does not prevent agreements to settle litigation among private parties.

(g) The Administrator shall, to the extent possible under existing law, protect the confidentiality of any complainant or other person who provides information to the Department.

§ 655.405 Complaints and investigative procedures.

(a) The Administrator, through investigation, shall determine whether a facility has failed to perform any attested conditions, misrepresented any material facts in an attestation (including misrepresentation as to compliance with regulatory standards), or otherwise violated the Act or subpart D or E of this part.

(NOTE: Federal criminal statutes provide penalties of up to $10,000 and/or imprisonment of up to 5 years for knowing and willful submission of false statements to the Federal Government. 18 U.S.C. 1001; see also 18 U.S.C. 1546).

(b) Any aggrieved person or organization may file a complaint of a violation of the provisions of section 212(m) of the INA (8 U.S.C. 1182(m)) or subpart D or E of this part. No particular form of complaint is required, except that the complaint shall be written or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the complaint. The complaint shall set forth sufficient facts for the Administrator to determine what part or parts of the attestation or regulations have allegedly been violated. Upon the request of the complainant, the Administrator shall, to the extent possible under existing law, maintain confidentiality regarding the complainant's identity; if the complainant wishes to be a party to the administrative hearing proceedings under this subpart, the complainant shall then waive confidentiality. The complaint may be submitted to any local Wage and Hour Division office; the addresses of such offices are found in local telephone directories. Inquiries concerning the enforcement program and requests for technical assistance regarding compliance may also be submitted to the local Wage and Hour Division office.

(c) The Administrator shall determine whether there is reasonable cause to believe that the complaint warrants investigation and, if so, shall conduct an investigation, within 180 days of the receipt of a complaint. If the Administrator determines that the complaint fails to present reasonable cause for an investigation, the Administrator shall so notify the complainant, who may submit a new complaint, with such additional information as may be necessary.

(d) When an investigation has been conducted, the Administrator shall, within 180 days of the receipt of a complaint, issue a written determination, stating whether a basis exists to make a finding that the facility failed to meet a condition of its attestation, or made a misrepresentation of a material fact therein, or otherwise violated the

Act or subpart D or E. The determination shall specify any sanctions imposed due to violations. The Administrator shall provide a notice of such determination to the interested parties and shall inform them of the opportunity for a hearing pursuant to § 655.420.

§ 655.410 Civil money penalties and other remedies.

(a) The Administrator may assess a civil money penalty not to exceed $1,000 for each affected person with respect to whom there has been a violation of the attestation or subpart D or E of this part of and with respect to each instance in which such violation occurred. The Administrator also shall impose appropriate remedies, including the payment of back wages and the performance of attested obligations such as providing training.

(b) In determining the amount of civil money penalty to be assessed for any violation, the Administrator shall consider the type of violation committed and other relevant factors. The matters which may be considered include, but are not limited to, the following:

(1) Previous history of violation, or violations, by the facility under the Act and subpart D or E of this part;

(2) The number of workers affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made by the violator in good faith to comply with the attestation or the State plan as provided in the Act and Subparts D and E of this part;

(5) The violator's explanation of the violation or violations;

(6) The violator's commitment to future compliance, taking into account the public health, interest or safety; and

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury or adverse effect upon the workers.

(c) The civil money penalty, back wages, and any other remedy determined by the Administrator to be appropriate, are immediately due for payment or performance upon the assessment by the Administrator, or the decision by an administrative law judge where a hearing is requested, or the decision by the Secretary where review is granted. The facility shall remit the amount of the civil money penalty, by certified check or money order made payable to the order of ''Wage and Hour Division, Labor.'' The remittance shall be delivered or mailed to the Wage and Hour Division Regional Office for the area in which the violations occurred. The payment of back wages, monetary relief, and/or the performance or any other remedy prescribed by the Administrator shall follow procedures established by the Administrator. The facility's failure to pay the civil money penalty, back wages, or other monetary relief, or to perform any other assessed remedy, shall result in the rejection by ETA of any future attestation submitted by the facility, until such payment or performance is accomplished.

§ 655.415 Written notice and service of Administrator's determination.

(a) The Administrator's determination, issued pursuant to § 655.405(d), shall be served on the complainant, the facility, and other interested parties by personal service or by certified mail at the parties' last known addresses. Where service by certified mail is not accepted by the party, the Administrator may exercise discretion to serve the determination by regular mail. Where the complainant has requested confidentiality, the Administrator shall serve the determination in a manner which will not breach that confidentiality.

(b) The Administrator shall file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the complaint and the Administrator's determination.

(c) The Administrator's written determination required by § 655.405(c) shall:

(1) Set forth the determination of the Administrator and the reason or reasons therefor; prescribe any remedies or penalties including the amount of any unpaid wages due, the actions required for compliance with the facility attestation and/or State plan, and the

amount of any civil money penalty assessment and the reason or reasons therefor.

(2) Inform the interested parties that they may request a hearing pursuant to § 655.420.

(3) Inform the interested parties that in the absence of a timely request for a hearing, received by the Chief Administrative Law Judge within 10 days of the date of the determination, the determination of the Administrator shall become final and not appealable.

(4) Set forth the procedure for requesting a hearing, and give the address of the Chief Administrative Law Judge.

(5) Inform the parties that, pursuant to § 655.455, the Administrator shall notify the Attorney General and ETA of the occurrence of a violation by the employer.

§ 655.420 Request for hearing.

(a) Any interested party desiring to request an administrative hearing on a determination issued pursuant to § 655.405(d) shall make such request in writing to the Chief Administrative Law Judge at the address stated in the notice of determination.

(b) An interested party may request a hearing in the following circumstances:

(1) Where the Administrator determines that there is no basis for a finding of violation, the complainant or other interested party may request a hearing. In such a proceeding, the party requesting the hearing shall be the prosecuting party and the facility shall be the respondent; the Administrator may intervene as a party or appear as *amicus curiae* at any time in the proceeding, at the Administrator's discretion.

(2) Where the Administrator determines that there is a basis for a finding of violation, the facility or other interested party may request a hearing. In such a proceeding, the Administrator shall be the prosecuting party and the facility shall be the respondent.

(c) No particular form is prescribed for any request for hearing permitted by this part. However, any such request shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the notice of determination given rise to such request;

(4) State the specific reason or reasons why the party requesting the hearing believes such determination is in error;

(5) Be signed by the party making the request or by an authorized representative of such party; and

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto.

(d) The request for such hearing shall be received by the Chief Administrative Law Judge, at the address stated in the Administrator's notice of determination, no later than 10 days after the date of the determination. An interested party which fails to meet this 10-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the administrative law judge, either through intervention as a party pursuant to 29 CFR 18.10 (b) through (d) or through participation as an *amicus curiae* pursuant to 29 CFR 18.12.

(e) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service. For the requesting party's protection, if the request is filed by mail, it should be certified mail. If the request is filed by facsimile transmission, the original of the request, signed by the requestor or authorized representative, shall be filed within 10 days of the date of the Administrator's notice of determination.

(f) Copies of the request for a hearing shall be sent by the requestor to the Wage and Hour Division official who issued the Administrator's notice of determination, to the representative(s) of the Solicitor of Labor identified in the notice of determination, and to all known interested parties.

§ 655.425 Rules of practice for administrative law judge proceedings.

(a) Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the ''Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative

Law Judges'' established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings under this subpart.

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the *Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges* (29 CFR part 18, subpart B) shall not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The administrative law judge may exclude evidence which is inmaterial, irrelevant, or unduly repetitive.

§ 655.430 Service and computation of time.

(a) Under this subpart, a party may serve any pleading or document by regular mail. Service is complete upon mailing to the last known address. No additional time for filing or response is authorized where service is by mail. In the interest of expeditious proceedings, the administrative law judge may direct the parties to serve pleadings or documents by a method other than regular mail.

(b) Two (2) copies of all pleadings and other documents in any administrative law judge proceeding shall be served on the attorneys for the Administrator. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, and one copy on the attorney representing the Administrator in the proceeding.

(c) Time will be computed beginning with the day following the action and includes the last day of the period unless it is a Saturday, Sunday, or federally-observed holiday, in which case the time period includes the next business day.

§ 655.435 Administrative law judge proceedings.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 655.420, the Chief Administrative Law Judge shall appoint an administrative law judge to hear the case.

(b) Within 7 days following the assignment of the case, the administrative law judge shall notify all interested parties of the date, time and place of the hearing. All parties shall be given at least 5 days notice of such hearing.

(c) The date of the hearing shall be not more than 60 days from the date of the Administrator's determination. Because of the time constraints imposed by the Act, no requests for postponement shall be granted except for compelling reasons and by consent of all the parties to the proceeding.

(d) The administrative law judge may prescribe a schedule by which the parties are permitted to file a prehearing brief or other written statement of fact or law. Any such brief or statement shall be served upon each other party in accordance with § 655.430. Posthearing briefs will not be permitted except at the request of the administrative law judge. When permitted, any such brief shall be limited to the issue or issues specified by the administrative law judge, shall be due within the time prescribed by the administrative law judge, and shall be served on each other party in accordance with § 655.430.

§ 655.440 Decision and order of administrative law judge.

(a) Within 90 days after receipt of the transcript of the hearing, the administrative law judge shall issue a decision.

(b) The decision of the administrative law judge shall include a statement of findings and conclusions, with reasons and basis therefore, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator; the reason or reasons for such order shall be stated in the decision. The administrative law judge shall not render determinations as to the legality of a regulatory provision or the constitutionality of a statutory provision.

(c) The decision shall be served on all parties in person or by certified or regular mail.

§ 655.445 Secretary's review of administrative law judge's decision.

(a) The Administrator or any interested party desiring review of the decision and order of an administrative law judge shall petition the Secretary to review the decision and order. To be effective, such petition shall be received by the Secretary within 30 days of the date of the decision and order. Copies of the petition shall be served on all parties and on the administrative law judge.

(b) No particular form is prescribed for any petition for Secretary's review permitted by this subpart. However, any such petition shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;

(4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;

(5) Be signed by the party filing the petition or by an authorized representative of such party;

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(7) Attach copies of the administrative law judge's decision and order, and any other record documents which would assist the Secretary in determining whether review is warranted.

(c) Whenever the Secretary determines to review the decision and order of an administrative law judge, a notice of the Secretary's determination shall be served upon the administrative law judge and upon all parties to the proceeding within 30 days after the Secretary's receipt of the petition for review.

(d) Upon receipt of the Secretary's notice, the Office of Administrative Law Judges shall within 15 days forward the complete hearing record to the Secretary.

(e) The Secretary's notice shall specify:

(1) The issue or issues to be reviewed;

(2) The form in which submissions shall be made by the parties (*e.g.*, briefs, oral argument);

(3) The time within which such submissions shall be made.

(f) All documents submitted to the Secretary shall be filed with the Secretary of Labor, U.S. Department of Labor, Washington, DC 20210, Attention: Executive Director, Office of Administrative Appeals, room S–4309. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Secretary until actually received by the Secretary. All documents, including documents filed by mail, shall be received by the Secretary either on or before the due date.

(g) Copies of all documents filed with the Secretary shall be served upon all other parties involved in the proceeding. Service upon the Administrator shall be in accordance with § 655.430(b).

(h) The Secretary's final decision shall be issued within 180 days from the date of the notice of intent to review. The Secretary's decision shall be served upon all parties and the administrative law judge.

(i) Upon issuance of the Secretary's decision, the Secretary shall transmit the entire record to the Chief Administrative Law Judge for custody pursuant to § 655.450.

§ 655.450 Administrative record.

The official record of every completed administrative hearing procedure provided by subparts D and E of this part shall be maintained and filed under the custody and control of the Chief Administrative Law Judge. Upon receipt of a complaint seeking review of the final agency action in a United States District Court, the Chief Administrative Law Judge shall certify the official record and shall transmit such record to the clerk of the court.

§ 655.455 Notice to the Attorney General and the Employment and Training Administration.

(a) The Administrator shall promptly notify the Attorney General and ETA of the final determination of a violation by an employer upon the earliest of the following events:

(1) Where the Administrator determines that there is a basis for a finding of violation by an employer, and no

timely request for hearing is made pursuant to § 655.420; or

(2) Where, after a hearing, the administrative law judge issues a decision and order finding a violation by an employer; or

(3) Where the administrative law judge finds that there was no violation, and the Secretary, upon review, issues a decision pursuant to § 655.445, holding that a violation was committed by an employer.

(b) The Attorney General, upon receipt of the Administrator's notice pursuant to paragraph (a) of this section, shall not approve petitions filed with respect to that employer under section 212(m) of the INA (8 U.S.C. 1182(m)) during a period of at least 12 months from the date of receipt of the Administrator's notification.

(c) ETA, upon receipt of the Administrator's notice pursuant to paragraph (a) of this section, shall suspend the employer's attestation under subparts D and E of this part, and shall not accept for filing any attestation submitted by the employer under subparts D and E of this part, for a period of 12 months from the date of receipt of the Administrator's notification or for a longer period if such is specified by the Attorney General for visa petitions filed by that employer under section 212(m) of the INA.

§ 655.460 Non-applicability of the Equal Access to Justice Act.

A proceeding under subpart D or E of this part is not subject to the Equal Access to Justice Act, as amended, 5 U.S.C. 504. In such a proceeding, the administrative law judge shall have no authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act.

Subpart F—Attestations by Employers Using Alien Crewmembers for Longshore Activities in U.S. Ports

SOURCE: 60 FR 3956, 3976, Jan. 19, 1995, unless otherwise noted.

GENERAL PROVISIONS

§ 655.500 Purpose, procedure and applicability of subparts F and G of this part.

(a) *Purpose.* (1) Section 258 of the Immigration and Nationality Act (''Act'') prohibits nonimmigrant alien crewmembers admitted to the United States on D-visas from performing longshore work at U.S. ports except in five specific instances:

(i) Where the vessel's country of registration does not prohibit U.S. crewmembers from performing longshore work in that country's ports and nationals of a country (or countries) which does not prohibit U.S. crewmembers from performing longshore work in that country's ports hold a majority of the ownership interest in the vessel, as determined by the Secretary of State (henceforth referred to as the ''reciprocity exception'');

(ii) Where there is in effect in a local port one or more collective bargaining agreement(s), each covering at least thirty percent of the longshore workers, and each permitting the activity to be performed under the terms of such agreement(s);

(iii) Where there is no collective bargaining agreement covering at least thirty percent of the longshore workers at the particular port and an attestation with accompanying documentation has been filed with the Department of Labor attesting that, among other things, the use of alien crewmembers to perform a particular activity of longshore work is permitted under the prevailing practice of the particular port (henceforth referred to as the ''prevailing practice exception'');

(iv) Where the longshore work is to be performed at a particular location in the State of Alaska and an attestation with accompanying documentation has been filed with the Department of Labor attesting that, among other things, before using alien crewmembers to perform the activity specified in the attestation, the employer will make a bona fide request for and employ United States longshore workers who are qualified and available in

sufficient numbers from contract stevedoring companies, labor organizations recognized as exclusive bargaining representatives of United States longshore workers, and private dock operators (henceforth referred to as the ''Alaska exception''); or

(v) Where the longshore work involves an automated self-unloading conveyor belt or vacuum-actuated system on a vessel and the Administrator has not previously determined that an attestation must be filed pursuant to this part as a basis for performing those functions (henceforth referred to as the ''automated vessel exception'').

(2) The term ''longshore work'' does not include the loading or unloading of hazardous cargo, as determined by the Secretary of Transportation, for safety and environmental protection. The Department of Justice, through the Immigration and Naturalization Service (INS), determines whether an employer may use alien crewmembers for longshore work at U.S. ports. In those cases where an employer must file an attestation in order to perform such work, the Department of Labor shall be responsible for accepting the filing of such attestations. Subpart F of this part sets forth the procedure for filing attestations with the Department of Labor for employers proposing to use alien crewmembers for longshore work at U.S. ports under the prevailing practice exception, the Alaska exception, and where it has been determined that an attestation is required under the automated vessel exception listed in paragraph (a)(1)(iv) of this section. Subpart G of this part sets forth complaint, investigation, and penalty provisions with respect to such attestations.

(b) *Procedure.* (1) Under the prevailing practice exception in sec. 258(c) of the Act, and in those cases where it has been determined that an attestation is required under the automated vessel exception for longshore work to be performed at locations other than in the State of Alaska, the procedure involves filing an attestation with the Department of Labor attesting that:

(i) The use of alien crewmembers for a particular activity of longshore work is the prevailing practice at the particular port;

(ii) The use of alien crewmembers is not during a strike or lockout nor designed to influence the election of a collective bargaining representative; and

(iii) Notice of the attestation has been provided to the bargaining representative of longshore workers in the local port, or, where there is none, notice has been provided to longshore workers employed at the local port.

(2) Under the automated vessel exception in sec. 258(c) of the Act, no attestation is required in cases where longshore activity consists of the use of an automated self-unloading conveyor belt or vacuum-actuated system on a vessel. The legislation creates a rebuttable presumption that the use of alien crewmembers for the operation of such automated systems is the prevailing practice. In order to overcome such presumption, it must be shown by the preponderance of the evidence submitted by any interested party, that the use of alien crewmembers for such activity is not the prevailing practice at the particular port, that it is during a strike or lockout, or that it is intended or designed to influence an election of a bargaining representative for workers in the local port.

(3) Under the Alaska exception in sec. 258(d) of the Act, and in those cases where it has been determined that an attestation is required under the automated vessel exception consisting of the use of such equipment for longshore work to be performed in the State of Alaska, the procedure involves filing an attestation with the Department of Labor attesting that:

(i) The employer will make a bona fide request for United States longshore workers who are qualified and available in sufficient numbers to perform the activity at the particular time and location from the parties to whom notice has been provided under paragraph (b)(3)(iv) (B) and (C) of this section, except that:

(A) Wherever two or more contract stevedoring companies which meet the requirements of section 32 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932) have signed a joint collective bargaining

agreement with a single labor organization recognized as an exclusive bargaining representative of United States longshore workers within the meaning of the National Labor Relations Act (29 U.S.C. 141 *et seq.*), the employer may request longshore workers from only one such contract stevedoring company, and

(B) A request for longshore workers to an operator of a private dock may be made only for longshore work to be performed at that dock and only if the operator meets the requirements of section 32 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932);

(ii) The employer will employ all United States longshore workers made available in response to the request made pursuant to paragraph (b)(3)(i) of this section who are qualified and available in sufficient numbers and who are needed to perform the longshore activity at the particular time and location attested to;

(iii) The use of alien crewmembers for such activity is not intended or designed to influence and election of a bargaining representative for workers in the State of Alaska; and

(iv) Notice of the attestation has been provided to:

(A) Labor organizations which have been recognized as exclusive bargaining representatives of United States longshore workers within the meaning of the National Labor Relations Act (29 U.S.C. 141 *et seq.*) and which make available or intend to make available workers to the particular location where the longshore work is to be performed;

(B) Contract stevedoring companies which employ or intend to employ United States longshore workers at that location; and

(C) Operators of private docks at which the employer will use longshore workers.

(c) *Applicability*. Subparts F and G of this part apply to all employers who seek to employ alien crewmembers for longshore work at U.S. ports under the prevailing practice exception, to all employers who seek to employ alien crewmembers for longshore work at locations in the State of Alaska under the Alaska exception, to all employers claiming the automated vessel exception, and to those cases where it has been determined that an attestation is required under the automated vessel exception.

§ 655.501 Overview of responsibilities.

This section provides a context for the attestation process, to facilitate understanding by employers that may seek to employ alien crewmembers for longshore work under the prevailing practice exception, under the Alaska exception, and in those cases where an attestation is necessary under the automated vessel exception.

(a) *Department of Labor's responsibilities.* The United States Department of Labor (DOL) administers the attestation process. Within DOL, the Employment and Training Administration (ETA) shall have responsibility for setting up and operating the attestation process; the Employment Standards Administration's Wage and Hour Division shall be responsible for investigating and resolving any complaints filed concerning such attestations.

(b) *Employer attestation responsibilities.* (1) Each employer seeking to use alien crewmembers for longshore work at a local U.S. port pursuant to the prevailing practice exception or where an attestation is required under the automated vessel exception for longshore work to be performed at locations other than in the State of Alaska shall, as the first step, submit an attestation on Form ETA 9033, as described in §655.510 of this part, to ETA at the address set forth at §655.510(b) of this part. If ETA accepts the attestation for filing, pursuant to §655.510 of this part, ETA shall return the cover form of the accepted attestation to the employer, and, at the same time, shall provide notice of the filing to the Immigration and Naturalization Service (INS) office having jurisdiction over the port where longshore work will be performed.

(2) Each employer seeking to use alien crewmembers for longshore work at a particular location in the State of Alaska pursuant to the Alaska exception or where an attestation is required under the automated vessel exception for longshore work to be performed at a particular location in Alaska shall submit, as a first step, an attestation

on Form ETA 9033–A, as described in § 655.533 of this part, to ETA at the address of the Seattle regional office as set forth at § 655.532 of this part. The address appears in the instructions to Form ETA 9033–A. ETA shall return the cover form of the accepted attestation to the employer, and, at the same time, shall provide notice of the filing to the INS office having jurisdiction over the location where longshore work will be performed.

(c) *Complaints.* Complaints concerning misrepresentation in the attestation, failure of the employer to carry out the terms of the attestation, or complaints that an employer is required to file an attestation under the automated vessel exception, may be filed with the Wage and Hour Division, according to the procedures set forth in subpart G of this part. Complaints of ''misrepresentation'' may include assertions that an employer has attested to the use of alien crewmembers only for a particular activity of longshore work and has thereafter used such alien crewmembers for another activity of longshore work. If the Division determines that the complaint presents reasonable cause to warrant an investigation, the Division shall then investigate, and, where appropriate, after an opportunity for a hearing, assess sanctions and penalties. Subpart G of this part further provides that interested parties may obtain an administrative law judge hearing on the Division's determination after an investigation and may seek the Secretary's review of the administrative law judge's decision. Subpart G of this part also provides that a complainant may request that the Wage and Hour Administrator issue a cease and desist order in the case of either alleged violation(s) of an attestation or longshore work by alien crewmember(s) employed by an employer allegedly not qualified for the claimed automated vessel exception. Upon the receipt of such a request, the Division shall notify the employer, provide an opportunity for a response and an informal meeting, and then rule on the request, which shall be granted if the preponderance of the evidence submitted supports the complainant's position.

§ 655.502 Definitions.

For the purposes of subparts F and G of this part:

Accepted for filing means that a properly completed attestation on Form ETA 9033, including accompanying documentation for each of the requirements in § 655.510 (d) through (f) of this part, or a properly completed attestation on Form ETA 9033–A, including accompanying documentation for the requirement in § 655.537 of this part in the case of an attestation under the Alaska exception, submitted by the employer or its designated agent or representative has been received and filed by the Employment and Training Administration of the Department of Labor (DOL). (Unacceptable attestations under the prevailing practice exception are described at § 655.510(g)(2) of this part. Unacceptable attestations under the Alaska exception are described at § 655.538(b) of this part.)

Act and *INA* mean the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq.*

Activity means any activity relating to loading cargo; unloading cargo; operation of cargo-related equipment; or handling of mooring lines on the dock when a vessel is made fast or let go.

Administrative law judge means an official appointed pursuant to 5 U.S.C. 3105.

Administrator means the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor, or such authorized representatives as may be designated to perform any of the functions of the Administrator under subparts F and G of this part.

Attestation means documents submitted by an employer attesting to and providing accompanying documentation to show that, under the prevailing practice exception, the use of alien crewmembers for a particular activity of longshore work at a particular U.S. port is the prevailing practice, and is not during a strike or lockout nor intended to influence an election of a bargaining representative for workers; and that notice of the attestation has been provided to the bargaining representative, or, where there is none, to the longshore workers at the local port. Under the Alaska exception, such

documents shall show that, before using alien crewmen to perform longshore work, the employer will make bona fide requests for dispatch of United States longshore workers who are qualified and available in sufficient numbers and that the employer will employ all such United States longshore workers in response to such a request for dispatch; that the use of alien crewmembers is not intended or designed to influence an election of a bargaining representative for workers in the State of Alaska; and that notice of the attestation has been provided to labor organizations recognized as exclusive bargaining representatives of United States longshore workers, contract stevedoring companies, and operators of private docks at which the employer will use longshore workers.

Attesting employer means an employer who has filed an attestation.

Attorney General means the chief official of the U.S. Department of Justice or the Attorney General's designee.

Automated vessel means a vessel equipped with an automated self-unloading conveyor belt or vacuum-actuated system which is utilized for loading or unloading cargo between the vessel and the dock.

Certifying Officer means a Department of Labor official who makes determinations about whether or not to accept attestations:

(1) A regional Certifying Officer designated by a Regional Administrator, Employment and Training Administration (RA) makes such determinations in a regional office of the Department;

(2) A national Certifying Officer makes such determinations in the national office of the USES.

Chief, Division of Foreign Labor Certifications, USES means the chief official of the Division of Foreign Labor Certifications within the United States Employment Service, Employment and Training Administration, Department of Labor, or the designee of the Chief, Division of Foreign Labor Certifications, USES.

Chief Administrative Law Judge means the chief official of the Office of the Administrative Law Judges of the Department of Labor or the Chief Administrative Law Judge's designee.

Contract stevedoring company means a stevedoring company which is licensed to do business in the State of Alaska and which meets the requirements of section 32 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932).

Crewmember means any nonimmigrant alien admitted to the United States to perform services under sec. 101(a)(15)(D)(i) of the Act (8 U.S.C. 1101(a)(15)(D)(i)).

Date of filing means the date an attestation is *accepted for filing* by ETA.

Department and *DOL* mean the United States Department of Labor.

Director means the chief official of the United States Employment Service (USES), Employment and Training Administration, Department of Labor, or the Director's designee.

Division means the Wage and Hour Division of the Employment Standards Administration, DOL.

Employer means a person, firm, corporation, or other association or organization, which suffers or permits, or proposes to suffer or permit, alien crewmembers to perform longshore work at a port within the U.S. For purposes of §§ 655.530 through 655.541, which govern the performance of longshore activities by alien crewmembers under the Alaska exception, ''employer'' includes any agent or representative designated by the employer.

Employment and Training Administration (ETA) means the agency within the Department of Labor (DOL) which includes the United States Employment Service (USES).

Employment Standards Administration (ESA) means the agency within the Department of Labor (DOL) which includes the Wage and Hour Division.

Immigration and Naturalization Service (INS) means the component of the Department of Justice which makes the determination under the Act on whether an employer of alien crewmembers may use such crewmembers for longshore work at a U.S. port.

Lockout means a labor dispute involving a work stoppage, wherein an employer withholds work from its employees in order to gain a concession from them.

Longshore work means any activity (except safety and environmental protection work as described in sec. 258(b)(2) of the Act) relating to the loading or unloading of cargo, the operation of cargo related equipment (whether or not integral to the vessel), or the handling of mooring lines on the dock when the vessel is made fast or let go, in the United States or the coastal waters thereof.

Longshore worker means a U.S. worker who performs longshore work.

Port means a geographic area, either on a seacoast, lake, river or any other navigable body of water, which contains one or more publicly or privately owned terminals, piers, docks, or maritime facilities, which is commonly thought of as a port by other government maritime-related agencies, such as the Maritime Administration. U.S. ports include, but are not limited to, those listed in Appendix A to this subpart.

Qualified and available in sufficient numbers means the full complement of qualified longshore workers needed to perform the longshore activity, as determined by industry standards in the State of Alaska, including safety considerations.

Regional Administrator, Employment and Training Administration (RA) means the chief official of the Employment and Training Administration (ETA) in a Department of Labor (DOL) regional office.

Secretary means the Secretary of Labor or the Secretary's designee.

Strike means a labor dispute wherein employees engage in a concerted stoppage of work (including stoppage by reason of the expiration of a collective-bargaining agreement) or engage in any concerted slowdown or other concerted interruption of operations.

Unanticipated emergency means an unexpected and unavoidable situation, such as one involving severe weather conditions, natural disaster, or mechanical breakdown, where cargo must be immediately loaded on, or unloaded from, a vessel.

United States is defined at 8 U.S.C. 1101(a)(38).

United States Employment Service (USES) means the agency of the Department of Labor, established under the Wagner-Peyser Act, which is charged with administering the national system of public employment offices.

United States (U.S.) worker means a worker who is a U.S. citizen, a U.S. national, a permanent resident alien, or any other worker legally permitted to work indefinitely in the United States.

§ 655.510 Employer attestations.

(a) *Who may submit attestations?* An employer (or the employer's designated U.S. agent or representative) seeking to employ alien crewmembers for a particular activity of longshore work under the prevailing practice exception shall submit an attestation, provided there is not in effect in the local port any collective bargaining agreement covering at least 30 percent of the longshore workers. An attestation is required for each port at which the employer intends to use alien crewmembers for longshore work. The attestation shall include: A completed Form ETA 9033, which shall be signed by the employer (or the employer's designated agent or representative); and facts and evidence prescribed in paragraphs (d) through (f) of this section. This § 655.510 shall not apply in the case of longshore work performed at a particular location in the State of Alaska. The procedures governing the filing of attestations under the Alaska exception are set forth at §§ 655.530 through 655.541.

(b) *Where and when should attestations be submitted?* (1) Attestations must be submitted, by U.S. mail, private carrier, or facsimile transmission to the U.S. Department of Labor ETA Regional Office(s) which are designated by the Chief, Division of Foreign Labor Certifications, USES. Attestations must be received and date-stamped by DOL at least 14 calendar days prior to the date of the first performance of the intended longshore activity, and shall be accepted for filing or returned by ETA in accordance with paragraph (g) of this section within 14 calendar days of the date received by ETA. An attestation which is accepted by ETA solely because it was not reviewed within 14 days is subject to subsequent invalidation pursuant to paragraph (i) of this

section. Every employer filing an attestation shall have an agent or representative with a United States address. Such address shall be clearly indicated on the Form ETA 9033. In order to ensure that an attestation has been accepted for filing prior to the date of the performance of the longshore activity, employers are advised to take mailing time into account to make sure that ETA receives the attestation at least 14 days prior to the first performance of the longshore activity.

(2) *Unanticipated Emergencies.* ETA may accept for filing attestations received after the 14-day deadline when due to an unanticipated emergency, as defined in §655.502 of this part. When an employer is claiming an unanticipated emergency, it shall submit documentation to support such a claim. ETA shall then make a determination on the validity of the claim, and shall accept the attestation for filing or return it in accordance with paragraph (g) of this section. ETA shall in no case accept an attestation received later than the date of the first performance of the activity.

(c) *What should be submitted?* (1) *Form ETA 9033 with accompanying documentation.* For each port, a completed and dated original Form ETA 9033, or facsimile transmission thereof, containing the required attestation elements and the original signature of the employer (or the employer's designated agent or representative) shall be submitted, along with two copies of the completed, signed, and dated Form ETA 9033. (If the attestation is submitted by facsimile transmission, the attestation containing the original signature shall be maintained at the U.S. business address of the employer's designated agent or representative). Copies of Form ETA 9033 are available at all Department of Labor ETA Regional Offices and at the National Office. In addition, the employer shall submit two sets of all facts and evidence to show compliance with each of the attestation elements as prescribed by the regulatory standards in paragraphs (d) through (f) of this section. In the case of an investigation pursuant to subpart G of this part, the employer shall have the burden of proof to establish the validity of each attestation. The employer shall maintain in its records at the office of its U.S. agent, for a period of at least 3 years from the date of filing, sufficient documentation to meet its burden of proof, which shall at a minimum include the documentation described in this §655.510, and shall make the documents available to Department of Labor officials upon request.

Whenever any document is submitted to a Federal agency or retained in the employer's records pursuant to this part, the document either shall be in the English language or shall be accompanied by a written translation into the English language certified by the translator as to the accuracy of the translation and his/her competency to translate.

(2) *Statutory precondition regarding collective bargaining agreements.* (i) The employer may file an attestation only when there is no collective bargaining agreement in effect in the port covering 30 percent or more of the longshore workers in the port. The employer shall attest on the Form ETA 9033 that no such collective bargaining agreement exists at the port at the time that the attestation is filed.

(ii) The employer is not required to submit with the Form ETA 9033 documentation substantiating that there is no collective bargaining agreement in effect in the port covering 30 percent or more of the longshore workers. If a complaint is filed which presents reasonable cause to believe that such an agreement exists, the Department shall conduct an investigation. In such an investigation, the employer shall have the burden of proving that no such collective bargaining agreement exists.

(3) *Ports for which attestations may be filed.* Employers may file an attestation for a port which is listed in appendix A (U.S. Seaports) to this subpart. Employers may also file an attestation for a particular location not in appendix A to this subpart if additional facts and evidence are submitted with the attestation to demonstrate that the location is a port, meeting all of the criteria as defined by §655.502 of this part.

(4) *Attestation elements.* The attestation elements referenced in paragraph (c)(1) of this section are mandated by sec. 258(c)(1)(B) of the Act (8 U.S.C. 1288(c)(1)(B)). Section 258(c)(1)(B) of the

Act requires employers who seek to have alien crewmembers engage in a longshore activity to attest as follows:

(i) The performance of the activity by alien crewmembers is permitted under the prevailing practice of the particular port as of the date of filing of the attestation;

(ii) The use of the alien crewmembers for such activity is not during a strike or lockout in the course of a labor dispute, and is not intended or designed to influence an election of a bargaining representative for workers in the local port; and

(iii) Notice of the attestation has been provided by the owner, agent, consignee, master, or commanding officer to the bargaining representative of longshore workers in the local port, or, where there is no such bargaining representative, notice has been provided to longshore workers employed at the local port.

(d) *The first attestation element: prevailing practice.* For an employer to be in compliance with the first attestation element, it is required to have been the prevailing practice during the 12-month period preceding the filing of the attestation, for a particular activity of longshore work at the particular port to be performed by alien crewmembers. For each port, a prevailing practice can exist for any of four different types of longshore work: loading of cargo, unloading of cargo, operation of cargo-related equipment, or handling of mooring lines. It is thus possible that at a particular port it is the prevailing practice for alien crewmembers to unload vessels but not the prevailing practice to load them. An employer shall indicate on the attestation form which of the four longshore activities it is claiming is the prevailing practice for such work to be performed by alien crewmembers.

(1) *Establishing a prevailing practice.*

(i) In establishing that a particular activity of longshore work is the prevailing practice at a particular port, an employer shall submit facts and evidence to show that in the 12-month period preceding the filing of the attestation, one of the following conditions existed:

(A) Over fifty percent of vessels docking at the port used alien crewmembers for the activity; or

(B) Alien crewmembers made up over fifty percent of the workers in the port who engaged in the activity.

(ii) *Prevailing practice after Secretary of State determination of non-reciprocity.* Section 258(d) of the Act provides a reciprocity exception (separate from the prevailing practice exception) to the prohibition on performance of longshore work by alien crewmembers in U.S. ports. However, this reciprocity exception becomes nonapplicable where the Secretary of State determines that, for a particular activity of longshore work, a particular country (by law, regulation, or practice) prohibits such activity by U.S. crewmembers in its ports. When the Secretary of State places a country on the non-reciprocity list (which means, for the purposes of this section, *Prohibitions on longshore work by U.S. nationals; listing by country* at 22 CFR 89.1), crewmembers on vessels from that country (that is, vessels that are registered in that country or vessels whose majority ownership interest is held by nationals of that country) are not permitted to perform longshore work in U.S. waters, absent applicability of some exception other than the reciprocity exception. The Secretary of State's determination has the following effects in the establishment of a prevailing practice for a particular longshore activity at a particular U.S. port for purposes of the prevailing practice exception.

(A) An employer from any country, other than the country which is placed on the non-reciprocity list, may include the longshore activities performed by alien crewmembers on all vessels in establishing the prevailing practice for a particular longshore activity in a particular port.

(B) An employer from a country which is placed on the non-reciprocity list may file an attestation for the prevailing practice exception under the standards and requirements established in this subpart F (except as provided in paragraph (d)(1)(ii)(C) of this section), provided that the attestation is filed at least 12 months after the date on which the employer's country is placed on the list.

(C) An employer from a country which is placed on the non-reciprocity list may file an attestation pursuant to the prevailing practice exception earlier than 12 months from the date on which the employer's country is placed on the list, except that the following restrictions shall apply to such attestation:

(*1*) The employer shall submit facts and evidence to show that, for the 12-month period preceding the date of the attestation, the use of alien crewmembers to perform a particular activity of longshore work was permitted by the prevailing practice in the port (as defined in paragraph (d)(1)(i) of this section) without considering or including such activity by crewmembers on vessels from the employer's country; or

(*2*) The employer shall submit facts and evidence (including data on activities performed by crewmembers on vessels from the employer's country) to show that the use of alien crewmembers to perform a particular activity of longshore work was permitted by the prevailing practice in the port (as defined in paragraph (d)(1)(i) of this section) for one of two periods—

(*i*) For the employer whose country has not previously been on the non-reciprocity list, the period is the continuous 12-month period prior to May 28, 1991 (the effective date of section 258 of the Act); or

(*ii*) For the employer whose country was at some time on the non-reciprocity list, but was subsequently removed from the non-reciprocity list and then restored to the non-reciprocity list (on one or more occasions), the period is the last continuous 12-month period during which the employer's country was not under the reciprocity exception (that is, was listed on the non-reciprocity list).

(*iii*) For purposes of this paragraph (d)(1):

(A) ''Workers in the port engaged in the activity'' means any person who performed the activity in any calendar day;

(B) Vessels shall be counted each time they dock at the particular port):

(C) Vessels exempt from section 258 of the INA for safety and environmental protection shall not be included in counting the number of vessels which dock at the port (see Department of Transportation Regulations); and

(D) Automated vessels shall not be included in counting the number of vessels which dock at the port. For establishing a prevailing practice under the automated vessel exception see § 655.520 of this part.

(2) *Documentation.* In assembling the facts and evidence required by paragraph (d)(1) of this section, the employer may consult with the port authority which has jurisdiction over the local port, the collective bargaining representative(s) of longshore workers at the local port, other employers, or any other entity which is familiar with the practices at the port. Such documentation shall include a written summary of a survey of the experience of shipmasters who entered the local port in the previous year; or a letter, affidavit, or other written statement from an appropriate local port authority regarding the use of alien crewmembers to perform the longshore activity at the port in the previous year; or other documentation of comparable weight. Written statements from collective bargaining representatives and/or shipping agents with direct knowledge of practices regarding the use of alien crewmembers in the local port may also be pertinent. Such documentation shall accompany the Form ETA 9033, and any underlying documentation which supports the employer's burden of proof shall be maintained in the employer's records at the office of the U.S. agent as required by paragraph (c)(1) of this section.

(e) *The second attestation element: no strike or lockout; no intention or design to influence bargaining representative election.* (1) The employer shall attest that, at the time of submitting the attestation, there is not a strike or lockout in the course of a labor dispute covering the employer's activity, and that it will not use alien crewmembers during a strike or lockout after filing the attestation. The employer shall also attest that the employment of such aliens is not intended or designed to influence an election for a bargaining representative for workers in the local port. Labor disputes for purposes of this attestation element relate only to

those involving longshore workers at the port of intended employment. This attestation element applies to strikes and lockouts and elections of bargaining representatives at the local port where the use of alien crewmembers for longshore work is intended.

(2) *Documentation.* As documentation to substantiate the requirement in paragraph (e)(1) of this section, an employer may submit a statement of the good faith efforts made to determine whether there is a strike or lockout at the particular port, as, for example, by contacting the port authority or the collective bargaining representative for longshore workers at the particular port.

(f) *The third attestation element: notice of filing.* The employer of alien crewmembers shall attest that at the time of filing the attestation, notice of filing has been provided to the bargaining representative of the longshore workers in the local port, or, where there is no such bargaining representative, notice of the filing has been provided to longshore workers employed at the local port through posting in conspicuous locations and through other appropriate means.

(1) *Notification of bargaining representative.* No later than the date the attestation is received by DOL to be considered for filing, the employer of alien crewmembers shall notify the bargaining representative (if any) of longshore workers at the local port that the attestation is being submitted to DOL. The notice shall include a copy of the Form ETA 9033, shall state the activity(ies) for which the attestation is submitted, and shall state in that notice that the attestation and accompanying documentation are available at the national office of ETA for review by interested parties. The employer may have its owner, agent, consignee, master, or commanding officer provide such notice. Notices under this paragraph (f)(1) shall include the following statement: ''Complaints alleging misrepresentation of material facts in the attestation and/or failure to comply with the terms of the attestation may be filed with any office of the Wage and Hour Division of the United States Department of Labor.''

(2) *Posting notice where there is no bargaining representative.* If there is no bargaining representative of longshore workers at the local port when the employer submits an attestation to ETA, the employer shall provide written notice to the port authority for distribution to the public on request. In addition, the employer shall post one or more written notices at the local port, stating that the attestation with accompanying documentation has been submitted, the activity(ies) for which the attestation has been submitted, and that the attestation and accompanying documentation are available at the national office of ETA for review by interested parties. Such posted notice shall be clearly visible and unobstructed, and shall be posted in conspicuous places where the longshore workers readily can read the posted notice on the way to or from their duties. Appropriate locations for posting such notices include locations in the immediate proximity of mandatory Fair Labor Standards Act wage and hour notices and Occupational Safety and Health Act occupational safety and health notices. The notice shall include a copy of the Form ETA 9033 filed with DOL, shall provide information concerning the availability of supporting documents for examination at the national office of ETA, and shall include the following statement: ''Complaints alleging misrepresentation of material facts in the attestation and/or failure to comply with the terms of the attestation may be filed with any office of the Wage and Hour Division of the United States Department of Labor.''

(3) *Documentation.* The employer shall provide a statement setting forth the name and address of the person to whom the notice was provided and where and when the notice was posted and shall attach a copy of the notice.

(g) *Actions on attestations submitted for filing.* Once an attestation has been received from an employer, a determination shall be made by the regional Certifying Officer whether to accept the attestation for filing or return it. The regional Certifying Officer may request additional explanation and/or documentation from the employer in making this determination. An attestation which is properly filled out and which

includes accompanying documentation for each of the requirements set forth at §655.510(d) through (f) shall be accepted for filing by ETA on the date it is signed by the regional Certifying Officer unless it falls within one of the categories set forth in paragraph (g)(2) of this section. Once an attestation is accepted for filing, ETA shall then follow the procedures set forth in paragraph (g)(1) of this section. Upon acceptance of the employer's attestation by ETA, the attestation and accompanying documentation will be forwarded and shall be available in a timely manner for public examination at the ETA national office. ETA shall not consider information contesting an attestation received by ETA prior to the determination to accept or return the attestation for filing. Such information shall not be made part of ETA's administrative record on the attestation, but shall be referred to ESA to be processed as a complaint pursuant to subpart G of this part if the attestation is accepted by ETA for filing.

(1) *Acceptance.* (i) If the attestation is properly filled out and includes accompanying documentation for each of the requirements at §655.510(d) through (f), and does not fall within one of the categories set forth at paragraph (g)(2) of this section, ETA shall accept the attestation for filing, provide notification to the INS office having jurisdiction over the port where longshore work will be performed, and return to the employer, or the employer's agent or representative at a U.S. address, one copy of the attestation form submitted by the employer, with ETA's acceptance indicated thereon. The employer may then use alien crewmembers for the particular activity of longshore work at the U.S. port cited in the attestation in accordance with INS regulations.

(ii) DOL is not the guarantor of the accuracy, truthfulness or adequacy of an attestation accepted for filing.

(2) *Unacceptable attestations.* ETA shall not accept an attestation for filing and shall return such attestation to the employer, or the employer's agent or representative at a U.S. address, when one of the following conditions exists:

(i) When the Form ETA 9033 is not properly filled out. Examples of improperly filled out Form ETA 9033's include instances where the employer has neglected to check all the necessary boxes, or where the employer has failed to include the name of the port where it intends to use the alien crewmembers for longshore work, or where the employer has named a port that is not listed in appendix A and has failed to submit facts and evidence to support a showing that the location is a port as defined by §655.502, or when the employer has failed to sign the attestation or to designate an agent in the United States;

(ii) When the Form ETA 9033 with accompanying documentation is not received by ETA at least 14 days prior to the date of performance of the first activity indicated on the Form ETA 9033; unless the employer is claiming an unanticipated emergency, has included documentation which supports such claim, and ETA has found the claim to be valid;

(iii) When the Form ETA 9033 does not include accompanying documentation for each of the requirements set forth at §655.510 (d) through (f);

(iv) When the accompanying documentation required by paragraph (c) of this section submitted by the employer, on its face, is inconsistent with the requirements set forth at §655.510 (d) through (f). Examples of such a situation include instances where the Form ETA 9033 pertains to one port and the accompanying documentation to another; where the Form ETA 9033 pertains to one activity of longshore work and the accompanying documentation obviously refers to another; or where the documentation clearly indicates that only thirty percent, instead of the required fifty percent, of the activity attested to is performed by alien crewmembers;

(v) When the Administrator, Wage and Hour Division, has notified ETA, in writing, after an investigation pursuant to subpart G of this part, that the particular activity of longshore work which the employer has attested is the prevailing practice at a particular port, is not, in fact, the prevailing practice at the particular port;

(vi) When the Administrator, Wage and Hour Division, has notified ETA, in writing, that a cease and desist order has been issued pursuant to subpart G of this part, with respect to the attesting employer's performance of the particular activity and port, in violation of a previously accepted attestation;

(vii) When the Administrator, Wage and Hour Division, has notified ETA, in writing, after an investigation pursuant to subpart G of this part, that the particular employer has misrepresented or failed to comply with an attestation previously submitted and accepted for filing, but in no case for a period of more than one year after the date of the Administrator's notice and provided that INS has not advised ETA that the prohibition is in effect for a lesser period; or

(viii) When the Administrator, Wage and Hour Division, has notified ETA, in writing, that the employer has failed to comply with any penalty, sanction, or other remedy assessed in a final agency action following an investigation by the Wage and Hour Division pursuant to subpart G of this part.

(3) *Resubmission.* If the attestation is not accepted for filing pursuant to the categories set forth in paragraph (g)(2) of this section, ETA shall return to the employer, or the employer's agent or representative, at a U.S. address, the attestation form and accompanying documentation submitted by the employer. ETA shall notify the employer, in writing, of the reason(s) that the attestation is unacceptable. When an attestation is found to be unacceptable pursuant to paragraphs (g)(2) (i) through (iv) of this section, the employer may resubmit the attestation with the proper documentation. When an attestation is found to be unacceptable pursuant to paragraphs (g)(2) (v) through (viii) of this section and returned, such action shall be the final decision of the Secretary of Labor.

(h) *Effective date and validity of filed attestations.* An attestation is filed and effective as of the date it is accepted and signed by the regional Certifying Officer. Such attestation is valid for the 12-month period beginning on the date of acceptance for filing, unless suspended or invalidated pursuant to subpart G of this part or paragraph (i) of this section. The filed attestation expires at the end of the 12-month period of validity.

(i) *Suspension or invalidation of filed attestations.* Suspension or invalidation of an attestation may result from enforcement action(s) under subpart G of this part (*i.e.*, investigation(s) conducted by the Administrator or cease and desist order(s) issued by the Administrator regarding the employer's misrepresentation in or failure to carry out its attestation); or from a discovery by ETA that it made an error in accepting the attestation because such attestation falls within one of the categories set forth in paragraph (g)(2) of this section.

(1) *Result of Wage and Hour Division action.* Upon the determination of a violation under subpart G of this part, the Administrator shall, pursuant to § 655.660(b), notify the Attorney General of the violation and of the Administrator's notice to ETA.

(2) *Result of ETA action.* If, after accepting an attestation for filing, ETA finds that the attestation is unacceptable because it falls within one of the categories set forth at paragraph (g)(2) of this section, and as a result, ETA suspends or invalidates the attestation, ETA shall notify the Attorney General of such suspension or invalidation and shall return a copy of the attestation form to the employer, or the employer's agent or representative, at a U.S. address. ETA shall notify the employer, in writing, of the reason(s) that the attestation is suspended or invalidated. When an attestation is found to be suspended or invalidated pursuant to paragraphs (g)(2) (i) through (iv) of this section, the employer may resubmit the attestation with the proper documentation. When an attestation is suspended or invalidated because it falls within one of the categories in paragraphs (g)(2) (v) through (viii) of this section, such action shall be the final decision of the Secretary of Labor, except as set forth in subpart G of this part.

(j) *Withdrawal of accepted attestations.* (1) An employer who has submitted an attestation which has been accepted for filing may withdraw such attestation at any time before the 12-month period of its validity terminates, unless

the Administrator has found reasonable cause under subpart G to commence an investigation of the particular attestation. Such withdrawal may be advisable, for example, when the employer learns that the particular activity(ies) of longshore work which it has attested is the prevailing practice to perform with alien crewmembers may not, in fact, have been the prevailing practice at the particular port at the time of filing. Requests for such withdrawals shall be in writing and shall be directed to the regional Certifying Officer.

(2) Withdrawal of an attestation shall not affect an employer's liability with respect to any failure to meet the conditions attested to which took place before the withdrawal, or for misrepresentations in an attestation. However, if an employer has not yet performed the particular longshore activity(ies) at the port in question, the Administrator will not find reasonable cause to investigate unless it is alleged, and there is reasonable cause to believe, that the employer has made misrepresentations in the attestation or documentation thereof, or that the employer has not in fact given the notice attested to.

(Approved by the Office of Management and Budget under Control No. 1205–0309)

§ 655.520 Special provisions regarding automated vessels.

In general, an attestation is not required in the case of a particular activity of longshore work consisting of the use of automated self-unloading conveyor belt or vacuum-actuated systems on a vessel. The legislation creates a rebuttable presumption that the use of alien crewmembers for the operation of such automated systems is the prevailing practice. In order to overcome such presumption, it must be shown by the preponderance of the evidence submitted by any interested party, that the use of alien crewmembers for such activity is not the prevailing practice. Longshore work involving the use of such equipment shall be exempt from the attestation requirement only if the activity consists of using that equipment. If the automated equipment is not used in the particular activity of longshore work, an attestation is required as described under §655.510 of this part if it is the prevailing practice in the port to use alien crewmembers for this work, except that in all cases, where an attestation is required for longshore work to be performed at a particular location in the State of Alaska, an employer shall file such attestation under the Alaska exception pursuant to §§655.530 through 655.541 on Form ETA 9033–A. When automated equipment is used in the particular activity of longshore work, an attestation is required only if the Administrator finds, based on a preponderance of the evidence which may be submitted by any interested party, that the performance of the particular activity of longshore work is not the prevailing practice at the port, or was during a strike or lockout or intended to influence an election of a bargaining representative for workers in the local port, or if the Administrator issues a cease and desist order against use of the automated equipment without such attestation.

(a) *Procedure when attestation is required.* If it is determined pursuant to subpart G of this part that an attestation is required for longshore work consisting of the use of automated equipment at a location other than in the State of Alaska, the employer shall comply with all the requirements set forth at §655.510 of this part except paragraph (d) of §655.510. In lieu of complying with §655.510(d) of this part, the employer shall comply with paragraph (b) of this section. If it is determined pursuant to subpart G of this part that an attestation is required for longshore work consisting of the use of automated equipment at a particular location in the State of Alaska, the employer shall comply with all the requirements set forth at §§655.530 through 655.541 of this part.

(b) *The first attestation element: prevailing practice for automated vessels.* For an employer to be in compliance with the first attestation element, it is required to have been the prevailing practice that over fifty percent (as described in paragraph (b)(1) of this section) of a particular activity of longshore work which was performed

through the use of automated self-unloading conveyor belt or vacuum-actuated equipment at the particular port during the 12-month period preceding the filing of the attestation, was performed by alien crewmembers. For purposes of this paragraph (b), only automated vessels shall be included in counting the number of vessels which dock at the port.

(1) *Establishing a prevailing practice.* (i) In establishing that the use of alien crewmembers to perform a particular activity of longshore work consisting of the use of self-unloading conveyor belt or vacuum-actuated systems on a vessel is the prevailing practice at a particular port, an employer shall submit facts and evidence to show that in the 12-month period preceding the filing of the attestation, one of the following conditions existed:

(A) Over fifty percent of the automated vessels docking at the port used alien crewmembers for the activity (for purposes of this paragraph (b)(1), a vessel shall be counted each time it docks at the particular port); or

(B) Alien crewmembers made up over fifty percent of the workers who performed the activity with respect to such automated vessels.

(ii) *Prevailing practice after Secretary of State determination of non-reciprocity.* Section 258(d) of the Act provides a reciprocity exception (separate from the prevailing practice exception) to the prohibition on performance of longshore work by alien crewmembers in U.S. ports. However, this reciprocity exception becomes nonapplicable where the Secretary of State determines that, for a particular activity of longshore work, a particular country (by law, regulation, or practice) prohibits such activity by U.S. crewmembers in its ports. When the Secretary of State places a country on the non-reciprocity list (which means, for the purposes of this section, *Prohibitions on longshore work by U.S. nationals; listing by country* at 22 CFR 89.1), crewmembers on vessels from that country (that is, vessels that are registered in that country or vessels whose majority ownership interest is held by nationals of that country) are not permitted to perform longshore work in U.S. waters, absent applicability of some exception other than the reciprocity exception. The Secretary of State's determination has the following effects in the establishment of a prevailing practice for a particular longshore activity at a particular U.S. port for purposes of the prevailing practice exception.

(A) An employer from any country, other than the country which is placed on the non-reciprocity list, may include the longshore activities performed by alien crewmembers on all vessels in establishing the prevailing practice for a particular longshore activity in a particular port.

(B) An employer from a country which is placed on the non-reciprocity list may file an attestation for the prevailing practice exception under the standards and requirements established in this subpart F (except as provided in paragraph (b)(1)(ii)(C) of this section), provided that the attestation is filed at least 12 months after the date on which the employer's country is placed on the list.

(C) An employer from a country which is placed on the non-reciprocity list may file an attestation pursuant to the prevailing practice exception earlier than 12 months from the date on which the employer's country is placed on the list, except that the following restrictions shall apply to such attestation:

(*1*) The employer shall submit facts and evidence to show that, for the 12-month period preceding the date of the attestation, the use of alien crewmembers to perform a particular activity of longshore work was permitted by the prevailing practice in the port (as defined in paragraph (d)(1)(i) of this section) without considering or including such activity by crewmembers on vessels from the employer's country; or

(*2*) The employer shall submit facts and evidence (including data on activities performed by crewmembers on vessels from the employer's country) to show that the use of alien crewmembers to perform a particular activity of longshore work was permitted by the prevailing practice in the port (as defined in paragraph (b)(1)(i) of this section) for one of two periods—

(*i*) For the employer whose country has not previously been on the non-reciprocity list, the period is the continuous 12-month period prior to May 28, 1991 (the effective date of section 258 of the Act); or

(*ii*) For the employer whose country was at some time on the non-reciprocity list, but was subsequently removed from the non-reciprocity list and then restored to the non-reciprocity list (on one or more occasions), the period is the last continuous 12-month period during which the employer's country was not under the reciprocity exception (that is, was listed on the non-reciprocity list).

(2) *Documentation.* In assembling the documentation described in paragraph (b)(1) of this section, the employer may consult with the port authority which has jurisdiction over the local port, the collective bargaining representative(s) of longshore workers at the local port, other employers, or any other entity which is familiar with the practices at the port. The documentation shall include a written summary of a survey of the experience of shipmasters who entered the local port in the previous year; or a letter, affidavit, or other written statement from an appropriate local port authority regarding the use of alien crewmembers to perform the longshore activity at the port in the previous year; or other documentation of comparable weight. Written statements from collective bargaining representatives and/or shipping agents with direct knowledge of practices regarding the use of alien crewmembers may also be pertinent. Such documentation shall accompany the Form ETA 9033, and any underlying documentation which supports the employer's burden of proof shall be maintained in the employer's records at the office of the U.S. agent as required under § 655.510(c)(1) of this part.

(Approved by the Office of Management and Budget under Control No. 1205–0309)

ALASKA EXCEPTION

§ 655.530 Special provisions regarding the performance of longshore activities at locations in the State of Alaska.

Applicability. Section § 655.510 of this part shall not apply to longshore work performed at locations in the State of Alaska. The performance of longshore work by alien crewmembers at locations in the State of Alaska shall instead be governed by §§ 655.530 through 655.541. The use of alien crewmembers to perform longshore work in Alaska consisting of the use of an automated self-unloading conveyor belt or vacuum-actuated system on a vessel shall continue to be governed by the provisions of § 655.520 of this part, except that, if the Administrator finds, based on a preponderance of the evidence which may be submitted by any interested party, that an attestation is required because the performance of the particular activity of longshore work is not the prevailing practice at the location in the State of Alaska, or was during a strike or lockout or intended to influence an election of a bargaining representative for workers at that location, or if the Administrator issues a cease and desist order against use of the automated equipment without such an attestation, the required attestation shall be filed pursuant to the Alaska exception at §§ 655.530 through 655.541 and not the prevailing practice exception at § 655.510.

§ 655.531 Who may submit attestations for locations in Alaska?

In order to use alien crewmembers to perform longshore activities at a particular location in the State of Alaska an employer shall submit an attestation on Form ETA 9033–A. As noted at § 655.502, ''Definitions,'' for purposes of §§ 655.530 through 655.541, which govern the performance of longshore activities by alien crewmembers under the Alaska exception, ''employer'' includes any agent or representative designated by the employer. An employer may file a

single attestation for multiple locations in the State of Alaska.

§ 655.532 Where and when should attestations be submitted for locations in Alaska?

(a) Attestations shall be submitted, by U.S. mail, private carrier, or facsimile transmission to the U.S. Department of Labor regional office of the Employment and Training Administration in Seattle, Washington. Except as provided in paragraph (b) of this section, attestations shall be received and date-stamped by the Department at least 30 calendar days prior to the date of the first performance of the longshore activity. The attestation shall be accepted for filing or returned by ETA in accordance with § 655.538 within 14 calendar days of the date received by ETA. An attestation which is accepted by ETA solely because it was not reviewed within 14 days is subject to subsequent invalidation pursuant to § 655.540 of this part. An employer filing an attestation shall have an agent or representative with a United States address. Such address shall be clearly indicated on the Form ETA 9033–A. In order to ensure that an attestation has been accepted for filing prior to the date of the first performance of the longshore activity, employers are advised to take mailing time into account to make sure that ETA receives the attestation at least 30 days prior to the first performance of the longshore activity.

(b) *Late filings.* ETA may accept for filing attestations received after the 30-day deadline where the employer could not have reasonably anticipated the need to file an attestation for the particular location at that time. When an employer states that it could not have reasonably anticipated the need to file the attestation at that time, it shall submit documentation to ETA to support such a claim. ETA shall then make a determination on the validity of the claim and shall accept the attestation for filing or return it in accordance with § 655.538 of this part. ETA in no case shall accept an attestation received less than 24 hours prior to the first performance of the activity.

§ 655.533 What should be submitted for locations in Alaska?

(a) *Form ETA 9033–A with accompanying documentation.* A completed and dated original Form ETA 9033–A, or facsimile transmission thereof, containing the required attestation elements and the original signature of the employer or the employer's agent or designated representative, along with two copies of the completed, signed, and dated Form ETA 9033–A shall be submitted to ETA. (If the attestation is submitted by facsimile transmission, the attestation containing the original signature shall be maintained at the U.S. business address of the employer's designated agent or representative). Copies of Form ETA 9033–A are available at all Department of Labor Regional offices and at the National office. In addition, the employer shall submit two sets of facts and evidence to show compliance with the fourth attestation element at § 655.537 of this part. In the case of an investigation pursuant to subpart G of this part, the employer has the burden of proof to establish the validity of each attestation. The employer shall maintain in its records at the office of its U.S. agent, for a period of at least 3 years from the date of filing, sufficient documentation to meet its burden of proof, which shall at a minimum include the documentation described in §§ 655.530 through ———.541, and shall make the documents available to Department of Labor officials upon request. Whenever any document is submitted to a Federal agency or retained in the employer's records pursuant to this part, the document shall either be in the English language or shall be accompanied by a written translation into the English language certified by the translator as to the accuracy of the translation and his/her competency to translate.

(b) *Attestation elements.* The attestation elements referenced in §§ 655.534 through 655.537 of this part are mandated by Sec. 258(d)(1) of the Act (8 U.S.C. 1288(d)(1)). Section 258(d)(1) of the Act requires employers who seek to have alien crewmembers engage in longshore activity at locations in the State of Alaska to attest as follows:

(1) The employer will make a bona fide request for United States

longshore workers who are qualified and available in sufficient numbers to perform the activity at the particular time and location from the parties to whom notice has been provided under § 655.537(a)(1) (ii) and (iii), except that:

(i) Wherever two or more contract stevedoring companies have signed a joint collective bargaining agreement with a single labor organization recognized as an exclusive bargaining representative of United States longshore workers within the meaning of the National Labor Relations Act (29 U.S.C. 141 *et seq.*), the employer may request longshore workers from only one such contract stevedoring company, and

(ii) A request for longshore workers to an operator of a private dock may be made only for longshore work to be performed at that dock and only if the operator meets the requirements of section 32 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932);

(2) The employer will employ all United States longshore workers made available in response to the request made pursuant to § 655.534(a)(1) who are qualified and available in sufficient numbers and who are needed to perform the longshore activity at the particular time and location to which the employer has attested;

(3) The use of alien crewmembers for such activity is not intended or designed to influence an election of a bargaining representative for workers in the State of Alaska; and

(4) Notice of the attestation has been provided to:

(i) Labor organizations which have been recognized as exclusive bargaining representatives of United States longshore workers within the meaning of the National Labor Relations Act (29 U.S.C. 141 *et seq.*) and which make available or intend to make available workers to the particular location where the longshore work is to be performed;

(ii) Contract stevedoring companies which employ or intend to employ United States longshore workers at that location; and

(iii) Operators of private docks at which the employer will use longshore workers.

§ 655.534 The first attestation element for locations in Alaska: Bona fide request for dispatch of United States longshore workers.

(a) The first attestation element shall be satisfied when the employer signs Form ETA 9033–A, attesting that, before using alien crewmembers to perform longshore work during the validity period of the attestation, the employer will make a bona fide request for United States longshore workers who are qualified and available in sufficient numbers to perform the specified longshore activity from the parties to whom notice is provided under § 655.537(a)(1) (ii) and (iii). Although an employer is required to provide notification of filing to labor organizations recognized as exclusive bargaining representatives of United States longshore workers pursuant to § 655.537(a)(1)(i) of this part, an employer need not request dispatch of United States longshore workers directly from such parties. The requests for dispatch of United States longshore workers pursuant to this section shall be directed to contract stevedoring companies which employ or intend to employ United States longshore workers at that location, and to operators of private docks at which the employer will use longshore workers. An employer is not required to request dispatch of United States longshore workers from private dock operators or contract stevedoring companies which do not meet the requirements of section 32 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932) or, in the case of contract stevedoring companies, which are not licensed to do business in the State of Alaska.

(1) Wherever two or more contract stevedoring companies have signed a joint collective bargaining agreement with a single qualified labor organization, the employer may request longshore workers from only one of such contract stevedoring companies. A qualified labor organization is one which has been recognized as an exclusive bargaining representative of United States longshore workers within the meaning of the National Labor Relations Act (29 U.S.C. 141 *et seq.*) and which makes available or intends to

make available workers to the particular location where the longshore work is to be performed.

(2) A request for longshore workers to an operator of a private dock may be made only for longshore work to be performed at that dock.

(3) An employer shall not be required to request longshore workers from a party if that party has notified the employer in writing that it does not intend to make available United States longshore workers who are qualified and available in sufficient numbers to the time and location at which the longshore work is to be performed.

(4) A party that has provided such written notice to the employer under paragraph (a)(3) of this section may subsequently notify the employer in writing that it is prepared to make available United States longshore workers who are qualified and available in sufficient numbers to perform the longshore activity at the time and location where the longshore work is to be performed. In that event, the employer's obligations to that party under §§ 655.534 and 655.535 of this part shall recommence 60 days after its receipt of such notice.

(5) When a party has provided written notice to the employer under paragraph (a)(3) of this section that it does not intend to dispatch United States longshore workers to perform the longshore work attested to by the employer, such notice shall expire upon the earliest of the following events:

(i) When the terms of such notice specify an expiration date at which time the employer's obligation to that party under §§ 655.534 and 655.535 of this part shall recommence;

(ii) When retracted pursuant to paragraph (a)(4) of this section; or

(iii) Upon the expiration of the validity of the attestation.

(b) *Documentation.* To substantiate the requirement in paragraph (a) of this section, an employer shall develop and maintain documentation to meet the employer's burden of proof under the first attestation element. The employer shall retain records of all requests for dispatch of United States longshore workers to perform the longshore work attested to. Such documentation shall consist of letters, telephone logs, facsimiles or other memoranda to show that, before using alien crewmembers to perform longshore work, the employer made a bona fide request for United States longshore workers who are qualified and available in sufficient numbers to perform the longshore activity. At a minimum, such documentation shall include the date the request was made, the name and telephone number of the particular individual(s) to whom the request for dispatch was directed, and the number and composition of full work units requested. Further, whenever any party has provided written notice to the employer under paragraph (a)(3) of this section, the employer shall retain the notice for the period of time specified in § 655.533 of this part, and, if appropriate, any subsequent notice by that party that it is prepared to make available United States longshore workers at the times and locations attested to.

§ 655.535 The second attestation element for locations in Alaska: Employment of United States longshore workers.

(a) The second attestation element shall be satisfied when the employer signs Form ETA 9033–A, attesting that during the validity period of the attestation, the employer will employ all United States longshore workers made available in response to the request for dispatch who, in compliance with applicable industry standards in the State of Alaska, including safety considerations, are qualified and available in sufficient numbers and are needed to perform the longshore activity at the particular time and location attested to.

(1) In no case shall an employer filing an attestation be required to hire less than a full work unit of United States longshore workers needed to perform the longshore activity nor be required to provide overnight accommodations for the longshore workers while employed. For purposes of this section, ''full work unit'' means the full complement of longshore workers needed to perform the longshore activity, as determined by industry standards in the State of Alaska, including safety considerations. Where the makeup of a full work unit is covered by one or

more collective bargaining agreements in effect at the time and location where longshore work is to be performed, the provisions of such agreement(s) shall be deemed to be in conformance with industry standards in the State of Alaska.

(2) In no case shall an employer be required to provide transportation to the vessel where the longshore work is to be performed, except where:

(i) Surface transportation is available; for purposes of this section, ''surface transportation'' means a tugboat or other vessel which is appropriately insured, operated by licensed personnel, and capable of safely transporting U.S. longshore workers from shore to a vessel on which longshore work is to be performed;

(ii) Such transportation may be safely accomplished; and

(iii)(A) Travel time to the vessel does not exceed one-half hour each way; and

(B) Travel distance to the vessel from the point of embarkation does not exceed 5 miles; for purposes of this section, ''point of embarkation'' means a dock or landing at which U.S. longshore workers may be safely boarded for transport from shore to a vessel on which longshore work is to be performed; or

(C) In the cases of Wide Bay, Alaska, and Klawock/Craig, Alaska, travel time does not exceed 45 minutes each way and travel distance to the vessel from the point of embarkation does not exceed 7.5 miles, unless the party responding to the request for dispatch agrees to lesser time and distance specifications.

(3) If a United States longshore worker is capable of getting to and from the vessel where longshore work is to be performed when the vessel is beyond the time and distance limitations specified in paragraph (a)(2)(iii) of this section, and where all of the other criteria governing the employment of United States longshore workers under this subpart are met (*e.g.*, ''qualified and available in sufficient numbers''), the employer is still obligated to employ the worker to perform the longshore activity. In such instance, however, the employer shall not be required to provide such transportation nor to reimburse the longshore worker for the cost incurred in transport to and from the vessel.

(4) Where an employer is required to provide transportation to the vessel because it is within the time and distance limitations specified in (a)(2)(iii) of this section, the employer also shall be required to provide return transportation to the point of embarkation.

(b) *Documentation.* To substantiate the requirement in paragraph (a) of this section, an employer shall develop and maintain documentation to meet the employer's burden of proof. Such documentation shall include records of payments to contract stevedoring companies or private dock operators, payroll records for United States longshore workers employed, or other documentation to show clearly that the employer has met its obligation to employ all United States longshore workers made available in response to a request for dispatch who are qualified and available in sufficient numbers. The documentation shall specify the number of full work units employed pursuant to this section, the composition of such full work units (i.e., number of workers by job title), and the date(s) and location(s) where the longshore work was performed. The employer also shall develop and maintain documentation concerning the provision of transportation from the point of embarkation to the vessel on which longshore work is to be performed. Each time one or more United States longshore workers are dispatched in response to the request under §655.534, the employer shall retain a written record of whether transportation to the vessel was provided and the time and distance from the point of embarkation to the vessel.

§ 655.536 The third attestation element for locations in Alaska: No intention or design to influence bargaining representative election.

(a) The employer shall attest that use of alien crewmembers to perform the longshore activity specified on the Form ETA 9033–A is not intended or designed to influence an election of a bargaining representative for workers in the State of Alaska.

(b) *Documentation.* The employer need not develop nor maintain documentation to substantiate the statement referenced in paragraph (a) of this section. In the case of an investigation, however, the employer has the burden of proof to show that the use of alien crewmembers to perform the longshore activity specified on the Form ETA 9033–A was not intended nor designed to influence an election of a bargaining representative for workers in the State of Alaska.

§ 655.537 The fourth attestation element for locations in Alaska: Notice of filing.

(a)(1) The employer shall attest that at the time of filing the attestation, notice of filing has been provided to:

(i) Labor organizations which have been recognized as exclusive bargaining representatives of United States longshore workers within the meaning of the National Labor Relations Act (29 U.S.C. 141 *et seq.*) and which make available or intend to make available workers to the particular location where the longshore work is to be performed;

(ii) Contract stevedoring companies which employ or intend to employ United States longshore workers at the location where the longshore work is to be performed; and

(iii) Operators of private docks at which the employer will use longshore workers.

(2) The notices provided under paragraph (a)(1) of this section shall include a copy of the Form ETA 9033–A to be submitted to ETA, shall provide information concerning the availability of supporting documents for public examination at the national office of ETA, and shall include the following statement: ''Complaints alleging a misrepresentation of material facts in the attestation and/or failure to comply with the terms of the attestation may be filed with any office of the Wage and Hour Division of the United States Department of Labor.''

(b) The employer shall request a copy of the Certificate of Compliance issued by the district director of the Office of Workers' Compensation Programs under section 37 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932) from the parties to whom notice is provided pursuant to paragraphs (a)(1) (ii) and (iii) of this section. An employer's obligation to make a bona fide request for dispatch of U.S. longshore workers under § 655.534 of this part before using alien crewmembers to perform the longshore work attested to shall commence upon receipt of the copy of the Certificate of Compliance.

(c) *Documentation.* The employer shall develop and maintain documentation sufficient to meet its burden of proving the validity of the statement referenced in paragraphs (a) and (b) of this section and attested to on the Form ETA 9033–A. Such documentation shall include a copy of the notices provided, as required by paragraph (a)(1) of this section, and shall be submitted to ETA along with the Form ETA 9033–A.

§ 655.538 Actions on attestations submitted for filing for locations in Alaska.

Once an attestation has been received from an employer, a determination shall be made by the regional certifying officer whether to accept the attestation for filing or return it. The regional certifying officer may request additional explanation and/or documentation from the employer in making this determination. An attestation which is properly filled out and which includes accompanying documentation for the requirement set forth at § 655.537 of this part shall be accepted for filing by ETA on the date it is signed by the regional certifying officer unless it falls within one of the categories set forth in paragraph (b) of this section. Once an attestation is accepted for filing, ETA shall then follow the procedures set forth in paragraph (a)(1) of this section. Upon acceptance of the employer's attestation by ETA, the attestation and accompanying documentation shall be forwarded to and be available for public examination at the ETA national office in a timely manner. ETA shall not consider information contesting an attestation received by ETA prior to the determination to accept or return the attestation for filing. Such information shall not be made a part of ETA's administrative record on the attestation, but shall be

referred to ESA to be processed as a complaint pursuant to subpart G of this part if the attestation is accepted by ETA for filing.

(a) *Acceptance.* (1) If the attestation is properly filled out and includes accompanying documentation for the requirement set forth at §655.537, and does not fall within one of the categories set forth at paragraph (b) of this section, ETA shall accept the attestation for filing, provide notification to the INS office having jurisdiction over the location where longshore work will be performed, and return to the employer, or the employer's agent or representative at a U.S. address, one copy of the attestation form submitted by the employer, with ETA's acceptance indicated thereon. Before using alien crewmembers to perform the longshore work attested to on Form ETA 9033–A, the employer shall make a bona fide request for and employ United States longshore workers who are qualified and available in sufficient numbers pursuant to §§655.534 and 655.535. Where such a request for dispatch of United States longshore workers is unsuccessful, either in whole or in part, any use of alien crewmembers to perform longshore activity shall be in accordance with INS regulations.

(2) DOL is not the guarantor of the accuracy, truthfulness or adequacy of an attestation accepted for filing.

(b) *Unacceptable attestations.* ETA shall not accept an attestation for filing and shall return such attestation to the employer, or the employer's agent or representative at a U.S. address, when any one of the following conditions exists:

(1) When the Form ETA 9033–A is not properly filled out. Examples of improperly filled out Form ETA 9033–A's include instances where the employer has neglected to check all the necessary boxes, where the employer has failed to include the name of any port, city, or other geographical reference point where longshore work is to be performed, or where the employer has failed to sign the attestation or to designate an agent in the United States.

(2) When the Form ETA 9033–A with accompanying documentation is not received by ETA at least 30 days prior to the first performance of the longshore activity, unless the employer is claiming that it could not have reasonably anticipated the need to file the attestation for that location at that time, and has included documentation which supports this contention, and ETA has found the claim to be valid.

(3) When the Form ETA 9033–A does not include accompanying documentation for the requirement set forth at §655.537.

(4) When the accompanying documentation submitted by the employer and required by §655.537, on its face, is inconsistent with that section. Examples of such a situation include an instance where the Form ETA 9033–A indicates that the longshore work will be performed at a particular private dock and the documentation required under the notice attestation element indicates that notice was provided to an operator of a different private dock, or where the longshore work is to be performed at a particular time and location in the State of Alaska and the notice of filing provided to qualified labor organizations and contract stevedoring companies indicates that the longshore work is to be performed at a different time and/or location.

(5) When the Administrator, Wage and Hour Division, has notified ETA, in writing, after an investigation pursuant to subpart G of this part, that a cease and desist order has been issued pursuant to subpart G of this part, with respect to the attesting employer's performance of longshore work at a particular location in the State of Alaska, in violation of a previously accepted attestation.

(6) When the Administrator, Wage and Hour Division, has notified ETA, in writing, after an investigation pursuant to subpart G of this part, that the particular employer has misrepresented or failed to comply with an attestation previously submitted and accepted for filing, but in no case for a period of more than one year after the date of the Administrator's notice and provided that INS has not advised ETA that the prohibition is in effect for a lesser period.

(7) When the Administrator, Wage and Hour Division, has notified ETA, in writing, that the employer has failed to comply with any penalty, sanction,

or other remedy assessed in a final agency action following an investigation by the Wage and Hour Division pursuant to subpart G of this part.

(c) *Resubmission.* If the attestation is not accepted for filing pursuant to paragraph (b) of this section, ETA shall return to the employer, or the employer's agent or representative, at a U.S. address, the attestation form and accompanying documentation submitted by the employer. ETA shall notify the employer, in writing, of the reason(s) that the attestation is unacceptable. When an attestation is found to be unacceptable pursuant to paragraph (b) (1), (2), (3), or (4) of this section, the employer may resubmit the corrected attestation with the proper documentation. When an attestation is found to be unacceptable pursuant to paragraph (b) (5), (6), or (7) of this section and returned, such action shall be the final decision of the Secretary of Labor.

§ 655.539 Effective date and validity of filed attestations for locations in Alaska.

An attestation is filed and effective as of the date it is accepted and signed by the regional certifying officer. Such attestation is valid for the 12-month period beginning on the date of acceptance for filing, unless suspended or invalidated pursuant to § 655.540 of this part. The filed attestation expires at the end of the 12-month period of validity.

§ 655.540 Suspension or invalidation of filed attestations for locations in Alaska.

Suspension or invalidation of an attestation may result from enforcement action(s) under subpart G of this part (*i.e.,* investigation(s) conducted by the Administrator or cease and desist order(s) issued by the Administrator regarding the employer's misrepresentation in or failure to carry out its attestation); or from a discovery by ETA that it made an error in accepting the attestation because such attestation falls within one of the categories set forth in § 655.538(b).

(a) *Result of Wage and Hour Division action.* Upon the determination of a violation under subpart G of this part, the Administrator shall, pursuant to § 655.665(b), notify the Attorney General of the violation and of the Administrator's notice to ETA.

(b) *Result of ETA action.* If, after accepting an attestation for filing, ETA finds that the attestation is unacceptable because it falls within one of the categories set forth at § 655.538(b) and, as a result, ETA suspends or invalidates the attestation, ETA shall notify the Attorney General of such suspension or invalidation and shall return a copy of the attestation form to the employer, or the employer's agent or representative at a U.S. address. ETA shall notify the employer, in writing, of the reason(s) that the attestation is suspended or invalidated.

§ 655.541 Withdrawal of accepted attestations for locations in Alaska.

(a) An employer who has submitted an attestation which has been accepted for filing may withdraw such attestation at any time before the 12-month period of its validity terminates, unless the Administrator has found reasonable cause under subpart G to commence an investigation of the particular attestation. Such withdrawal may be advisable, for example, when the employer learns that the country in which the vessel is registered and of which nationals of such country hold a majority of the ownership interest in the vessel has been removed from the non-reciprocity list (which means, for purposes of this section, *Prohibitions on longshore work by U.S. nationals; listing by country* at 22 CFR 89.1). In that event, an attestation would no longer be required under subpart F of this part, since upon being removed from the non-reciprocity list the performance of longshore work by alien crewmembers would be permitted under the reciprocity exception at sec. 258(e) of the Act (8 U.S.C. 1288(e)). Requests for withdrawals shall be in writing and shall be directed to the regional certifying officer.

(b) Withdrawal of an attestation shall not affect an employer's liability with respect to any failure to meet the conditions attested to which took place before the withdrawal, or for misrepresentations in an attestation. However, if an employer has not yet performed

the longshore activities at the location(s) in question, the Administrator shall not find reasonable cause to investigate unless it is alleged, and there is reasonable cause to believe, that the employer has made misrepresentations in the attestation or documentation thereof, or that the employer has not in fact given the notice attested to.

PUBLIC ACCESS

§ 655.550 Public access.

(a) *Public examination at ETA.* ETA shall make available for public examination in Washington, DC, a list of employers which have filed attestations under this subpart, and for each such employer, a copy of the employer's attestation and accompanying documentation it has received.

(b) *Notice to public.* ETA periodically shall publish a list in the FEDERAL REGISTER identifying under this subpart employers which have submitted attestations; employers which have attestations on file; and employers which have submitted attestations which have been found unacceptable for filing.

(Approved by the Office of Management and Budget under Control No. 1205–0309)

APPENDIX A TO SUBPART F—U.S. SEAPORTS

The list of 224 seaports includes all major and most smaller ports serving ocean and Great Lakes commerce.

NORTH ATLANTIC RANGE

Bucksport, ME
Eastport, ME
Portland, ME
Searsport, ME
Portsmouth, NH
Boston, MA
Fall River, MA
New Bedford, MA
Providence, RI
Bridgeport, CT
New Haven, CT
New London, CT
Albany, NY
New York, NY/NJ
Camden, NJ
Gloucester City, NJ
Paulsboro, NJ
Chester, PA
Marcus Hook, PA
Philadelphia, PA
Delaware City, DE
Wilmington, DE
Baltimore, MD
Cambridge, MD
Alexandria, VA
Chesapeake, VA
Hopewell, VA
Newport News, VA
Norfolk, VA
Portsmouth, VA
Richmond, VA

SOUTH ATLANTIC RANGE

Morehead City, NC
Southport, NC
Wilmington, NC
Charleston, SC
Georgetown, SC
Port Royal, SC
Brunswick, GA
Savannah, GA
St. Mary, GA
Cocoa, FL
Fernandina Beach, FL
Fort Lauderdale, FL
Fort Pierce, FL
Jacksonville, FL
Miami, FL
Palm Beach, FL
Port Canaveral, FL
Port Everglades, FL
Riviera, FL
Aguadilla, PR
Ceiba, PR
Guanica, PR
Guayanilla, PR
Humacao, PR
Jobos, PR
Mayaguez, PR
Ponce, PR
San Juan, PR
Vieques, PR
Yabucoa, PR
Alucroix, VI
Charlotte Amalie, VI
Christiansted, VI
Frederiksted, VI
Limetree Bay, VI

NORTH PACIFIC RANGE

Astoria, OR
Bandon, OR
Columbia City, OR
Coos Bay, OR
Mapleton, OR
Newport, OR
Portland, OR
Rainier, OR
Reedsport, OR
St. Helens, OR
Toledo, OR
Anacortes, WA
Bellingham, WA
Edmonds (Edwards Point), WA
Everett, WA
Ferndale, WA
Friday Harbor, WA

Grays Harbor, WA
Kalama, WA
Longview, WA
Olympia, WA
Point Wells, WA
Portage, WA
Port Angeles, WA
Port Gamble, WA
Port Townsend, WA
Raymond, WA
Seattle, WA
Tacoma, WA
Vancouver, WA
Willapa Harbor, WA
Winslow, WA

GREAT LAKES RANGE

Duluth, MN
Silver Bay, MN
Green Bay, WI
Kenosha, WI
Manitowoc, WI
Milwaukee, WI
Sheboygan, WI
Superior, WI
Alpena, MI
Bay City, MI
Detroit, MI
De Tour Village, MI
Essexville, MI
Ferrysburg, MI
Grand Haven, MI
Marine City, MI
Muskegon, MI
Port Huron, MI
Presque Isle, MI
Rogers City, MI
Saginaw, MI
Sault Ste Marie, MI
Chicago, IL
Ashtabula, OH
Cincinnati, OH
Cleveland, OH
Conneaut, OH
Fairport, OH
Huron, OH
Lorain, OH
Sandusky, OH
Toledo, OH
Erie, PA
Buffalo, NY
Odgensburg, NY
Oswego, NY
Rochester, NY
Burns Harbor, IN
E. Chicago, IN
Gary, IN

GULF COAST RANGE

Panama City, FL
Pensacola, FL
Port Manatee, FL
Port St. Joe, FL
Tampa, FL
Mobile, AL
Gulfport, MS
Pascagoula, MS
Baton Rouge, LA
Gretna, LA
Lake Charles, LA
Louisiana Offshore Oil Port, LA
New Orleans, LA
Beaumont, TX
Brownsville, TX
Corpus Christi, TX
Freeport, TX
Galveston, TX
Harbor Island, TX
Houston, TX
Orange, TX
Port Arthur, TX
Port Isabel, TX
Port Lavaca, TX
Port Neches, TX
Sabine, TX
Texas City, TX

SOUTH PACIFIC RANGE

Alameda, CA
Antioch, CA
Benicia, CA
Carlsbad, CA
Carpinteria, CA
Crockett, CA
El Segundo, CA
Eureka, CA
Estero Bay, CA
Gaviota, CA
Huntington Beach, CA
Long Beach, CA
Los Angeles, CA
Mandalay Beach, CA
Martinez, CA
Moss Landing, CA
Oakland, CA
Pittsburg, CA
Port Costa, CA
Port Hueneme, CA
Port San Luis, CA
Redwood City, CA
Richmond, CA
Sacramento, CA
San Diego, CA
San Francisco, CA
Selby, CA
Stockton, CA
Vallejo, CA
Ventura, CA
Barbers Point, HI
Hilo, HI
Honolulu, HI
Kahului, HI
Kaunakakai, HI
Kawaihae, HI
Nawiliwili, HI
Port Allen, HI

Subpart G—Enforcement of the Limitations Imposed on Employers Using Alien Crewmembers for Longshore Activities in U.S. Ports

SOURCE: 60 FR 3969, 3977, Jan. 19, 1995, unless otherwise noted.

§ 655.600 Enforcement authority of Administrator, Wage and Hour Division.

(a) The Administrator shall perform all the Secretary's investigative and enforcement functions under section 258 of the INA (8 U.S.C. 1288) and subparts F and G of this part.

(b) The Administrator, pursuant to a complaint, shall conduct such investigations as may be appropriate and, in connection therewith, enter and inspect such places and such records (and make transcriptions or copies thereof), question such persons and gather such information as deemed necessary by the Administrator to determine compliance regarding the matters which are the subject of the investigation.

(c) An employer being investigated shall make available to the Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. No employer subject to the provisions of section 258 of the INA (8 U.S.C. 1288) and subparts F and G of this part shall interfere with any official of the Department of Labor performing an investigation, inspection or law enforcement function pursuant to 8 U.S.C. 1288 or subpart F or G of this part. Any such interference shall be a violation of the attestation and subparts F and G of this part, and the Administrator may take such further actions as the Administrator considers appropriate. (NOTE: Federal criminal statutes prohibit certain interference with a Federal officer in the performance of official duties. 18 U.S.C. 111 and 18 U.S.C. 1114.)

(d)(1) An employer subject to subparts F and G of this part shall at all times cooperate in administrative and enforcement proceedings. No employer shall intimidate, threaten, restrain, coerce, blacklist, discharge, retaliate, or in any manner discriminate against any person because such person has:

(i) Filed a complaint or appeal under or related to section 258 of the INA (8 U.S.C. 1288) or subpart F or G of this part;

(ii) Testified or is about to testify in any proceeding under or related to section 258 of the INA (8 U.S.C. 1288) or subpart F or G of this part;

(iii) Exercised or asserted on behalf of himself or herself or others any right or protection afforded by section 258 of the INA (8 U.S.C. 1288) or subpart F or G of this part.

(iv) Consulted with an employee of a legal assistance program or an attorney on matters related to section 258 of the Act or to subpart F or G of this part or any other DOL regulation promulgated pursuant to 8 U.S.C. 1288.

(2) In the event of such intimidation or restraint as are described in paragraph (d)(1) of this section, the conduct shall be a violation of the attestation and subparts F and G of this part, and the Administrator may take such further actions as the Administrator considers appropriate.

(e) The Administrator shall, to the extent possible under existing law, protect the confidentiality of any person who provides information to the Department in confidence in the course of an investigation or otherwise under subpart F or G of this part. However, confidentiality will not be afforded to the complainant or to information provided by the complainant.

§ 655.605 Complaints and investigative procedures.

(a) The Administrator, through an investigation, shall determine whether a basis exists to make a finding that:

(1) An attesting employer has—

(i) Failed to meet conditions attested to; or

(ii) Misrepresented a material fact in an attestation.

(NOTE: Federal criminal statutes provide penalties of up to $10,000 and/or imprisonment of up to 5 years for knowing and willful submission of false statements to the Federal Government. 18 U.S.C. 1001; see also 18 U.S.C. 1546.); or

(2) In the case of an employer operating under the automated vessel exception to the prohibition on utilizing alien crewmembers to perform longshore activity(ies) at a U.S. port, the employer—

(i) Is utilizing alien crewmember(s) to perform longshore activity(ies) at a port where the prevailing practice has not been to use such workers for such activity(ies); or

(ii) Is utilizing alien crewmember(s) to perform longshore activities:

(A) During a strike or lockout in the course of a labor dispute at the U.S. port; and/or

(B) With intent or design to influence an election of a bargaining representative for workers at the U.S. port; or

(3) An employer failed to comply in any other manner with the provisions of subpart F or G of this part.

(b) Any aggrieved person or organization may file a complaint of a violation of the provisions of subpart F or G of this part.

(1) No particular form of complaint is required, except that the complaint shall be written or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the complaint.

(2) The complaint shall set forth sufficient facts for the Administrator to determine—

(i) Whether, in the case of an attesting employer, there is reasonable cause to believe that particular part or parts of the attestation or regulations have been violated; or

(ii) Whether, in the case of an employer claiming the automated vessel exception, the preponderance of the evidence submitted by any interested party shows that conditions exist that would require the employer to file an attestation.

(3) The complaint may be submitted to any local Wage and Hour Division office; the addresses of such offices are found in local telephone directories. The office or person receiving such a complaint shall refer it to the office of the Wage and Hour Division administering the area in which the reported violation is alleged to have occurred.

(c) The Administrator shall determine whether there is reasonable cause to believe that the complaint warrants investigation. If the Administrator determines that the complaint fails to present reasonable cause for an investigation, the Administrator shall so notify the complainant, who may submit a new complaint, with such additional information as may be necessary. There shall be no hearing pursuant to § 655.625 for the Administrator's determination not to conduct an investigation. If the Administrator determines that an investigation on the complaint is warranted, the investigation shall be conducted and a determination issued within 180 calendar days of the Administrator's receipt of the complaint, or later for good cause shown.

(d) In conducting an investigation, the Administrator may consider and make part of the investigation file any evidence or materials that have been compiled in any previous investigation regarding the same or a closely related matter.

(e) In conducting an investigation under an attestation, the Administrator shall take into consideration the employer's burden to provide facts and evidence to establish the matters asserted. In conducting an investigation regarding an employer's eligibility for the automated vessel exception, the Administrator shall not impose the burden of proof on the employer, but shall consider all evidence from any interested party in determining whether the employer is not eligible for the exception.

(f) In an investigation regarding the use of alien crewmembers to perform longshore activity(ies) in a U.S. port (whether by an attesting employer or by an employer claiming the automated vessel exception), the Administrator shall accept as conclusive proof a previous Departmental determination, published in the FEDERAL REGISTER pursuant to § 655.670, establishing that such use of alien crewmembers is not the prevailing practice for the activity(ies) and U.S. port at issue. The Administrator shall give appropriate weight to a previous Departmental determination published in the FEDERAL REGISTER pursuant to § 655.670, establishing that at the time of such determination, such use of alien crewmembers was the prevailing practice for the activity(ies) and U.S. port at issue.

(g) When an investigation has been conducted, the Administrator shall, within the time period specified in paragraph (c) of this section, issue a

written determination as to whether a basis exists to make a finding stated in paragraph (a) of this section. The determination shall be issued and an opportunity for a hearing shall be afforded in accordance with the procedures specified in §655.625(d) of this part.

§ 655.610 Automated vessel exception to prohibition on utilization of alien crewmember(s) to perform longshore activity(ies) at a U.S. port.

(a) The Act establishes a rebuttable presumption that the prevailing practice in U.S. ports is for automated vessels (*i.e.,* vessels equipped with automated self- unloading conveyor belts or vacuum-actuated systems) to use alien crewmembers to perform longshore activity(ies) through the use of the self-unloading equipment. An employer claiming the automated vessel exception does not have the burden of establishing eligibility for the exception.

(b) In the event of a complaint asserting that an employer claiming the automated vessel exception is not eligible for such exception, the Administrator shall determine whether the preponderance of the evidence submitted by any interested party shows that:

(1) It is not the prevailing practice at the U.S. port to use alien crewmember(s) to perform the longshore activity(ies) through the use of the self-unloading equipment; or

(2) The employer is using alien crewmembers to perform longshore activity(ies)—

(i) During a strike or lockout in the course of a labor dispute at the U.S. port; and/or

(ii) With intent or design to influence an election of a bargaining representative for workers at the U.S. port.

(c) In making the prevailing practice determination required by paragraph (b)(1) of this section, the Administrator shall determine whether, in the 12-month period preceding the date of the Administrator's receipt of the complaint, one of the following conditions existed:

(1) Over fifty percent of the automated vessels docking at the port used alien crewmembers for the activity (for purposes of this paragraph (c)(1) of this section, a vessel shall be counted each time it docks at the particular port); or

(2) Alien crewmembers made up over fifty percent of the workers who performed the activity with respect to such automated vessels.

(d) An interested party, complaining that the automated vessel exception is not applicable to a particular employer, shall provide to the Administrator evidence such as:

(1) A written summary of a survey of the experience of masters of automated vessels which entered the local port in the previous year, describing the practice in the port as to the use of alien crewmembers;

(2) A letter, affidavit, or other written statement from an appropriate local port authority regarding the use of alien crewmembers to perform the longshore activity at the port in the previous year;

(3) Written statements from collective bargaining representatives and/or shipping agents with direct knowledge of practices regarding the use of alien crewmembers at the port in the previous year.

§ 655.615 Cease and desist order.

(a) If the Administrator determines that reasonable cause exists to conduct an investigation with respect to an attestation, the complainant may request that the Administrator enter a cease and desist order against the employer against whom the complaint is lodged.

(1) The request for a cease and desist order may be filed along with the complaint, or may be filed subsequently. The request, including all accompanying documents, shall be filed in duplicate with the same Wage and Hour Division office that received the complaint.

(2) No particular form is prescribed for a request for a cease and desist order pursuant to this paragraph (a). However, any such request shall:

(i) Be dated;

(ii) Be typewritten or legibly written;

(iii) Specify the attestation provision(s) with respect to which the employer allegedly failed to comply and/or submitted misrepresentation(s) of material fact(s);

(iv) Be accompanied by evidence to substantiate the allegation(s) of noncompliance and/or misrepresentation;

(v) Be signed by the complaining party making the request or by the authorized representative of such party;

(vi) Include the address at which such complaining party or authorized representative desires to receive further communications relating thereto.

(3) Upon receipt of a request for a cease and desist order, the Administrator shall promptly notify the employer of the request. The Administrator's notice shall:

(i) Inform the employer that it may respond to the request and meet with a Wage and Hour Division official within 14 calendar days of the date of the notice;

(ii) Be served upon the employer by facsimile transmission, in person, or by certified or regular mail, at the address of the U.S. agent stated on the employer's attestation;

(iii) Be accompanied by copies of the complaint, the request for a cease and desist order, the evidence submitted by the complainant, and any evidence from other investigation(s) of the same or a closely related matter which the Administrator may incorporate into the record. (Any such evidence from other investigation(s) shall also be made available for examination by the complaining party at the Wage and Hour Division office which issued the notice.)

(4) No particular form is prescribed for the employer's response to the complaining party's request for a cease and desist order under this paragraph (a), however, any such response shall:

(i) Be dated;

(ii) Be submitted by facsimile transmission, in person, by certified or regular mail, or by courier service to the Wage and Hour Division office which issued the notice of the request;

(iii) Be received by the appropriate Wage and Hour Division office no later than 14 calendar days from the date of the notice of the request;

(iv) Be typewritten or legibly written;

(v) Explain, in any detail desired by the employer, the employer's grounds or reasons as to why the Administrator should deny the requested cease and desist order;

(vi) Be accompanied by evidence to substantiate the employer's grounds or reasons as to why the Administrator should deny the requested cease and desist order;

(vii) Specify whether the employer desires an informal meeting with a Wage and Hour Division official;

(viii) Be signed by the employer or its authorized representative; and

(ix) Include the address at which the employer or its authorized representative desires to receive further communications relating thereto, if such address is different from the address of the U.S. agent stated on the attestation.

(5) In the event the employer requests a meeting with a Wage and Hour Division official, the Administrator shall provide the employer and the complaining party, or their authorized representatives, an opportunity for such a meeting to present their views regarding the evidence and arguments submitted by the parties. This shall be an informal meeting, not subject to any procedural rules. The meeting shall be held within the 14 calendar days permitted for the employer's response to the request for the cease and desist order, and shall be held at a time and place set by the Wage and Hour Division official, who shall notify the parties.

(6) After receipt of the employer's timely response and after any informal meeting which may have been held with the parties, the Administrator shall promptly issue a written determination, either denying the request or issuing a cease and desist order. In making the determination, the Administrator shall consider all the evidence submitted, including any evidence from the same or a closely related matter which the Administrator has incorporated into the record and provided to the employer. If the Administrator determines that the complaining party's position is supported by a preponderance of the evidence submitted, the Administrator shall order that the employer cease the activities specified in the determination, until the completion of the Administrator's investigation and any subsequent proceedings

pursuant to § 655.625 of this part, unless the prohibition is lifted by subsequent order of the Administrator because it is later determined that the employer's position was correct. While the cease and desist order is in effect, ETA shall suspend the subject attestation, either in whole or in part, and shall not accept any subsequent attestation from the employer for the activity(ies) and U.S. port or location in the State of Alaska at issue.

(7) The Administrator's cease and desist order shall be served on the employer at the address of its designated U.S. based representative or at the address specified in the employer's response, by facsimile transmission, personal service, or certified mail.

(b) If the Administrator determines that reasonable cause exists to conduct an investigation with respect to a complaint that a non-attesting employer is not entitled to the automated vessel exception to the requirement for the filing of an attestation, a complaining party may request that the Administrator enter a cease and desist order against the employer against whom the complaint is lodged.

(1) The request for a cease and desist order may be filed along with the complaint, or may be filed subsequently. The request, including all accompanying documents, shall be filed in duplicate with the same Wage and Hour Division office that received the complaint.

(2) No particular form is prescribed for a request for a cease and desist order pursuant to this paragraph. However, any such request shall:

(i) Be dated;

(ii) Be typewritten or legibly written;

(iii) Specify the circumstances which allegedly require that the employer be denied the use of the automated vessel exception;

(iv) Be accompanied by evidence to substantiate the allegation(s);

(v) Be signed by the complaining party making the request or by the authorized representative of such party; and

(vi) Include the address at which such complaining party or authorized representative desires to receive further communications relating thereto.

(3) Upon receipt of a request for a cease and desist order, the Administrator shall notify the employer of the request. The Administrator's notice shall:

(i) Inform the employer that it may respond to the request and meet with a Wage and Hour Division official within 14 calendar days of the date of the notice;

(ii) Be served upon the employer by facsimile transmission, in person, or by certified or regular mail, at the employer's last known address; and

(iii) Be accompanied by copies of the complaint, the request for a cease and desist order, the evidence submitted by the complainant, and any evidence from other investigation(s) of the same or a closely related matter which the Administrator may incorporate into the record. (Any such evidence from other investigation(s) shall also be made available for examination by the complaining party at the Wage and Hour Division office which issued the notice.)

(4) No particular form is prescribed for the employer's response to the complaining party's request for a cease and desist order under this paragraph (b). However, any such response shall:

(i) Be dated;

(ii) Be submitted by facsimile transmission, in person, by certified or regular mail, or by courier service to the Wage and Hour Division office which issued the notice of the request;

(iii) Be received by the appropriate Wage and Hour Division office no later than 14 calendar days from the date of the notice of the request;

(iv) Be typewritten or legibly written;

(v) Explain, in any detail desired by the employer, the employer's grounds or reasons as to why the Administrator should deny the requested cease and desist order;

(vi) Be accompanied by evidence to substantiate the employer's grounds or reasons as to why the Administrator should deny the requested cease and desist order;

(vii) Specify whether the employer desires an informal meeting with a Wage and Hour Division official;

(viii) Be signed by the employer or its authorized representative; and

(ix) Include the address at which the employer or its authorized representative desires to receive further communications relating thereto.

(5) In the event the employer requests a meeting with a Wage and Hour Division official, the Administrator shall provide the employer and the complaining party, or their authorized representatives, an opportunity for such a meeting to present their views regarding the evidence and arguments submitted by the parties. This shall be an informal meeting, not subject to any procedural rules. The meeting shall be held within the 14 calendar days permitted for the employer's response to the request for the cease and desist order, and shall be held at a time and place set by the Wage and Hour Division official, who shall notify the parties.

(6) After receipt of the employer's timely response and after any informal meeting which may have been held with the parties, the Administrator shall promptly issue a written determination, either denying the request or issuing a cease and desist order. If the Administrator determines that the complaining party's position is supported by a preponderance of the evidence submitted, the Administrator shall order that the employer cease the use of alien crewmembers to perform the longshore activity(ies) specified in the order. In making the determination, the Administrator shall consider all the evidence submitted, including any evidence from the same or a closely related matter which the Administrator has incorporated into the record and provided to the employer. The order shall remain in effect until the completion of the investigation and any subsequent hearing proceedings pursuant to § 655.625 of this part, unless the employer files and maintains on file with ETA an attestation pursuant to § 655.520 of this part or unless the prohibition is lifted by subsequent order of the Administrator because it is later determined that the employer's position was correct.

(7) The Administrator's cease and desist order shall be served on the employer or its designated representative by facsimile transmission, personal service, or by certified mail at the address specified in the employer's response or, if no such address was specified, at the employer's last known address.

§ 655.620 Civil money penalties and other remedies.

(a) The Administrator may assess a civil money penalty not to exceed $5,000 for each alien crewmember with respect to whom there has been a violation of the attestation or subpart F or G of this part. The Administrator may also impose appropriate remedy(ies).

(b) In determining the amount of civil money penalty to be assessed, the Administrator shall consider the type of violation committed and other relevant factors. The factors which may be considered include, but are not limited to, the following:

(1) Previous history of violation, or violations, by the employer under the Act and subpart F or G of this part;

(2) The number of workers affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made by the violator in good faith to comply with the provisions of 8 U.S.C. 1288(c) and subparts F and G of this part;

(5) The violator's explanation of the violation or violations;

(6) The violator's commitment to future compliance; and/or

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss, potential injury or adverse effect with respect to other parties.

(c) The civil money penalty, and any other remedy determined by the Administrator to be appropriate, are immediately due for payment or performance upon the assessment by the Administrator, or the decision by an administrative law judge where a hearing is requested, or the decision by the Secretary where review is granted. The employer shall remit the amount of the civil money penalty, by certified check or money order made payable to the order of ''Wage and Hour Division, Labor.'' The remittance shall be delivered or mailed to the Wage and Hour Division office for the area in which the violations occurred. The performance of any other remedy prescribed by

the Administrator shall follow procedures established by the Administrator. The employer's failure to pay the civil money penalty, or to perform any other remedy prescribed by the Administrator, shall result in the rejection by ETA of any future attestation submitted by the employer, until such payment or performance is accomplished.

§ 655.625 Written notice, service and Federal Register publication of Administrator's determination.

(a) The Administrator's determination, issued pursuant to § 655.605 of this part, shall be served on the complainant, the employer, and other known interested parties by personal service or by certified mail at the parties' last known addresses. Where service by certified mail is not accepted by the party, the Administrator may exercise discretion to serve the determination by regular mail.

(b) Where the Administrator determines the prevailing practice regarding the use of alien crewmember(s) to perform longshore activity(ies) in a U.S. port (whether the Administrator's investigation involves an employer operating under an attestation, or under the automated vessel exception), the Administrator shall, simultaneously with issuance of the determination, publish in the FEDERAL REGISTER a notice of the determination. The notice shall identify the activity(ies), the U.S. port, and the prevailing practice regarding the use of alien crewmembers. The notice shall also inform interested parties that they may request a hearing pursuant to § 655.630 of this part, within 15 days of the date of the determination.

(c) The Administrator shall file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the complaint and the Administrator's determination.

(d) The Administrator's written determination required by § 655.605 of this part shall:

(1) Set forth the determination of the Administrator and the reason or reasons therefor, and in the case of a finding of violation(s) by an attesting employer, prescribe any remedies, including the amount of any civil money penalties assessed and the reason therefor, and/or any other remedies required for compliance with the employer's attestation.

(2) Inform the interested parties that they may request a hearing pursuant to § 655.625 of this part.

(3) Inform the interested parties that in the absence of a timely request for a hearing, received by the Chief Administrative Law Judge within 15 calendar days of the date of the determination, the determination of the Administrator shall become final and not appealable.

(4) Set forth the procedure for requesting a hearing, and give the address of the Chief Administrative Law Judge (with whom the request must be filed) and the representative(s) of the Solicitor of Labor (upon whom copies of the request must be served).

(5) Inform the parties that, pursuant to § 655.665, the Administrator shall notify ETA and the Attorney General of the occurrence of a violation by the attesting employer or of the non-attesting employer's ineligibility for the automated vessel exception.

§ 655.630 Request for hearing.

(a) Any interested party desiring to request an administrative hearing on a determination issued pursuant to §§ 655.605 and 655.625 of this part shall make such request in writing to the Chief Administrative Law Judge at the address stated in the notice of determination.

(b) Interested parties may request a hearing in the following circumstances:

(1) The complainant or any other interested party may request a hearing where the Administrator determines, after investigation, that there is no basis for a finding that an attesting employer has committed violation(s) or that the employer is eligible for the automated vessel exception. In such a proceeding, the requesting party and the employer shall be parties; the Administrator may intervene as a party or appear as *amicus curiae* at any time in the proceeding, at the Administrator's discretion.

(2) The employer or any other interested party may request a hearing where the Administrator determines,

after investigation, that there is a basis for a finding that an attesting employer has committed violation(s) or that a non- attesting employer is not eligible for the automated vessel exception. In such a proceeding, the Administrator and the employer shall be parties.

(c) No particular form is prescribed for any request for hearing permitted by this section. However, any such request shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the notice of determination giving rise to such request;

(4) State the specific reason or reasons why the party requesting the hearing believes such determination is in error;

(5) Be signed by the party making the request or by an authorized representative of such party; and

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto.

(d) The request for such hearing must be received by the Chief Administrative Law Judge, at the address stated in the Administrator's notice of determination, no later than 15 calendar days after the date of the determination. An interested party that fails to meet this 15-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the administrative law judge, either through intervention as a party pursuant to 29 CFR 18.10 (b) through (d) or through participation as an amicus curiae pursuant to 18 CFR 18.12.

(e) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service. For the requesting party's protection, if the request is filed by mail, it should be by certified mail. If the request is filed by facsimile transmission, the original of the request, signed by the requestor or authorized representative, shall be filed within ten days.

(f) Copies of the request for a hearing shall be sent by the requestor to the Wage and Hour Division official who issued the Administrator's notice of determination, to the representative(s) of the Solicitor of Labor identified in the notice of determination, and to all known interested parties.

§ 655.635 Rules of practice for administrative law judge proceedings.

(a) Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the ''Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges'' established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings under this subpart.

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) shall not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

§ 655.640 Service and computation of time.

(a) Under this subpart, a party may serve any pleading or document by regular mail. Service on a party is complete upon mailing to the last known address or, in the case of the attesting employer, to the employer's designated representative in the U.S. No additional time for filing or response is authorized where service is by mail. In the interest of expeditious proceedings, the administrative law judge may direct the parties to serve pleadings or documents by a method other than regular mail.

(b) Two (2) copies of all pleadings and other documents in any administrative law judge proceeding shall be served on the attorneys for the Administrator. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, and

one copy on the attorney representing the Administrator in the proceeding.

(c) Time will be computed beginning with the day following the action and includes the last day of the period unless it is a Saturday, Sunday, or federally-observed holiday, in which case the time period includes the next business day.

§ 655.645 Administrative law judge proceedings.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 655.630 of this part, the Chief Administrative Law Judge shall promptly appoint an administrative law judge to hear the case.

(b) Within seven calendar days following the assignment of the case, the administrative law judge shall notify all interested parties of the date, time and place of the hearing. All parties shall be given at least fourteen calendar days' notice of such hearing.

(c) The date of the hearing shall be not more than 60 calendar days from the date of the Administrator's determination. Because of the time constraints imposed by the Act, no requests for postponement shall be granted except for compelling reasons. Even if such reasons are shown, no extension of the hearing date beyond 60 days from the date of the Administrator's determination shall be granted except by consent of all the parties to the proceeding.

(d) The administrative law judge may prescribe a schedule by which the parties are permitted to file a prehearing brief or other written statement of fact or law. Any such brief or statement shall be served upon each other party in accordance with § 655.640 of this part. Posthearing briefs will not be permitted except at the request of the administrative law judge. When permitted, any such brief shall be limited to the issue or issues specified by the administrative law judge, shall be due within the time prescribed by the administrative law judge, and shall be served on each other party in accordance with § 655.640 of this part.

(e) In reaching a decision, the administrative law judge shall, in accordance with the Act, impose the following burden of proof—

(1) The attesting employer shall have the burden of producing facts and evidence to establish the matters required by the attestation at issue;

(2) The burden of proof as to the applicability of the automated vessel exception shall be on the party to the hearing who is asserting that the employer is not eligible for the exception.

(f) The administrative law judge proceeding shall not be an appeal or review of the Administrator's ruling on a request for a cease and desist order pursuant to § 655.615.

§ 655.650 Decision and order of administrative law judge.

(a) Within 90 calendar days after receipt of the transcript of the hearing, the administrative law judge shall issue a decision. If any party desires review of the decision, including judicial review, a petition for Secretary's review thereof shall be filed as provided in § 655.655 of this subpart. If a petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the Secretary issues an order affirming the decision, or, unless and until 30 calendar days have passed after the Secretary's receipt of the petition for review and the Secretary has not issued notice to the parties that the Secretary will review the administrative law judge's decision.

(b) The decision of the administrative law judge shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator; the reason or reasons for such order shall be stated in the decision. The administrative law judge shall not render determinations as to the legality of a regulatory provision or the constitutionality of a statutory provision.

(c) The decision shall be served on all parties in person or by certified or regular mail.

§ 655.655 Secretary's review of administrative law judge's decision.

(a) The Administrator or any interested party desiring review of the decision and order of an administrative law judge shall petition the Secretary to review the decision and order. To be effective, such petition shall be received by the Secretary within 30 calendar days of the date of the decision and order. Copies of the petition shall be served on all parties and on the administrative law judge.

(b) No particular form is prescribed for any petition for Secretary's review permitted by this subpart. However, any such petition shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;

(4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;

(5) Be signed by the party filing the petition or by an authorized representative of such party;

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(7) Attach copies of the administrative law judge's decision and order, and any other record documents which would assist the Secretary in determining whether review is warranted.

(c) Whenever the Secretary determines to review the decision and order of an administrative law judge, a notice of the Secretary's determination shall be served upon the administrative law judge and upon all parties to the proceeding within 30 calendar days after the Secretary's receipt of the petition for review.

(d) Upon receipt of the Secretary's notice, the Office of Administrative Law Judges shall within fifteen calendar days forward the complete hearing record to the Secretary.

(e) The Secretary's notice may specify:

(1) The issue or issues to be reviewed;

(2) The form in which submissions shall be made by the parties (*e.g.*, briefs); and

(3) The time within which such submissions shall be made.

(f) All documents submitted to the Secretary shall be filed with the Secretary of Labor, U.S. Department of Labor, Washington, DC 20210, Attention: Executive Director, Office of Administrative Appeals, room S–4309. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Secretary until actually received by the Secretary. All documents, including documents filed by mail, shall be received by the Secretary either on or before the due date.

(g) Copies of all documents filed with the Secretary shall be served upon all other parties involved in the proceeding. Service upon the Administrator shall be in accordance with § 655.640(b) of this part.

(h) The Secretary's final decision shall be issued within 180 calendar days from the date of the notice of intent to review. The Secretary's decision shall be served upon all parties and the administrative law judge.

(i) Upon issuance of the Secretary's decision, the Secretary shall transmit the entire record to the Chief Administrative Law Judge for custody pursuant to § 655.660 of this part.

§ 655.660 Administrative record.

The official record of every completed administrative hearing procedure provided by subparts F and G of this part shall be maintained and filed under the custody and control of the Chief Administrative Law Judge. Upon receipt of a complaint seeking review of the final agency action in a United States District Court, the Chief Administrative Law Judge shall certify the official record and shall transmit such record to the clerk of the court.

§ 655.665 Notice to the Attorney General and the Employment and Training Administration.

(a) The Administrator shall promptly notify the Attorney General and ETA of the entry of a cease and desist order pursuant to § 655.615 of this part. The order shall remain in effect until the completion of the Administrator's investigation and any subsequent proceedings pursuant to § 655.630 of this

part, unless the Administrator notifies the Attorney General and ETA of the entry of a subsequent order lifting the prohibition.

(1) The Attorney General, upon receipt of notification from the Administrator that a cease and desist order has been entered against an employer:

(i) Shall not permit the vessels owned or chartered by the attesting employer to use alien crewmembers to perform the longshore activity(ies) at the port or location in the State of Alaska specified in the cease and desist order; and

(ii) Shall, in the case of an employer seeking to utilize the automated vessel exception, require that such employer not use alien crewmembers to perform the longshore activity(ies) at the port or location in the State of Alaska specified in the cease and desist order, without having on file with ETA an attestation pursuant to §655.520 of this part.

(2) ETA, upon receipt of the Administrator's notice shall, in the case of an attesting employer, suspend the employer's attestation, either in whole or in part, for the activity(ies) and port or location in the State of Alaska specified in the cease and desist order.

(b) The Administrator shall notify the Attorney General and ETA of the final determination of a violation by an attesting employer or of the ineligibility of an employer for the automated vessel exception, upon the earliest of the following events:

(1) Where the Administrator determines that there is a basis for a finding of violation by an attesting employer or a finding of nonapplicability of the automated vessel exception, and no timely request for hearing is made pursuant to §655.630 of this part;

(2) Where, after a hearing, the administrative law judge issues a decision and order finding a violation by an attesting employer or finding inapplicable the automated vessel exception, and no timely petition for review to the Secretary is made pursuant to §655.655 of this part; or

(3) Where a petition for review is taken from an administrative law judge's decision finding a violation or finding inapplicable the automated vessel exception, and the Secretary either declines within thirty days to entertain the appeal, pursuant to §655.655(c) of this part, or the Secretary affirms the administrative law judge's determination; or

(4) Where the administrative law judge finds that there was no violation by an attesting employer or that the automated vessel exception does apply, and the Secretary, upon review, issues a decision pursuant to §655.655 of this part, holding that a violation was committed by an attesting employer or holding that the automated vessel exception does not apply.

(c) The Attorney General, upon receipt of notification from the Administrator pursuant to paragraph (b) of this section:

(1) Shall not permit the vessels owned or chartered by the attesting employer to enter any port of the U.S. for a period of up to one year;

(2) Shall, in the case of an employer determined to be ineligible for the automated vessel exception, thereafter require that such employer not use alien crewmembers(s) to perform the longshore activity(ies) at the specified port or location in the State of Alaska without having on file with ETA an attestation pursuant to §655.520 of this part; and

(3) Shall, in the event that the Administrator's notice constitutes a conclusive determination (pursuant to §655.670) that the prevailing practice at a particular U.S. port does not permit the use of nonimmigrant alien crewmembers for particular longshore activity(ies), thereafter permit no employer to use alien crewmembers for the particular longshore activity(ies) at that port.

(d) ETA, upon receipt of the Administrator's notice pursuant to paragraph (b) of this section:

(1) Shall, in the case of an attesting employer, suspend the employer's attestation, either in whole or in part, for the port or location at issue and for any other U.S. port, and shall not accept for filing any attestation submitted by the employer for a period of 12 months or for a shorter period if such is specified for that employer by the Attorney General; and

(2) Shall, if the Administrator's notice constitutes a conclusive determination (pursuant to §655.670) that

the prevailing practice at a particular U.S. port does not permit the use of alien crewmembers for the longshore activity(ies), thereafter accept no attestation under the prevailing practice exception on Form ETA 9033 from any employer for the performance of the activity(ies) at that port, and shall invalidate any current attestation under the prevailing practice exception on Form ETA 9033 for any employer for the performance of the activity(ies) at that port.

§ 655.670 Federal Register notice of determination of prevailing practice.

(a) Pursuant to § 655.625(b), the Administrator shall publish in the FEDERAL REGISTER a notice of the Administrator's determination of any investigation regarding the prevailing practice for the use of alien crewmembers for particular longshore activity(ies) in a particular U.S. port (whether under an attestation or under the automated vessel exception). Where the Administrator has determined that the prevailing practice in that U.S. port does not permit such use of alien crewmembers, and no timely request for a hearing is filed pursuant to § 655.630, the Administrator's determination shall be the conclusive determination for purposes of the Act and subparts F and G of this part; the Attorney General and ETA shall, upon notice from the Administrator, take the actions specified in § 655.665. Where the Administrator has determined that the prevailing practice in that U.S. port at the time of the investigation permits such use of alien crewmembers, the Administrator shall, in any subsequent investigation, give that determination appropriate weight, unless the determination is reversed in proceedings under § 655.630 or § 655.655.

(b) Where an interested party, pursuant to § 655.630, requests a hearing on the Administrator's determination, the Administrator shall, upon the issuance of the decision of the administrative law judge, publish in the FEDERAL REGISTER a notice of the judge's decision as to the prevailing practice for the longshore activity(ies) and U.S. port at issue, if the administrative law judge:

(1) Reversed the determination of the Administrator published in the FEDERAL REGISTER pursuant to paragraph (a) of this section; or

(2) Determines that the prevailing practice for the particular activity in the port does not permit the use of alien crewmembers.

(c) If the administrative law judge determines that the prevailing practice in that port does not permit such use of alien crewmembers, the judge's decision shall be the conclusive determination for purposes of the Act and subparts F and G of this part (unless and until reversed by the Secretary on discretionary review pursuant to § 655.655). The Attorney General and ETA shall upon notice from the Administrator, take the actions specified in § 655.665.

(d) In the event that the Secretary, upon discretionary review pursuant to § 655.655, issues a decision that reverses the administrative law judge on a matter on which the Administrator has published notices in the FEDERAL REGISTER pursuant to paragraphs (a) and (b) of this section, the Administrator shall publish in the FEDERAL REGISTER a notice of the Secretary's decision and shall notify the Attorney General and ETA.

(1) Where the Secretary reverses the administrative law judge and determines that, contrary to the judge's decision, the prevailing practice for the longshore activity(ies) in the U.S. port at issue does not permit the use of alien crewmembers, the Secretary's decision shall be the conclusive determination for purposes of the Act and subparts F and G of this part. Upon notice from the Administrator, the Attorney General and ETA shall take the actions specified in § 655.665.

(2) Where the Secretary reverses the administrative law judge and determines that, contrary to the judge's decision, the use of alien crewmembers is permitted by the prevailing practice for the longshore activity(ies) in the U.S. port at issue, the judge's decision shall no longer have the conclusive effect specified in paragraph (b) of this section. Upon notice from the Administrator, the Attorney General and ETA shall cease the actions specified in § 655.665.

§ 655.675 Non-applicability of the Equal Access to Justice Act.

A proceeding under subpart G of this part is not subject to the Equal Access to Justice Act, as amended, 5 U.S.C. 504. In such a proceeding, the administrative law judge shall have no authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act.

Subpart H—Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas In Specialty Occupations and as Fashion Models

SOURCE: 59 FR 65659, 65676, Dec. 20, 1994, unless otherwise noted.

§ 655.700 Purpose, procedure and applicability of subparts H and I.

(a) *Purpose.* With respect to nonimmigrant workers entering the United States (U.S.) on H–1B visas pursuant to the Immigration and Nationality Act (INA):

(1) Establishes an annual ceiling of 65,000 (exclusive of spouses and children) on the number of foreign workers who may be issued H–1B visas;

(2) Defines the scope of eligible occupations for which nonimmigrants may be issued H–1B visas and specifies the qualifications that are required for entry as an H–1B nonimmigrant;

(3) Requires an employer seeking to employ H–1B nonimmigrants to file a labor condition application (LCA) with and have it certified by the Department of Labor (DOL) before a nonimmigrant may be provided H–1B status by the Immigration and Naturalization Service (INS); and

(4) Establishes a system for the receipt and investigation of complaints, as well as for the imposition of fines and penalties for misrepresentation or for failure to fulfill a condition of the labor condition application. 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), 1184(g)(1)(A), and 1184(i).

(b) *Procedure for obtaining an H–1B visa classification.* Before a nonimmigrant may be admitted to work in a ''specialty occupation'' or as a fashion model of distinguished merit and ability in the United States under the H–1B visa classification, there are certain steps which must be followed:

(1) First, an employer shall submit to DOL, and obtain DOL certification of, a labor condition application. The requirements for obtaining a certified labor condition application are provided in this subpart. The labor condition application (Form ETA 9035) and instructions may be obtained from DOL Regional Offices listed in §655.720 of this part.

(2) After obtaining DOL certification of a labor condition application, the employer may submit a nonimmigrant visa petition (INS Form I–129), together with the certified labor condition application, to INS, requesting H–1B classification for the foreign worker. The requirements concerning the submission of a petition to, and its processing by, INS are set forth in INS regulations. The INS petition (Form I–129) may be obtained from an INS district or area office.

(3) If INS approves the H–1B classification, the nonimmigrant then may apply for an H–1B visa abroad at a consular office of the Department of State, or apply to the INS for a change of visa status if already in the United States.

(c) *Applicability.* (1) Subparts H and I of this part apply to all employers seeking to employ foreign workers under the H–1B visa classification in specialty occupations or as fashion models of distinguished merit and ability.

(2) During the period that the provisions of Appendix 1603.D.4 of Annex 1603 of the North American Free Trade Agreement (NAFTA) apply, subparts H and I of this part shall apply to the entry and employment of a nonimmigrant who is a citizen of Mexico under and pursuant to the provisions of section D or Annex 1603 of NAFTA in the case of all professions set out in Appendix 1603.D.1 of Annex 1603 of NAFTA other than registered nurses. Therefore, the references in this part to ''H–1B nonimmigrant'' apply to such nonimmigrants, who are classified by INS as ''TN.'' In the case of a registered nurse, the provisions of 20 CFR part 655, subparts D and E, and 29 CFR part 504, subparts D and E, shall apply.

§ 655.705 Overview of responsibilities.

Three federal agencies are involved in the process which leads to H–1B nonimmigrant classification. The employer also has continuing responsibilities under the process. This section briefly describes the responsibilities of each of these entities.

(a) *Department of Labor responsibilities.* DOL administers the labor condition application process and enforcement provisions.

(1) The Employment and Training Administration (ETA), DOL, is responsible for receiving and certifying labor condition applications in accordance with subpart H of this part. ETA is also responsible for compiling and maintaining a list of labor condition applications and makes such list available for public examination at the Department of Labor, 200 Constitution Avenue, NW., room N4456, Washington, DC 20210.

(2) The Employment Standards Administration (ESA), DOL, is responsible, in accordance with subpart I of this part, for investigating and determining, pursuant to a complaint or otherwise, an employer's misrepresentation in or failure to comply with labor condition applications or the employment of H–1B nonimmigrants.

(b) *Immigration and Naturalization Service (INS) and Department of State (DOS) responsibilities.* The Immigration and Naturalization Service (INS) accepts the employer's petition (INS Form I–129) with the DOL-certified labor condition application attached. INS is responsible for approving the nonimmigrant's H–1B visa classification. In doing so, the INS determines whether the occupation named in the labor condition application is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements for H–1B visa classification. If the petition is approved, INS will notify the U.S. Consulate where the nonimmigrant intends to apply for the visa unless the nonimmigrant is in the U.S. and eligible to adjust status without leaving this country. See 8 U.S.C. 1184(i). The Department of State, through U.S. Embassies and Consulates, is responsible for issuing H–1B visas.

(c) *Employer's responsibilities.* Each employer seeking an H–1B nonimmigrant in a specialty occupation or as a fashion model of distinguished merit and ability has several responsibilities.

(1) The employer shall submit a completed labor condition application on Form ETA 9035 and one copy to the regional office of ETA serving the area where the nonimmigrant will be employed. If the labor condition application is certified by ETA, a copy will be returned to the employer.

(2) The employer shall make a filed labor condition application and necessary supporting documentation (as identified under this subpart) available for public examination at the employer's principal place of business in the U.S. or at the place of employment within one working day after the date on which the labor condition application is filed with ETA.

(3) The employer then may submit a copy of the certified labor condition application to INS with a completed petition (INS Form I–129) requesting H–1B classification.

(4) The employer should not allow the nonimmigrant worker to begin work, even though a labor condition application has been certified by DOL, until INS grants the worker authorization to work in the United States for that employer.

(5) The employer shall develop sufficient documentation to meet its burden of proof with respect to the validity of the statements made in its labor condition application and the accuracy of information provided in the event that such statement or information is challenged. The employer shall also maintain such documentation at its principal place of business in the U.S. and shall make such documentation available to DOL for inspection and copying upon request.

§ 655.710 Complaints.

Complaints concerning misrepresentation in the labor condition application or failure of the employer to meet a condition specified in the application shall be filed with the Administrator,

Wage and Hour Division (Administrator), ESA, according to the procedures set forth in subpart I of this part. The Administrator, either pursuant to a complaint or otherwise, shall investigate where appropriate, and after an opportunity for a hearing, assess appropriate sanctions and penalties.

§ 655.715 Definitions.

For the purposes of subparts H and I of this part:

Actual wage means the wage rate paid by the employer to all individuals with experience and qualifications similar to the H–1B nonimmigant's experience and qualifications for the specific employment in question at the place of employment. The actual wage established by the employer is *not* an average of the wage rates paid to all workers employed in the occupation.

Administrative Law Judge (ALJ) means an official appointed pursuant to 5 U.S.C. 3105.

Administrator means the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor, and such authorized representatives as may be designated to perform any of the functions of the Administrator under subpart H or I of this part.

Aggrieved party means a person or entity whose operations or interests are adversely affected by the employer's alleged non-compliance with the labor condition application and includes, but is not limited to:

(1) A worker whose job, wages, or working conditions are adversely affected by the employer's alleged non-compliance with the labor condition application;

(2) A bargaining representative for workers whose jobs, wages, or working conditions are adversely affected by the employer's alleged non-compliance with the labor condition application;

(3) A competitor adversely affected by the employer's alleged non-compliance with the labor condition application; and

(4) A government agency which has a program that is impacted by the employer's alleged non-compliance with the labor condition application.

Area of intended employment means the area within normal commuting distance of the place (address) of employment where the H–1B nonimmigrant is or will be employed. If the place of employment is within a Metropolitan Statistical Area (MSA), any place within the MSA is deemed to be within normal commuting distance of the place of employment. (*See* definition of ''place of employment.'')

Attorney General means the chief official of the U.S. Department of Justice or the Attorney General's designee.

Authorized agent and *authorized representative* mean an official of the employer who has the legal authority to commit the employer to the statements in the labor condition application.

Certification means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

Certify means the act of making a certification.

Certifying Officer and *Regional Certifying Officer* mean a Department of Labor official, or such official's designee, who makes determinations about whether or not to certify labor condition applications.

Chief Administrative Law Judge (Chief ALJ) means the chief official of the Office of the Administrative Law Judges of the Department of Labor or the Chief Administrative Law Judge's designee.

Department and *DOL* mean the United States Department of Labor.

Division means the Wage and Hour Division of the Employment Standards Administration, DOL.

Employer means a person, firm, corporation, contractor, or other association or organization in the United States:

(1) Which suffers or permits a person to work within the United States;

(2) Which has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee; and

(3) Which has an Internal Revenue Service tax identification number.

Employment and Training Administration (ETA) means the agency within the

Department which includes the United States Employment Service (USES).

Employment Standards Administration (ESA) means the agency within the Department which includes the Wage and Hour Division.

Immigration and Naturalization Service (INS) means the component of the Department of Justice which makes the determination under the INA on whether to grant visa petitions of employers seeking the admission of nonimmigrants under H–1B visas for the purpose of employment.

INA means the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq.*

Independent authoritative source means a professional, business, trade, educational or governmental association, organization, or other similar entity, not owned or controlled by the employer, which has recognized expertise in an occupational field.

Independent authoritative source survey means a survey of wages conducted by an independent authoritative source and published in a book, newspaper, periodical, loose-leaf service, newsletter, or other similar medium, within the 24-month period immediately preceding the filing of the employer's application. Such survey shall:

(1) Reflect the average wage paid to workers similarly employed in the area of intended employment;

(2) Be based upon recently collected data—*e.g.*, within the 24-month period immediately preceding the date of publication of the survey; and

(3) Represent the latest published prevailing wage finding by the authoritative source for the occupation in the area of intended employment.

Interested party means a person or entity who or which may be affected by the actions of an H–1B employer or by the outcome of a particular investigation and includes any person, organization, or entity who or which has notified the Department of his/her/its interest or concern in the Administrator's determination.

Lockout means a labor dispute involving a work stoppage, wherein an employer withholds work from its employees in order to gain a concession from them.

Occupation means the occupational or job classification in which the H–1B nonimmigrant is to be employed.

Period of intended employment means the time period between the starting and ending dates inclusive of the H–1B nonimmigrant's intended period of employment in the occupational classification at the place of employment as set forth in the labor condition application.

Place of employment means the worksite or physical location where the work actually is performed. (See definition of ''Area of Intended Employment.'')

Required wage rate means the rate of pay which is the higher of:

(1) The actual wage for the specific employment in question; or

(2) The prevailing wage rate (determined as of the time of filing the application) for the occupation in which the H–1B nonimmigrant is to be employed in the geographic area of intended employment. The prevailing wage rate must be no less than the minimum wage required by Federal, State, or local law.

Secretary means the Secretary of Labor or the Secretary's designee.

Specialty occupation means an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree (or its equivalent) in the specific specialty as a minimum for entry into the occupation in the United States. The nonimmigrant in a specialty occupation shall possess the following qualifications: (1) Full state licensure to practice in the occupation, if licensure is required for the occupation; (2) completion of the required degree; or (3) experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty. 8 U.S.C. 1184(i). Determinations of specialty occupation and of nonimmigrant qualifications are made by INS.

Specific employment in question means the set of duties and responsibilities performed or to be performed by the H–1B nonimmigrant at the place of employment.

State means one of the 50 States, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.

State Employment Security Agency (SESA) means the State agency designated under section 4 of the Wagner-Peyser Act to cooperate with USES in the operation of the national system of public employment offices.

Strike means a labor dispute wherein employees engage in a concerted stoppage of work (including stoppage by reason of the expiration of a collective-bargaining agreement) or engage in any concerted slowdown or other concerted interruption of operation.

United States Employment Service (USES) means the agency of the Department of Labor, established under the Wagner-Peyser Act, which is charged with administering the national system of public employment offices.

Wage rate means the remuneration (exclusive of fringe benefits) to be paid, stated in terms of amount per hour, day, month or year (see definition of ''Required Wage Rate'').

§ 655.720 Addresses of Department of Labor regional offices.

Region I (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont): One Congress Street 10th Floor, Boston, Massachusetts 02114–2023. Telephone: 617–565–4446.

Region II (New York, New Jersey, Puerto Rico, and the Virgin Islands): 201 Varick Street, Room 755, New York, New York 10014. Telephone: 212–337–2186.

Region III (Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia): 3535 Market St., Post Office Box 8796, Philadelphia, Pennsylvania 19101. Telephone: 215–596–6363.

Region IV (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee): 1371 Peachtree Street, NE., Atlanta, Georgia 30309. Telephone: 404–347–3938.

Region V (Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin): 230 South Dearborn Street, Room 605, Chicago, Illinois 60604. Telephone: 312–353–1550.

Region VI (Arkansas, Louisiana, New Mexico, Oklahoma, and Texas): 525 Griffin Street, Room 311, Dallas, Texas 75202. Telephone: 214–767–4989.

Region VII (Iowa, Kansas, Missouri, and Nebraska): 1100 Main, Rm. 1050, Kansas City, Missouri 64105. Telephone: 816–426–3796.

Region VIII (Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming): 1999 Broadway, Rm. 1780, Denver, Colorado 80202. Telephone: 303–391–5742.

Region IX (Arizona, California, Guam, Hawaii, and Nevada): 71 Stevenson Street, Room 805, San Francisco, California 94105. Telephone: 415–744–7618.

Region X (Alaska, Idaho, Oregon, and Washington): 1111 Third Avenue, Suite 900, Seattle, Washington 98101–3212. Telephone: 206–553–7700.

§ 655.730 Labor condition application.

(a) *Who must submit labor condition applications?* An employer, or the employer's authorized agent or representative, which meets the definition of employer set forth in § 655.715 of this part and intends to employ an H–1B nonimmigrant in a specialty occupation or as a fashion model of distinguished merit and ability shall submit a labor condition application to DOL. Attorneys and agents submitting applications on an employer's behalf shall submit, also, a completed INS Form G–28.

(b) *Where and when should a labor condition application be submitted?* A labor condition application shall be submitted, by U.S. mail, private carrier, or facsimile transmission, to the ETA regional office shown in § 655.720 of this part in whose geographic area of jurisdiction the H–1B nonimmigrant will be employed no earlier than six months before the beginning date of the period of intended employment shown on the LCA. It is the employer's responsibility to ensure that a complete and accurate application is received by the appropriate regional office of ETA. Incomplete or obviously inaccurate applications will not be certified. The regional office shall process all applications sequentially upon receipt regardless of the method used by the employer to submit the application and shall make a determination to certify or not certify the labor condition application within 7 working days of the date the

application is received and date-stamped by the Department. If the application is submitted by facsimile transmission, the application containing the original signature shall be maintained by the employer as set forth at § 655.760(a)(1) of this part.

(c) *What should be submitted? Form ETA 9035.*

(1) *General.* One completed and dated original Form ETA 9035 containing the labor condition statements referenced in §§ 655.731 through 655.734 of this part, bearing the employer's original signature (or that of the employer's authorized agent or representative) and one copy of the completed and dated original Form ETA 9035 shall be submitted to ETA (see paragraph (b) of this section and § 655.760(a)(1) of this part with respect to applications filed by facsimile transmission). Copies of Form ETA 9035 are available at the addresses listed in § 655.720 of this part; photocopies of the form (obtained from any source) also are permitted. Each application shall identify the occupational classification for which the labor condition application is being submitted and shall state:

(i) The occupation, by Dictionary of Occupational Titles (DOT) Three-Digit Occupational Groups code and by the employer's own title for the job;

(ii) The number of H–1B nonimmigrants sought;

(iii) The gross wage rate to be paid to each H–1B nonimmigrant, expressed on an hourly, weekly, biweekly, monthly or annual basis;

(iv) The starting and ending dates of the H–1B nonimmigrants' employment;

(v) The place(s) of intended employment; and

(vi) The prevailing wage for the occupation in the area of intended employment and the specific source (*e.g.,* name of published survey) relied upon by the employer to determine the wage. If the wage is obtained from a SESA, the appropriate box must be checked and the wage provided; wages obtained from a source other than a SESA must be identified along with the wage;

(2) *Mutiple positions or places of employment.* The employer shall file a separate LCA for each occupation in which the employer intends to employ one or more H–1B nonimmigrants. All places of employment covered by the application must be located within the jurisdiction of a single ETA regional office, or, if the nonimmigrant(s) is(are) to be employed sequentially in various places of employment, the application is to be submitted to the regional office having jurisdiction over the initial place of employment; and

(3) *Full-time and part-time jobs.* The position(s) covered by the LCA may be full-time or part-time or a mix of both.

(d) *Content of the labor condition application.* An employer's labor condition application shall contain the labor condition statements referenced in §§ 655.731 through 655.734 of this part, which provide that no individual may be admitted or provided status as an H–1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary an application stating that:

(1) The employer is offering and will offer during the period of authorized employment to H–1B nonimmigrants no less than the greater of the following:

(i) The actual wage paid to the employer's other employees at the worksite with similar experience and qualifications for the specific employment in question; or

(ii) The prevailing wage level for the occupational classification in the area or intended employment;

(2) The employer will provide working conditions for such nonimmigrants that will not adversely affect the working conditions of workers similarly employed;

(3) There is not a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment;

(4) The employer has provided and will provide notice of the filing of the labor condition application to:

(i)(A) The bargaining representative of the employer's employees in the occupational classification in the area of intended employment for which the H–1B nonimmigrants are sought, in the manner described in § 655.734(a)(1)(i); or

(B) If there is no such bargaining representative, posts notice of the filing of the labor condition application in conspicuous locations in the employer's

establishment(s) in the area of intended employment, in the manner described in § 655.734(a)(1)(ii) of this subpart and, in the manner described in § 655.734(a)(2) of this subpart; and

(ii) H–1B nonimmigrants at the time that such nonimmigrants actually report to work; and

(5) The employer has provided the information about the occupation required in paragraph (c) of this section.

(Approved by the Office of Management and Budget under control number 1205–0310)

[59 FR 65659, 65676, Dec. 20, 1994, as amended at 60 FR 4029, Jan. 19, 1995]

§ 655.731 The first labor condition statement: wages.

An employer seeking to employ H–1B nonimmigrants in a specialty occupation or as a fashion model of distinguished merit and ability shall state on Form ETA 9035 that it will pay the H–1B nonimmigrants the required wage rate.

(a) *Establishing the wage requirement.* The first labor condition application requirement shall be satisfied when the employer signs Form ETA 9035 attesting that, for the entire period of authorized employment, the required wage rate will be paid to the H–1B nonimmigrant's; that is, that the wage shall be the greater of: the actual wage rate (as specified in paragraph (a)(1) of this section) or the prevailing wage (as specified in paragraph (a)(2) of this section).

(1) The actual wage is the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question. In determining such wage level, the following factors may be considered: experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors. ''Legitimate business factors,'' for purposes of this paragraph (a), means those that it is reasonable to conclude are necessary because they conform to recognized principles or can be demonstrated by accepted rules and standards. Where there are other employees with substantially similar experience and qualifications in the specific employment in question—*i.e.,* they have substantially the same duties and responsibilities as the H–1B nonimmigrant—the actual wage shall be the amount paid to these other employees. Where no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H–1B nonimmigrant by the employer. Where the employer's pay system or scale provides for adjustments during the period of the LCA—*e.g.,* cost of living increases or other periodic adjustments, higher entry rate due to market conditions, or the employee moves into a more advanced level in the same occupation—such adjustments shall be provided to similarly employed H–1B nonimmigrants (unless the prevailing wage is higher than the actual wage). Examples illustrating these principles may be found in appendix A to this subpart H.

(2) The *prevailing wage* for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information available as of the time of filing the application. The employer is not required to use any specific methodology to determine the prevailing wage and may utilize a SESA, an independent authoritative source, or other legitimate sources of wage data. One of the following sources shall be used to establish the prevailing wage:

(i) A wage determination for the occupation and area issued under the Davis-Bacon Act, 40 U.S.C. 276a *et seq.* (see also 29 CFR part 1), or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.* (see also 29 CFR part 4) (which shall be available through the SESA);

(ii) A union contract which was negotiated at arms-length between a union and the employer, which contains a wage rate applicable to the occupation; or

(iii) If the job opportunity is in an occupation which is not covered by paragraph (a)(2) (i) or (ii) of this section, the prevailing wage shall be the average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wages paid to workers similarly employed in the area of intended employment and dividing

the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages. See paragraph (c) of this section, regarding payment of required wages. See also paragraph (d)(4) of this section, regarding enforcement. The prevailing wage rate under this paragraph (a)(2)(iii) shall be based on the best information available. The Department believes that the following prevailing wage sources are, in order of priority, the most accurate and reliable:

(A) *A SESA Determination.* Upon receipt of a written request for a prevailing wage determination, the SESA will determine whether the occupation is covered by a Davis-Bacon or Service Contract Act wage determination, and, if not, whether it has on file current prevailing wage information for the occupation.This information will be provided by the SESA to the employer in writing in a timely manner. Where the prevailing wage is not immediately available, the SESA will conduct a prevailing wage survey using the methods outlined at 20 CFR 656.40 and other administrative guidelines or regulations issued by ETA.

(*1*) An employer who chooses to utilize a SESA prevailing wage determination shall file the labor condition application not more than 90 days after the date of issuance of such SESA wage determination. Once an employer obtains a prevailing wage determination from the SESA and files an LCA supported by that prevailing wage determination, the employer is deemed to have accepted the prevailing wage determination (both as to the occupational classification and wage) and thereafter may not contest the legitimacy of the prevailing wage determination through the Employment Service complaint system or in an investigation or enforcement action. Prior to filing the LCA, the employer may challenge a SESA prevailing wage determination through the Employment Service complaint system, by filing a complaint with the SESA. See 20 CFR 658.410 through 658.426. Employers which challenge a SESA prevailing wage determination must obtain a final ruling from the Employment Service complaint system prior to filing an LCA based on such determination. In any challenge, the SESA shall not divulge any employer wage data which was collected under the promise of confidentiality.

(*2*) If the employer is unable to wait for the SESA to produce the requested prevailing wage determination for the occupation in question, or for the Employment Service complaint system process to be completed, the employer may rely on other legitimate sources of available wage information in filing the LCA, as set forth in paragraph (a)(2)(iii) (B) and (C) of this section. If the employer later discovers, upon receipt of a prevailing wage determination from the SESA, that the information relied upon produced a wage that was below the prevailing wage for the occupation in the area of intended employment and the employer was paying below the SESA-determined wage, no wage violation will be found if the employer retroactively compensates the H–1B nonimmigrant(s) for the difference between the wage paid and the prevailing wage, within 30 days of the employer's receipt of the SESA determination.

(*3*) In all situations where the employer obtains the prevailing wage determination from the SESA, the Department will accept that prevailing wage determination as correct and will not question its validity where the employer has maintained a copy of the SESA prevailing wage determination. A complaint alleging inaccuracy of a SESA prevailing wage determination, in such cases, will not be investigated.

(B) *An independent authoritative source.* The employer may use an independent authoritative wage source in lieu of a SESA prevailing wage determination. The independent authoritative source survey must meet all the criteria set forth in paragraph (b)(3)(iii)(B) of this section.

(C) *Another legitimate source of wage information.* The employer may rely on other legitimate sources of wage data to obtain the prevailing wage. The other legitimate source survey must

meet all the criteria set forth in paragraph (b)(3)(iii) of this section. The employer will be required to demonstrate the legitimacy of the wage in the event of an investigation.

(iv) For purposes of this section, ''similarly employed'' means ''having substantially comparable jobs in the occupational classification in the area of intended employment,'' except that if no such workers are employed by employers other than the employer applicant in the area of intended employment, ''similarly employed'' means:

(A) Having jobs requiring a substantially similar level of skills within the area of intended employment; or

(B) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

(v) A prevailing wage determination for labor condition application purposes made pursuant to this section shall not permit an employer to pay a wage lower than that required under any other applicable Federal, State or local law.

(vi) Where a range of wages is paid by the employer to individuals in an occupational classification or among individuals with similar experience and qualifications for the specific employment in question, a range is considered to meet the prevailing wage requirement so long as the bottom of the wage range is at least the prevailing wage rate.

(3) Once the prevailing wage rate is established, the H–1B employer than shall compare this wage with the actual wage rate for the specific employment in question at the place of employment and must pay the H–1B nonimmigrant at least the higher of the two wages.

(b) *Documentation of the wage statement.* (1) The employer shall develop and maintain documentation sufficient to meet its burden of proving the validity of the wage statement required in paragraph (a) of this section and attested to on Form ETA 9035. The documentation shall be made available to DOL upon request. Documentation shall also be made available for public examination to the extent required by §655.760(a) of this part. The employer shall also document that the wage rate(s) paid to H–1B nonimmigrant(s) is(are) no less than the required wage rate(s). The documentation shall include information about the employer's wage rate for all other employees for the specific employment in question at the place of employment, beginning with the date the labor condition application was submitted and continuing throughout the period of employment. The records shall be retained for the period of time specified in §655.760 of this part. The payroll records for each such employee shall include:

(i) Employee's full name;

(ii) Employee's home address;

(iii) Employee's occupation;

(iv) Employee's rate of pay;

(v) Hours worked each day and each week by the employee if paid on other than a salary basis, or the prevailing or actual wage is expressed as an hourly wage;

(vi) Total additions to or deductions from pay each pay period by employee; and

(vii) Total wages paid each pay period, date of pay and pay period covered by the payment by employee.

(2) *Actual wage.* In addition to payroll data required by paragraph (b)(1) of this section (and also by the Fair Labor Standards Act), the employer shall retain documentation specifying the basis it used to establish the actual wage. The employer shall show how the wage set for the H–1B nonimmigrant relates to the wages paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question at the place of employment. Where adjustments are made in the employer's pay system or scale during the validity period of the LCA, the employer shall retain documentation explaining the changes and clearly showing that, after such adjustments, the wages paid to the H–1B nonimmigrant are at least the greater of the adjusted actual wage or the prevailing wage for the occupation and area of intended employment. See appendix A to subpart H.

(3) *Prevailing wage.* The employer also shall retain documentation regarding its determination of the prevailing wage. This source documentation shall

not be submitted to ETA with the labor condition application, but shall be retained at the employer's place of business for the length of time required in § 655.760(c) of this part. Such documentation shall consist of the documentation described in paragraph (b)(3)(i), (ii), or (iii) of this section and the documentation described in paragraph (b)(1) of this section.

(i) If the employer used a wage determination issued pursuant to the provisions of the Davis-Bacon Act, 40 U.S.C. 276a *et seq.* (see 29 CFR part 1), or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.* (see 29 CFR part 4), the documentation shall include a copy of the determination showing the wage rate for the occupation in the area of intended employment.

(ii) If the employer used an applicable wage rate from a union contract which was negotiated at arms-length between a union and the employer, the documentation shall include an excerpt from the union contract showing the wage rate(s) for the occupation.

(iii) If the employer did not use a wage covered by the provisions of paragraph (b)(3)(i) or (ii) of this section, the employer's documentation shall consist of:

(A) A copy of the prevailing wage finding from the SESA for the occupation within the area of intended employment; or

(B) A copy of the prevailing wage survey for the occupation within the area of intended employment published by an independent authoritative source. For purposes of this paragraph (b)(3)(iii)(B), a prevailing wage survey for the occupation in the area of intended employment published by an authoritative independent source shall mean a survey of wages published in a book, newspaper, periodical, loose-leaf service, newsletter, or other similar medium, within the 24-month period immediately preceding the filing of the employer's application. Such survey shall:

(*1*) Reflect the average wage paid to workers similarly employed in the area of intended employment;

(*2*) Be based upon recently collected data—*e.g.,* within the 24-month period immediately preceding the date of publication of the survey; and

(*3*) Represent the latest published prevailing wage finding by the independent authoritative source for the occupation in the area of intended employment; or

(C) A copy of the prevailing wage survey or other source data acquired from a legitimate source of wage information that was used to make the prevailing wage determination. For purposes of paragraph (b)(3)(iii)(C) of this section, a prevailing wage provided by another legitimate source of such wage information shall be one which:

(*1*) Reflects the weighted average wage paid to workers similarly employed in the area of intended employment;

(*2*) Is based on the most recent and accurate information available; and

(*3*) Is reasonable and consistent with recognized standards and principles in producing a prevailing wage.

(c) *Satisfaction of required wage obligation.* (1) The required wage must be paid to the employee, cash in hand, free and clear, when due, *except that* deductions made in accordance with paragraph (c)(7) of this section may reduce the cash wage below the level of the required wage.

(2) ''Wages paid,'' for purposes of satisfying the H–1B required wage, shall consist only of those payments that meet all the following criteria:

(i) Payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due, except for deductions authorized by paragraph (c)(7) of this section;

(ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS (in accordance with the Internal Revenue Code of 1986, 26 U.S.C. 1, *et seq.*);

(iii) Payments of the tax reported and paid to the IRS as required by the Federal Insurance Contributions Act, 26 U.S.C. 3101, *et seq.* (FICA). The employer must be able to document that the payments have been so reported to IRS and that both the employer's and employee's taxes have been paid *except that* when the H–1B nonimmigrant is a

citizen of a foreign country with which the President of the United States has entered into an agreement as authorized by section 233 of the Social Security Act, 42 U.S.C. 433 (*i.e.,* an agreement establishing a totalization arrangement between the social security system of the United States and that of the foreign country), the employer's documentation shall show that all appropriate reports have been filed and taxes have been paid in the employee's home country.

(iv) Payments reported, and so documented by the employer, as the employee's earnings, with appropriate employer and employee taxes paid to all other appropriate Federal, State, and local governments in accordance with any other applicable law.

(3) For salaried employees, wages will be due in pro-rated installments (*e.g.,* annual salary divided into 26 bi-weekly pay periods, where employer pays bi-weekly) paid no less often than monthly *except that,* in the event that the employer intends to use some other form of nondiscretionary payment to supplement the employee's regular/pro-rata pay in order to meet the required wage obligation (*e.g.,* a quarterly production bonus), the employer's documentation of wage payments (including such supplemental payments) must show the employer's commitment to make such payment and the method of determining the amount thereof, and must show unequivocally that the required wage obligation was met for prior pay periods and, upon payment and distribution of such other payments that are pending, will be met for each current or future pay period.

(4) For hourly-wage employees, the required wages will be due for all hours worked and/or for any nonproductive time (as specified in paragraph (c)(5) of this section) at the end of the employer's ordinary pay period (*e.g.,* weekly) but in no event less frequently than monthly.

(5)(i) For the purpose of DOL administration and enforcement of the H–1B program, an H–1B nonimmigrant is considered to be under the control or employ of the LCA-filing employer, and therefore shall receive the full wage which the LCA-filing employer is required to pay, beginning no later than the first day the H–1B nonimmigrant is in the United States and continuing throughout the nonimmigrant's period of employment. Therefore if the H–1B nonimmigrant is in a nonproductive status for reasons such as training, lack of license, lack of assigned work or any other reason, the employer will be required to pay the salaried employee the full pro-rata amount due, or to pay the hourly-wage employee for a full-time week (40 hours or such other number of hours as the employer can demonstrate to be full-time employment for the occupation and area involved) at the required wage for the occupation listed on the LCA. If the employer's LCA carries a designation of ''part-time employment,'' the employer will be required to pay the nonproductive employee for at least the number of hours indicated on the I–129 petition filed by the employer with the INS. If during a subsequent enforcement action by the Administrator it is determined that an employee designated in the LCA as part-time was in fact working full-time or regularly working more hours than reflected on the I–129 petition, the employer will be held to the factual standard disclosed by the enforcement action.

(ii) If, however, during the period of employment, an H–1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which render the nonimmigrant unable to work—*e.g.,* maternity leave, automobile accident which temporarily incapacitates the nonimmigrant, caring for an ill relative—then the employer shall not be obligated to pay the required wage rate during that period *provided that* the INS permits the employee to remain in the U.S. without being paid and provided further that such period is not subject to payment under other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 *et seq.*) or the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*).

(6) If the employee works in an occupation other than that identified on the employer's LCA, the employer's required wage obligation is based on the occupation identified on the LCA, and not on whatever wage standards may

be applicable in the occupation in which the employee may be working.

(7) ''*Authorized deduction*,'' for purposes of the H–1B required wage obligation, means a deduction from wages in complete compliance with one of the following sets of criteria—

(i) Deduction which is required by law (*e.g.*, income tax; FICA); *or*

(ii) Deduction which is authorized by a collective bargaining agreement, or is reasonable and customary in the occupation and/or area of employment (*e.g.*, union dues; contribution to premium for health insurance policy covering all employees; savings or retirement fund contribution for plan(s) in compliance with the Employee Retirement Income Security Act, 29 U.S.C. 1001, *et seq.*), *except that* the deduction may not recoup a business expense(s) of the employer; the deduction must have been revealed to the worker prior to the commencement of employment and, if the deduction was a condition of employment, had been clearly identified as such; and the deduction must be made against wages of U.S. workers as well as H–1B nonimmigrants (where there are U.S. workers); *or*

(iii) Deduction which meets the following requirements:

(A) Is made in accordance with a voluntary, written authorization by the employee (Note: an employee's mere acceptance of a job which carries a deduction as a condition of employment does not constitute voluntary authorization, even if such condition were stated in writing);

(B) Is for a matter principally for the benefit of the employee (*Note:* housing and food allowances would be considered to meet this ''benefit of employee'' standard, unless the employee is in travel/per diem status, or unless the circumstances indicate that the arrangements for the employee's housing or food are principally for the convenience or benefit of the employer (*e.g.*, employee living at worksite in ''on call'' status));

(C) Is not a recoupment of the employer's business expense (*e.g.*, tools and equipment; transportation costs where such transportation is an incident of and necessary to the employment; living expenses when the employee is traveling on the employer's business) (for purposes of this section, initial transportation from and end-of-employment travel to the worker's home country shall not be considered a business expense);

(D) Is an amount that does not exceed the fair market value or the actual cost (whichever is lower) of the matter covered (Note: the employer must document the cost and value); and

(E) Is an amount that does not exceed the limits set for garnishment of wages in the Consumer Credit Protection Act, 15 U.S.C. 1673, and the regulations of the Secretary pursuant to that Act, 29 CFR part 870, under which garnishment(s) may not exceed 25% of an employee's disposable earnings for a workweek.

(8) Any unauthorized deduction taken from wages is considered by the Department to be non-payment of that amount of wages, and, in the event of an investigation, will result in back wage assessment (plus civil money penalties and/or disqualification from H–1B and other immigration programs (pursuant to § 655.810(b)), if willful).

(9) Where the employer depresses the employee's wages below the required wage by imposing on the employee any of the employer's business expense(s), the Department will consider the amount to be an unauthorized deduction from wages even if the matter is not shown in the employer's payroll records as a deduction.

(10) Where the employer makes deduction(s) for repayment of loan(s) or wage advance(s) made to the employee, the Department, in the event of an investigation, will require the employer to establish the legitimacy and purpose(s) of the loan(s) or wage advance(s), with reference to the standards set out in paragraph (c)(7) of this section.

(d) *Enforcement actions.* (1) In the event that a complaint is filed pursuant to subpart I of this part, alleging a failure to meet the ''prevailing wage'' condition or a material misrepresentation by the employer regarding the payment of the required wage, or pursuant to such other basis for investigation as the Administrator may find, the Administrator shall determine

whether the employer has the documentation required in paragraph (b)(3) of this section, and whether the documentation supports the employer's wage attestation. Where the documentation is either nonexistent or is insufficient to determine the prevailing wage (*e.g.,* does not meet the criteria specified in this section, in which case the Administrator may find a violation of paragraph (b)(1), (2), or (3), of this section); *or* where, based on significant evidence regarding wages paid for the occupation in the area of intended employment, the Administrator has reason to believe that the prevailing wage finding obtained from an independent authoritative source or another legitimate source varies substantially from the wage prevailing for the occupation in the area of intended employment; *or* where the employer has been unable to demonstrate that the prevailing wage determined by another legitimate source is in accordance with the regulatory criteria, the Administrator may contact ETA, which shall provide the Administrator with a prevailing wage determination, which the Administrator shall use as the basis for determining violations and for computing back wages, if such wages are found to be owed. The 30-day investigatory period shall be suspended while ETA makes the prevailing wage determination and, in the event that the employer timely challenges the determination through the Employment service complaint system (see § 655.731(d)(2) of this part), shall be suspended until the Employment Service complaint system process is completed and the Administrator's investigation can be resumed.

(2) In the event the Administrator obtains a prevailing wage from ETA pursuant to paragraph (d)(1) of this section, the employer may challenge the ETA prevailing wage only through the Employment Service complaint system. See 20 CFR part 658, subpart E. Notwithstanding the provisions of 20 CFR 658.421 and 658.426, the appeal shall be initiated at the ETA regional office level. Such challenge shall be initiated within 10 days after the employer receives ETA's prevailing wage determination from the Administrator. In any challenge to the wage determination, neither ETA nor the SESA shall divulge any employer wage data which was collected under the promise of confidentiality.

(i) Where the employer timely challenges an ETA prevailing wage determination obtained by the Administrator, the 30-day investigative period shall be suspended until the employer obtains a final ruling from the Employment Service complaint system. Upon such final ruling, the investigation and any subsequent enforcement proceeding shall continue, with ETA's prevailing wage determination serving as the conclusive determination for all purposes.

(ii) Where the employer does not challenge ETA's prevailing wage determination obtained by the Administrator, such determination shall be deemed to have been accepted by the employer as accurate and appropriate (both as to the occupational classification and wage) and thereafter shall not be subject to challenge in a hearing pursuant to § 655.835 of this part.

(3) For purposes of this paragraph (d), ETA may consult with the appropriate SESA to ascertain the prevailing wage applicable under the circumstances of the particular complaint.

(4) No prevailing wage violation will be found if the employer paid a wage that is equal to or more than 95 percent of the prevailing wage as required by paragraph (a)(2)(iii) of this section. If the employer paid a wage that is less than 95 percent of the prevailing wage, the employer will be required to pay 100 percent of the prevailing wage.

§ 655.732 The second labor condition statement: working conditions.

An employer seeking to employ H–1B nonimmigrants in specialty occupations or as fashion models of distinguished merit and ability shall state on Form ETA 9035 that the employment of H–1B nonimmigrants will not adversely affect the working conditions of workers similarly employed in the area of intended employment.

(a) For purposes of this section, ''similarly employed'' shall mean ''having substantially comparable jobs in the occupational classification at the worksite and in the area of intended employment.'' If no such workers are

employed at the worksite or by employers other than the employer applicant in the area of intended employment ''similarly employed'' shall mean:

(1) Having jobs requiring a substantially similar level of skills at the worksite or within the area of intended employment; or

(2) If there are no substantially comparable jobs at the worksite or in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

(b) *Establishing the working conditions requirement.* The second labor condition application requirement shall be satisfied when the employer signs the labor condition application attesting that for the period of intended employment its employment of H–1B nonimmigrants will not adversely affect the working conditions of workers similarly employed. Working conditions encompass matters including hours, shifts, vacation periods, and fringe benefits. The employer's obligation regarding working conditions shall extend for the longer of two periods: the validity period of the certified LCA or the period during which the H–1B nonimmigrant(s) is(are) employed by the employer.

(c) *Documentation of the working condition statement.* (1) In the event an enforcement action is initiated pursuant to subpart I of this part, the employer shall document the validity of its prevailing working conditions statement referenced in paragraph (b) of this section and attested to on Form ETA 9035. The employer must be able to show that the working conditions of similarly employed workers were not adversely affected by the employment of an H–1B nonimmigrant—*e.g.,* that the working conditions are similar to working conditions which preceded the employment of the H–1B nonimmigrant, or, if there are no similarly employed workers working for the employer, are similar to those existing in like business establishments to the employer's in the area of employment.

(2) In the event that an investigation is conducted pursuant to subpart I of this part concerning whether the employer failed to satisfy the prevailing working conditions statement referenced in paragraph (b) of this section and attested to on Form ETA 9035, the Administrator shall determine whether the employer has produced the documentation required in paragraph (c)(1) of this section, and whether the documentation is sufficient to support the employer's prevailing working conditions statement. If the employer fails to produce any documentation to support its burden of proof demonstrating that there is no adverse effect on the working conditions of workers similarly employed, the Administrator shall find a violation of paragraph (c)(1) of this section. Examples of documentation which employers should either maintain or produce include any relevant information which discusses the working conditions for the industry, occupation and locale, such as published studies, surveys, or articles and documentation regarding working conditions at the worksite, such as fringe benefit packages, which pre-existed the employment of the H–1B nonimmigrant. If the documentation is insufficient to determine whether the employment of H–1B nonimmigrants has or has not adversely affected the working conditions of workers similarly employed in the area of employment, the Administrator may contact ETA, which shall provide the Administrator with advice regarding the working conditions of similarly employed workers in the area of employment.

§ 655.733 The third labor condition statement: no strike or lockout.

An employer seeking to employ H–1B nonimmigrants shall state on Form ETA 9035 that there is not at that time a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment. A strike or lockout which occurs after the labor condition application is filed by the employer with DOL is covered by INS regulations at 8 CFR 214.2(h)(17).

(a) *Establishing the no strike or lockout requirement.* The third labor condition application requirement shall be satisfied when the employer signs the labor condition application attesting that, as of the date the application is filed, the employer is not involved in a strike,

lockout, or work stoppage in the course of a labor dispute in the occupational classification in the area of intended employment. Labor disputes for the purpose of this section relate only to those disputes involving employees of the employer working at the place of employment in the occupational classification named in the labor condition application. See also INS regulations at 8 CFR 214.2(h)(17) for effects of strikes or lockouts in general on the H–1B nonimmigrant's employment.

(1) *Strike or lockout subsequent to certification of labor condition application.* In order to remain in compliance with the no strike or lockout labor condition statement, if a strike or lockout of workers in the same occupational classification as the H–1B nonimmigrant occurs at the place of employment during the validity of the labor condition application, the employer, within three days of the occurrence of the strike or lockout, shall submit to ETA, by U.S. mail, facsimile (FAX), or private carrier, written notice of the strike or lockout. Further, the employer shall not place, assign, lease, or otherwise contract out an H–1B nonimmigrant, during the entire period of the labor condition application's validity, to any place of employment where there is a strike or lockout in the course of a labor dispute in the same occupational classification as the H–1B nonimmigrant. Finally, the employer shall not use the labor condition application in support of any petition filings for H–1B nonimmigrants to work in such occupational classification at such place of employment until ETA determines that the strike or lockout has ended.

(2) *ETA notice to INS.* Upon receiving from an employer a notice described in paragraph (a)(1) of this section, ETA shall examine the documentation, and may consult with the union at the employer's place of business or other appropriate entities. If ETA determines that the strike or lockout is covered under INS's ''*Effect of strike*'' regulation for ''H'' visa holders, ETA shall certify to INS, in the manner set forth in that regulation, that a strike or other labor dispute involving a work stoppage of workers in the same occupational classification as the H–1B nonimmigrant is in progress at the place of employment. See 8 CFR 214.2(h)(17).

(b) *Documentation of the third labor condition statement.* The employer need not develop nor maintain documentation to substantiate the statement referenced in paragraph (a) of this section. In the case of an investigation, however, the employer has the burden of proof to show that there was no strike or lockout in the course of a labor dispute for the occupational classification in which an H–1B nonimmigrant is employed, either at the time the application was filed or during the validity period of the LCA.

§ 655.734 The fourth labor condition statement: notice.

An employer seeking to employ H–1B nonimmigrants shall state on Form ETA 9035 that the employer has provided notice of the filing of the labor condition application to the bargaining representative of the employer's employees in the occupational classification in which the H–1B nonimmigrants will be employed or are intended to be employed in the area of intended employment, or, if there is no such bargaining representative, has posted notice of filing in conspicuous locations in the employer's establishment(s) in the area of intended employment, in the manner described in this section.

(a) *Establishing the notice requirement.* The fourth labor condition application requirement shall be established when the conditions of paragraphs (a)(1) and (a)(2) of this section are met.

(1)(i) Where there is a collective bargaining representative for the occupational classification in which the H–1B nonimmigrants will be employed, on or within 30 days before the date the labor condition application is filed with ETA, the employer shall provide notice to the bargaining representative that a labor condition application is being, or will be, filed with ETA. The notice shall identify the number of H–1B nonimmigrants the employer is seeking to employ; the occupational classification in which the H–1B nonimmigrants will be employed; the wages offered; the period of employment; and the location(s) at which the H–1B nonimmigrants will be employed. Notice

under this paragraph (a)(1)(i) shall include the following statement: ''Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division of the United States Department of Labor.''

(ii) Where there is no collective bargaining representative, the employer shall, on or within 30 days before the date the labor condition application is filed with ETA, provide a notice of the filing of the labor condition application to its employees by posting a notice in at least two conspicuous locations at each place of employment where any H–1B nonimmigrant will be employed. The notice shall indicate that H–1B nonimmigrants are sought; the number of such nonimmigrants the employer is seeking; the occupational classification; the wages offered; the period of employment; the location(s) at which the H–1B nonimmigrants will be employed; and that the labor condition application is available for public inspection at the employer's principal place of business in the U.S. or at the worksite. The notice shall also include the statement: ''Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division of the United States Department of Labor.'' The posting of exact copies of the labor condition application shall be sufficient to meet the requirements of this paragraph (a)(1)(ii).

(A) The notice shall be of sufficient size and visibility, and shall be posted in two or more conspicuous places so that the employer's workers at the place(s) of employment can easily see and read the posted notice(s).

(B) Appropriate locations for posting the notices include, but are not limited to, locations in the immediate proximity of wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a).

(C) The notices shall be posted on or within 30 days before the date the labor condition application is filed and shall remain posted for a total of 10 days.

(D) Where the employer places any H–1B nonimmigrant(s) at one or more worksites not contemplated at the time of filing the application, but which are within the area of intended employment listed on the LCA, the employer is required to post notice(s) at such worksite(s) on or before the date any H–1B nonimmigrant begins work, which notice shall remain posted for a total of ten days.

(2) The employer shall, no later than the date the H–1B nonimmigrant reports to work at the place of employment, provide the H–1B nonimmigrant with a copy of the labor condition application certified by the Department.

(b) *Documentation of the fourth labor condition statement.* The employer shall develop and maintain documentation sufficient to meet its burden of proving the validity of the statement referenced in paragraph (a) of this section and attested to on form ETA 9035. Such documentation shall include a copy of the dated notice and the name and address of the collective bargaining representative to whom the notice was provided. Where there is no collective bargaining representative, the employer shall note and retain the dates when, and locations where, the notice was posted and shall retain a copy of the posted notice.

(c) *Records retention; records availability.* The employer's documentation shall not be submitted to ETA with the labor condition application, but shall be retained for the period of time specified in § 655.760(c) of this part. The documentation shall be made available for public examination as required in § 655.760(a) of this part, and shall be made available to DOL upon request.

§ 655.735 Special provisions for short-term placement of H–1B nonimmigrants at place(s) of employment outside the area(s) of intended employment listed on labor condition application.

(a) Subject to the conditions specified in paragraph (b) of this section, an employer may place H–1B nonimmigrant(s) at worksite(s) (place(s) of employment) within areas of employment not listed on the employer's labor condition application(s)—whether or

not the employer owns or controls such worksite(s)—without filing new labor condition application(s) for the area(s) of intended employment which would encompass such worksite(s).

(b) The following restrictions shall be fully satisfied by an employer which places H–1B nonimmigrant(s) at worksite(s) (place(s) of employment) within areas of employment not listed on the employer's labor condition application(s):

(1) The employer has fully satisfied the requirements of §§ 655.730 through 655.734 of this part with regard to worksite(s) located within the area(s) of intended employment listed on the employer's labor condition application(s).

(2) The employer shall not place, assign, lease, or otherwise contract out any H–1B nonimmigrant(s) to any worksite where there is a strike or lockout in the course of a labor dispute in the same occupational classification(s) as the H–1B nonimmigrant(s).

(3) For every day of the H–1B nonimmigrant's(s') placement outside the LCA-listed area of employment, the employer shall pay such worker(s) the required wage (based on the prevailing wage at such worker's(s) permanent work site, or the employer's actual wage, whichever is higher) plus per diem and transportation expenses (for both workdays and non-workdays) at rate(s) no lower than the rate(s) prescribed for Federal Government employees on travel or temporary assignment, as set out in 41 CFR Part 301–7 and Ch. 301, App. A.

(4) The employer's placement(s) of H–1B nonimmigrant(s) at any worksite(s) in an area of employment not listed on the employer's labor condition application(s) shall be limited to a cumulative total of ninety workdays within a three-year period, beginning on the first day on which the employer placed an H–1B nonimmigrant at any worksite within such area of employment. For purposes of this section, ''workday'' shall mean any day on which one or more H–1B nonimmigrants perform any work at any worksite(s) within the area of employment. For example, one ''workday'' would be counted for a day on which seven H–1B nonimmigrants worked at three worksites within one city, and one ''workday'' would be counted for a day on which one H–1B nonimmigrant worked at one worksite within a city. The employer may rotate such workers into worksites within such area of employment or may maintain a constant work force. However, on the first day after the accumulation of 90 workdays, the employer shall not have any such H–1B nonimmigrant(s) at any worksite(s) within such area of employment not included on a certified LCA.

(c) At the accumulation of the 90 workdays described in paragraph (b)(4) of this section, the employer shall have ended its placement of all H–1B nonimmigrant(s) at any worksite(s) within the area of employment not listed on the labor condition application, *or* shall have filed and received a certified labor condition application for the area(s) of intended employment encompassing such worksite(s) and performed all actions required in connection with such filing(s) (*e.g.,* determination of the prevailing wage; notice to collective bargaining representative or on-site notice to workers).

(d) At any time during the 90-day period described in paragraph (b)(4) of this section, the employer may file a labor condition application for the area of intended employment encompassing such worksite(s), performing all actions required in connection with such labor condition application. Upon certification of such LCA, the employer's obligation to pay Federal per diem rates to the H–1B nonimmigrant(s) shall terminate. (However, *see* § 655.731(c)(7)(iii)(C) regarding payment of business expenses for employee's travel on employer's business.)

§ 655.740 Labor condition application determinations.

(a) *Actions on labor condition applications submitted for filing.* Once a labor condition application has been received from an employer, a determination shall be made by the ETA regional Certifying Officer whether to certify the labor condition application or return it to the employer not certified.

(1) *Certification of labor condition application.* Where all items on Form ETA 9035 have been completed, the form is not obviously inaccurate, and it contains the signature of the employer or

its authorized agent or representative, the regional Certifying Officer shall certify the labor condition application unless it falls within one of the categories set forth in paragraph (a)(2) of this section. The Certifying Officer shall make a determination to certify or not certify the labor condition application within 7 working days of the date the application is received and date-stamped by the Department. If the labor condition application is certified, the regional Certifying Officer shall return a certified copy of the labor condition application to the employer or the employer's authorized agent or representative. The employer shall file the certified labor condition application with the appropriate INS office in the manner prescribed by INS. The INS shall determine whether each occupational classification named in the certified labor condition application is a specialty occupation or is a fashion model of distinguished merit and ability.

(2) *Determinations not to certify labor condition applications.* ETA shall not certify a labor condition application and shall return such application to the employer or the employer's authorized agent or representative, when either or both of the following two conditions exists:

(i) When the Form ETA 9035 is not properly completed. Examples of a Form ETA 9035 which is not properly completed include instances where the employer has failed to check all the necessary boxes; or where the employer has failed to state the occupational classification, number of nonimmigrants sought, wage rate, period of intended employment, place of intended employment, or prevailing wage and its source; or where the application does not contain the signature of the employer or the employer's authorized agent or representative.

(ii) When the Form ETA ETA 9035 contains obvious inaccuracies. An obvious inaccuracy will be found if the employer files an application in error—*e.g.,* where the Administrator, Wage and Hour Division, after notice and opportunity for a hearing pursuant to subpart I of this part, has notified ETA in writing that the employer has been disqualified from employing H–1B nonimmigrants under section 212(n)(2) of the INA. Examples of other obvious inaccuracies include stating a wage rate below the FLSA minimum wage, submitting a labor condition application earlier than six months before the beginning date of the period of intended employment, identifying multiple occupations on a single labor condition application, identifying places of employment within the jurisdiction of more than one ETA regional office on a single labor condition application, identifying a wage which is below the prevailing wage listed on the LCA, or identifying a wage range where the bottom of such wage range is lower than the prevailing wage listed on the LCA.

(3) *Correction and resubmission of labor condition application.* If the labor condition application is not certified pursuant to paragraph (a)(2) (i) or (ii) of this section, ETA shall return it to the employer, or the employer's authorized agent or representative, explaining the reasons for such return without certification. The employer may immediately submit a corrected application to ETA. A ''resubmitted'' or ''corrected'' labor condition application shall be treated as a new application by the regional office (*i.e.,* on a ''first come, first served'' basis) *except that* if the labor condition application is not certified pursuant to paragraph (a)(2)(ii) of this section because of notification by the Administrator of the employer's disqualification, such action shall be the final decision of the Secretary and no application shall be resubmitted by the employer.

(b) *Challenges to labor condition applications.* ETA shall not consider information contesting a labor condition application received by ETA prior to the determination on the application. Such information shall not be made part of ETA's administrative record on the application, but shall be referred to ESA to be processed as a complaint pursuant to subpart I of this part, and, if such application is certified by ETA, the complaint will be handled by ESA under subpart I of this part.

(c) *Truthfulness and adequacy of information.* DOL is not the guarantor of the accuracy, truthfulness or adequacy of a certified labor condition application.

The burden of proof is on the employer to establish the truthfulness of the information contained on the labor condition application.

§ 655.750 Validity period of the labor condition application.

(a) *Validity of certified labor condition applications.* A labor condition application which has been certified pursuant to the provisions of § 655.740 of this part shall be valid for the period of employment indicated on Form ETA 9035 by the authorized DOL official; however, in no event shall the validity period of a labor condition application begin before the application is certified or exceed three years. Where the labor condition application contains multiple periods of intended employment, the validity period shall extend to the latest date indicated or three years, whichever comes first.

(b) *Withdrawal of certified labor condition applications.* (1) An employer who has filed a labor condition application which has been certified pursuant to § 655.740 of this part may withdraw such labor condition application at any time before the expiration of the validity period of the application, provided that:

(i) H–1B nonimmigrants are not employed at the place of employment pursuant to the labor condition application; and

(ii) The Administrator has not commenced an investigation of the particular application. Any such request for withdrawal shall be null and void; and the employer shall remain bound by the labor condition application until the enforcement proceeding is completed, at which time the application may be withdrawn.

(2) Requests for withdrawals shall be in writing and shall be directed to the regional ETA Certifying Officer.

(3) An employer shall comply with the ''required wage rate'' and ''prevailing working conditions'' statements of its labor condition application required under §§ 655.731 and 655.732 of this part, respectively, even if such application is withdrawn, at any time H–1B nonimmigrants are employed pursuant to the application, unless the application is superseded by a subsequent application which is certified by ETA.

(4) An employer's obligation to comply with the ''no strike or lockout'' and ''notice'' statements of its labor condition application (required under §§ 655.733 and 655.734 of this part, respectively), shall remain in effect and the employer shall remain subject to investigation and sanctions for misrepresentation on these statements even if such application is withdrawn, regardless of whether H–1B nonimmigrants are actually employed, unless the application is superseded by a subsequent application which is certified by ETA.

(5) Only for the purpose of assuring the labor standards protections afforded under the H–1B program, where an employer files a petition with INS under the H–1B classification pursuant to a certified LCA that had been withdrawn by the employer, such petition filing binds the employer to all obligations under the withdrawn LCA immediately upon receipt of such petition by INS.

(c) *Invalidation or suspension of a labor condition application.* (1) Invalidation of a labor condition application shall result from enforcement action(s) by the Administrator, Wage and Hour Division, under subpart I of this part—*e.g.*, a final determination finding the employer's failure to meet the application's condition regarding strike or lockout; or the employer's willful failure to meet the wage and working conditions provisions of the application; or the employer's substantial failure to meet the notice of specification requirements of the application; see §§ 655.734 and 655.760 of this part; or the misrepresentation of a material fact in an application. Upon notice by the Administrator of the employer's disqualification, ETA shall invalidate the application and notify the employer, or the employer's authorized agent or representative. ETA shall notify the employer in writing of the reason(s) that the application is invalidated. When a labor condition application is invalidated, such action shall be the final decision of the Secretary.

(2) Suspension of a labor condition application may result from a discovery by ETA that it made an error in certifying the application because such application is incomplete, contains one or more obvious inaccuracies, or has

not been signed. In such event, ETA shall immediately notify INS and the employer. When an application is suspended, the employer may immediately submit to the certifying officer a corrected or completed application. If ETA does not receive a corrected application within 30 days of the suspension, or if the employer was disqualified by the Administrator, the application shall be immediately invalidated as described in paragraph (c) of this section.

(3) An employer shall comply with the ''required wages rate'' and ''prevailing working conditions'' statements of its labor condition application required under §§ 655.731 and 655.732 of this part, respectively, even if such application is suspended or invalidated, at any time H–1B nonimmigrants are employed pursuant to the application, unless the application is superseded by a subsequent application which is certified by ETA.

(4) An employer's obligation to comply with the ''no strike or lockout'' and ''notice'' statements of its labor condition application (required under §§ 655.733 and 655.734 of this part, respectively), shall remain in effect and the employer shall remain subject to investigation and sanctions for misrepresentation on these statements even if such application is suspended or invalidated, regardless of whether H–1B nonimmigrants are actually employed, unless the application is superseded by a subsequent application which is certified by ETA.

(d) *Employers subject to disqualification.* No labor condition application shall be certified for an employer which has been found to be disqualified from participation, in the H–1B program as determined in a final agency action following an investigation by the Wage and Hour Division pursuant to subpart I of this part.

§ 655.760 Public access; retention of records.

(a) *Public examination.* The employer shall make a filed labor condition application and necessary supporting documentation available for public examination at the employer's principal place of business in the U.S. or at the place of employment within one working day after the date on which the labor condition application is filed with DOL. The following documentation shall be necessary:

(1) A copy of the completed labor condition application, Form ETA 9035. If the application is submitted by facsimile transmission, the application containing the original signature shall be maintained by the employer;

(2) Documentation which provides the wage rate to be paid the H–1B nonimmigrant;

(3) A full, clear explanation of the system that the employer used to set the ''actual wage'' the employer has paid or will pay workers in the occupation for which the H–1B nonimmigrant is sought, including any periodic increases which the system may provide—*e.g.*, memorandum summarizing the system or a copy of the employer's pay system or scale (payroll records are not required, although they shall be made available to the Department in an enforcement action).

(4) A copy of the documentation the employer used to establish the ''prevailing wage'' for the occupation for which the H–1B nonimmigrant is sought (a general description of the source and methodology is all that is required to be made available for public examination; the underlying individual wage data relied upon to determine the prevailing wage is not a public record, although it shall be made available to the Department in an enforcement action); and

(5) A copy of the document(s) with which the employer has satisfied the union/employee notification requirements of § 655.734 of this part.

(b) *National list of applications.* ETA shall compile and maintain on a current basis a list of the labor condition applications. Such list shall be by employer, showing the occupational classification, wage rate(s), number of nonimmigrants sought, period(s) of intended employment, and date(s) of need for each employer's application. The list shall be available for public examination at the Department of Labor, 200 Constitution Avenue, NW., Room N–4456, Washington, DC 20210.

(c) *Retention of records.* Either at the employer's principal place of business in the U.S. or at the place of employment, the employer shall retain copies

of the labor condition application, required wage information, and documentation showing provision of notice to bargaining representatives or employees at the place of employment for a period of one year beyond the end of the period of employment specified on the labor condition application or one year from the date the labor condition application was withdrawn, except that if an enforcement action is commenced, the documentation shall be retained until the enforcement proceeding is completed through the procedures set forth in subpart I of this part. Required payroll records for the H–1B employees and other employees in the occupational classification shall be retained at the employer's principal place of business in the U.S. or at the place of employment for a period of three years from the date(s) of the creation of the record(s), except that if an enforcement action is commenced, all payroll records shall be retained until the enforcement proceeding is completed through the procedures set forth in subpart I of this part.

(Approved by the Office of Management and Budget under control number 1205–0310)

[59 FR 65659, 65676, Dec. 20, 1994, as amended at 60 FR 4029, Jan. 19, 1995]

APPENDIX A TO SUBPART H—GUIDANCE FOR DETERMINATION OF THE ''ACTUAL WAGE''

In determining the required wage rate, in addition to obtaining the prevailing wage, the employer must establish the actual wage for the occupation in which the H–1B nonimmigrant is employed by the employer. For purposes of establishing its compensation system for workers in an occupational category, an employer may take into consideration objective standards relating to experience, qualifications, education, specific job responsibility and function, specialized knowledge, and other legitimate business factors. The use of any or all these factors is at the discretion of the employer. The employer must have and document an objective system used to determine the wages of non–H–1B workers, and apply that system to H–1B nonimmigrants as well. It is not sufficient for the employer simply to calculate an average wage of all non–H–1B employees in an occupation; the actual wage is not an ''average wage''.

The documents explaining the system must be maintained in the public disclosure file. The explanation of the compensation system must be sufficiently detailed to enable a third party to apply the system to arrive at the actual wage rate computed by the employer for any H–1B nonimmigrant. The computation of the H–1B nonimmigrant's individual actual wage rate must be documented in the H–1B nonimmigrant's personnel file.

Assuming the actual wage is higher than the prevailing wage and thus is the required wage rate, if an employer gives its employees a raise at year's end or if the system provides for other adjustments in wages, H–1B nonimmigrants must also be given the raise (consistent with legitimate employer-established criteria such as level of performance, attendance, *etc.*). This is consistent with Congressional intent that H–1B nonimmigrants and similarly employed U.S. workers be provided the same wages.

Where the employer's pay system or scale provides adjustments during the validity period of the LCA—*e.g.*, cost-of-living increase or other annual adjustments, increase in the entry-level rate for the occupation due to market forces, or the employee moves into a more advanced level in the same occupation—the employer shall retain documentation explaining the changes and clearly showing that, after such adjustments, the wages paid to the H–1B nonimmigrant are at least the greater of the adjusted actual wage or the prevailing wage for the occupation in the area of intended employment.

The following examples illustrate these principles:

(1) Worker A is paid $10.00 per hour and supervises two employees. Worker B, who is similarly qualified and performs substantially the same job duties except for supervising other employees, is paid $8.00 per hour because he/she has no supervisory responsibility.

The compensation differential is acceptable because it is based upon a relevant distinction in job duties, responsibilities, and functions: The difference in the supervisory responsibilities of the two employees. The actual wage in this occupation at the worksite for workers with supervisory responsibility is $10.00 per hour; the actual wage in this occupation at the worksite for workers without supervisory responsibility is $8.00 per hour.

(2) Systems Analyst A has experience with a particular software which the employer is interested in purchasing, of which none of the employer's current employees have knowledge. The employer buys the software and hires Systems Analyst A on an H–1B visa to train the other employees in its application. The employer pays Systems Analyst A more than its other Systems Analysts who are otherwise similarly qualified.

The compensation differential is acceptable because of the distinction in the specialized knowledge and the job duties of the employees. Systems Analyst A, in addition to the qualifications and duties normally associated with this occupation at the employer's worksite, is also specially knowledgeable and responsible for training the employer's other Systems Analysts in a new software package. As a result, Systems Analyst A commands a higher actual wage. However, if the employer employs other similarly qualified systems analysts who also have unique knowledge and perform similar duties in training other analysts in their area of expertise, the actual wage for Systems Analyst A would have to be at least equivalent to the actual wage paid to such similarly employed analysts.

(3) An employer seeks a scientist to conduct AIDS research in the employer's laboratory. Research Assistants A (a U.S. worker) and B (an H–1B nonimmigrant) both hold Ph.D's in the requisite field(s) of study and have the same number of years of experience in AIDS research. However, Research Assistant A's experience is on the cutting edge of a breakthrough in the field and his/her work history is distinguished by frequent praise and recognition in writing and through awards. Research Assistant B (the nonimmigrant) has a respectable work history but has not conducted research which has been internationally recognized. Employer pays Research Assistant A $10,000 per year more than Research Assistant B in recognition of his/her unparalleled expertise and accomplishments. The employer now wants to hire a third Research Assistant on an H–1B visa to participate in the work.

The differential between the salary paid Research Assistant A (the U.S. worker) and Research Assistant B (an H–1B nonimmigrant) is acceptable because it is based upon the specialized knowledge, expertise and experience of Research Assistant A, demonstrated in writing. The employer is not required to pay Research Assistant B the same wage rate as that paid Research Assistant A, even though they may have the same job titles. The actual wage required for the third Research Assistant, to be hired on an H–1B visa, would be the wage paid to Research Assistant B unless he/she has internationally recognized expertise similar to that of Research Assistant A. As set out in § 655.731(1)(A) the employer must have and document the system used in determining the actual wage of H–1B nonimmigrants. The explanation of the system must be such that a third party may use the system to arrive at the actual wage paid the H–1B nonimmigrant.

(4) Employer located in City X seeks experienced mechanical engineers. In City X, the prevailing wage for such engineers is $49,500 annually. In setting the salaries of U.S. workers, employer pays its nonsupervisory mechanical engineers with 5 to 10 years of experience between $50,000 and $75,000 per year, using defined pay scale ''steps'' tied to experience. Employer hires engineers A, B, and C, who each have five years of experience and similar qualifications and will perform substantially the same nonsupervisory job duties. Engineer A is from Japan, where he/she earns the equivalent of $80,000 per year. Engineer B is from France and had been earning the equivalent of $50,000 per year. Engineer C is from India and had been earning the equivalent of $20,000 per year. Employer pays Engineer A $80,000 per year, Engineer B $50,000, and Engineer C $20,000 as the employer has had a long-established system of maintaining the home-country pay levels of temporary foreign workers.

The INA requires that the employer pay the H–1B nonimmigrant at least the actual wage or the prevailing wage, whichever is greater, but there is no prohibition against paying an H–1B nonimmigrant a greater wage. Therefore, Engineer A may lawfully be paid the $80,000 per year. Engineer B's salary of $50,000 is acceptable, since this is the employer's actual wage for an engineer with Engineer B's experience and duties. Engineer C's salary, however, at a rate of $20,000 per year, is unacceptable under the law, even given the employer's ''long-established 'home country' system,'' since $20,000 would be below both the actual wage and the prevailing wage. The latter situation is an example of an illegitimate business factor, *i.e.*, a system to maintain salary parity with peers in the country of origin, which yields a wage below the required wage levels.

Subpart I—Enforcement of H–1B Labor Condition Applications

SOURCE: 59 FR 65672, 65676, Dec. 20, 1994, unless otherwise noted.

§ 655.800 Enforcement authority of Administrator, Wage and Hour Division.

(a) *Authority of Administrator.* The Administrator shall perform all the Secretary's investigative and enforcement functions under section 212(n) of the INA (8 U.S.C. 1182(n)) and subparts H and I of this part.

(b) *Conduct of investigations.* The Administrator, either pursuant to a complaint or otherwise, shall conduct such investigations as may be appropriate and, in connection therewith, enter and inspect such places and such records (and make transcriptions or copies thereof), question such persons and

gather such information as deemed necessary by the Administrator to determine compliance regarding the matters which are the subject of the investigation.

(c) *Availability of records.* An employer being investigated shall make available to the Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. No employer subject to the provisions of section 212(n) of the INA (8 U.S.C. 1182(n)) and/or subpart H or I of this part shall interfere with any official of the Department of Labor performing an investigation, inspection or law enforcement function pursuant to 8 U.S.C. 1182(n) or subpart H or I of this part. Any such interference shall be a violation of the labor condition application and the regulations in subparts H and I of this part, and the Administrator may take such further actions as the Administrator considers appropriate.

(NOTE: Federal criminal statutes prohibit certain interference with a Federal officer in the performance of official duties. 18 U.S.C. 111 and 18 U.S.C. 1114.)

(d) *Employer cooperation.* (1) An employer subject to subpart H or I of this part shall at all times cooperate in administrative and enforcement proceedings. No employer shall intimidate, threaten, restrain, coerce, blacklist, discharge, retaliate, or in any manner discriminate against any person because such person has:

(i) Filed a complaint or appeal under or related to section 212(n) of the INA (8 U.S.C. 1182(n)) or subpart H or I of this part;

(ii) Testified or is about to testify in any proceeding under or related to section 212(n) of the INA (8 U.S.C. 1182(n)) or subpart H or I of this part;

(iii) Exercised or asserted on behalf of himself or herself or others any right or protection afforded by section 212(n) of the INA (8 U.S.C. 1182(n)) or subpart H or I of this part;

(iv) Consulted with an employee of a legal assistance program or an attorney on matters related to section 212(n) of the INA (8 U.S.C. 1182(n)) or to subpart H or I of this part or any other DOL regulation promulgated pursuant to 8 U.S.C. 1182(n).

(2) In the event of such intimidation or restraint as are described in this paragraph (d), the conduct shall be a violation of the labor condition application and subparts H and I of this part, and the Administrator may take such further actions as the Administrator considers appropriate.

(e) *Confidentiality.* The Administrator shall, to the extent possible under existing law, protect the confidentiality of any person who provides information to the Department in confidence in the course of an investigation or otherwise under subpart H or I of this part.

§ 655.805 Complaints and investigative procedures.

(a) The Administrator, through an investigation either pursuant to a complaint or otherwise, shall determine whether an H–1B employer has:

(1) Filed a labor condition application with ETA which misrepresents a material fact.

(NOTE: Federal criminal statutes provide penalties of up to $10,000 and/or imprisonment of up to 5 years for knowing and willful submission of false statements to the Federal Government. 18 U.S.C. 1001; see also 18 U.S.C. 1546);

(2)(i) Willfully failed to pay wages as required under § 655.731 of this part;

(ii) Willfully failed to provide the working conditions required under § 655.732 of this part;

(3) Filed a labor condition application for H–1B nonimmigrants during a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment (see § 655.733 of this part); or

(4) Substantially failed to provide notice of the filing of the labor condition application as required in § 655.734 of this part;

(5) Substantially failed to be specific on the labor condition application as to the number of workers sought, the occupational classification in which the H–1B nonimmigrants will be employed, or the wage rate and conditions under which the H–1B nonimmigrants will be employed;

(6) Failed to pay wages as required under § 655.731 of this part, for purposes of the assessment of back wages (pursuant to § 655.810(a) of this part);

(7) Failed to make available for public examination the application and

necessary document(s) at the employer's principal place of business or worksite as required in § 655.760(a);

(8) Failed to retain documentation as required by § 655.760(c) of this part; or

(9) Failed otherwise to comply in any other manner with the provisions of subpart H or I of this part.

(b) For purposes of this part, ''willful failure'' means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to Section 212(n)(1)(A) (i) or (ii) of the INA, or § 655.731 or 655.732 of this part. See *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128 (1988); see also *Trans World Airlines* v. *Thurston,* 469 U.S. 111 (1985).

(c) Pursuant to §§ 655.740(a)(1) and 655.750 of this part, the provisions of this part become applicable upon the date of ETA's notification that the employer's labor condition application is certified, whether or not the employer hires any H–1B nonimmigrants in the occupation for the period of employment covered in the labor condition application. Should the period of employment specified in the labor condition application expire or should the employer withdraw the application in accordance with § 655.750(b) of this part, the provisions of this part will no longer apply with respect to such application, except as provided in § 655.750(b)(3) and (4) of this part.

(d) Any aggrieved person or organization (including bargaining representatives and governmental officials) may file a complaint alleging a violation described in paragraph (a) of this section.

(1) No particular form of complaint is required, except that the complaint shall be written or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the complaint.

(2) The complaint shall set forth sufficient facts for the Administrator to determine whether an investigation is warranted, in that there is reasonable cause to believe that a violation as described in paragraph (a) of this section has been committed. This determination shall be made within 10 days of the date that the complaint is received by a Wage and Hour Division official. If the Administrator determines that the complaint fails to present reasonable cause for an investigation, the Administrator shall so notify the complainant, who may submit a new complaint, with such additional information as may be necessary. No hearing pursuant to this subpart shall be available where the Administrator determines that an investigation on a complaint is not warranted.

(3) If the Administrator determines that an investigation on a complaint is warranted, the complaint shall be accepted for filing; an investigation shall be conducted and a determination issued within 30 calendar days of the date of filing.

(4) In the event that the Administrator seeks a prevailing wage determination from ETA pursuant to § 655.731(d) of this part, or advice as to prevailing working conditions from ETA pursuant to § 655.732(c)(2) of this part, the 30-day investigation period shall be suspended from the date of the Administrator's request to the date of the Administrator's receipt of the wage determination (or, in the event that the employer challenges the wage determination through the Employment Service complaint system, to the date of the completion of such complaint process) or advice as to prevailing working conditions.

(5) A complaint must be filed not later than 12 months after the latest date on which the alleged violation(s) were committed, which would be the date on which the employer allegedly failed to perform an action or fulfill a condition specified in the LCA, or allegedly took an action which, through such action or inaction, demonstrates a misrepresentation of a material fact in the LCA regarding such action or inaction. This jurisdictional bar does not affect the scope of the remedies which may be assessed by the Administrator. Where, for example, a complaint is timely filed, back wages may be assessed for a period prior to one year before the filing of a complaint.

(6) A complaint may be submitted to any local Wage and Hour Division office. The addresses of such offices are found in local telephone directories. The office or person receiving such a complaint shall refer it to the office of the Wage and Hour Division administering the area in which the reported violation is alleged to have occurred.

(e) When an investigation has been conducted, the Administrator shall, pursuant to § 655.815 of this part, issue a written determination as to whether or not any violation(s) as described in paragraph (a) of this section has been committed.

§ 655.810 Remedies.

(a) Upon determining that the employer has failed to pay wages as required by § 655.731 of this part, the Administrator shall assess and oversee the payment of back wages to any H–1B nonimmigrant employed by the employer in the specific employment in question. The back wages shall be equal to the difference between the amount that should have been paid and the amount that actually was paid to such nonimmigrant(s);

(b) Upon determining that the employer has committed any violation(s) described in § 655.805(a) of this part (other than a violation of § 655.805(a)(6)), the Administrator may assess a civil money penalty not to exceed $1,000 per violation. In determining the amount of civil money penalty to be assessed, the Administrator shall consider the type of violation committed and other relevant factors. The factors which may be considered include, but are not limited to, the following:

(1) Previous history of violation, or violations, by the employer under the INA and subpart H or I of this part;

(2) The number of workers affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made by the violator in good faith to comply with the provisions of 8 U.S.C. 1182(n) and subparts H and I of this part;

(5) The violator's explanation of the violation or violations;

(6) The violator's commitment to future compliance; and

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss, potential injury or adverse effect with respect to other parties.

(c) In addition to back wages and civil money penalties, the Administrator may impose such other administrative remedy(ies) under this subpart as the Administrator deems appropriate.

(d) The civil money penalties, back wages, and/or any other remedy(ies) determined by the Administrator to be appropriate are immediately due for payment or performance upon the assessment by the Administrator, or upon the decision by an administrative law judge where a hearing is timely requested, or the decision by the Secretary where review is granted. The employer shall remit the amount of the civil money penalty by certified check or money order made payable to the order of ''Wage and Hour Division, Labor.'' The remittance shall be delivered or mailed to the Wage and Hour Division office in the manner directed in the Administrator's notice of determination. The performance of any other remedy prescribed by the Administrator shall follow procedures established by the Administrator. Distribution of back wages shall be administered in accordance with existing procedures established by the Administrator.

§ 655.815 Written notice and service of Administrator's determination.

(a) The Administrator's determination, issued pursuant to § 655.805 of this part, shall be served on the complainant, the employer, and other known interested parties by personal service or by certified mail at the parties' last known addresses. Where service by certified mail is not accepted by the party, the Administrator may exercise discretion to serve the determination by regular mail.

(b) The Administrator shall file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the complaint and the Administrator's determination.

(c) The Administrator's written determination required by § 655.805 of this part shall:

(1) Set forth the determination of the Administrator and the reason or reasons therefor, and in the case of a finding of violation(s) by an employer, prescribe any remedies, including the amount of any back wages assessed, the amount of any civil money penalties assessed and the reason therefor, and/or any other remedies assessed.

(2) Inform the interested parties that they may request a hearing pursuant to § 655.820 of this part.

(3) Inform the interested parties that in the absence of a timely request for a hearing, received by the Chief Administrative Law Judge within 15 calendar days of the date of the determination, the determination of the Administrator shall become final and not appealable.

(4) Set forth the procedure for requesting a hearing, give the addresses of the Chief Administrative Law Judge (with whom the request must be filed) and the representative(s) of the Solicitor of labor (upon whom copies of the request must be served).

(5) Inform the parties that, pursuant to § 655.855 of this part, the Administrator shall notify ETA and the Attorney General of the occurrence of a violation by the employer.

§ 655.820 Request for hearing.

(a) Any interested party desiring to request an administrative hearing in accordance with section 556 of title 5, United States Code, on a determination issued pursuant to §§ 655.805 and 655.815 of this part shall make such request in writing to the Chief Administrative Law Judge at the address stated in the notice of determination.

(b) Interested parties may request a hearing in the following circumstances:

(1) The complainant or any other interested party may request a hearing where the Administrator determines, after investigation, that there is no basis for a finding that an employer has committed violation(s). In such a proceeding, the party requesting the hearing shall be the prosecuting party and the employer shall be the respondent; the Administrator may intervene as a party or appear as *amicus curiae* at any time in the proceeding, at the Administrator's discretion.

(2) The employer or any other interested party may request a hearing where the Administrator determines, after investigation, that the employer has committed violation(s). In such a proceeding, the Administrator shall be the prosecuting party and the employer shall be the respondent.

(c) No particular form is prescribed for any request for hearing permitted by this section. However, any such request shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the notice of determination giving rise to such request;

(4) State the specific reason or reasons why the party requesting the hearing believes such determination is in error;

(5) Be signed by the party making the request or by an authorized representative of such party; and

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto.

(d) The request for such hearing shall be received by the Chief Administrative Law Judge, at the address stated in the Administrator's notice of determination, no later than 15 calendar days after the date of the determination. An interested party which fails to meet this 15-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the administrative law judge, either through intervention as a party pursuant to 29 CFR 18.10 (b) through (d) or through participation as an *amicus curiae* pursuant to 29 CFR 18.12.

(e) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service. For the requesting party's protection, if the request is by mail, it should be by certified mail. If the request is by facsimile transmission, the original of the request, signed by the requestor or authorized representative, shall be filed within ten days.

(f) Copies of the request for a hearing shall be sent by the requestor to the Wage and Hour Division official who issued the Administrator's notice of determination, to the representative(s) of the Solicitor of Labor identified in the notice of determination, and to all known interested parties.

§ 655.825 Rules of practice for administrative law judge proceedings.

(a) Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this

subpart, the ''Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges'' established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings under this subpart.

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) shall not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

§ 655.830 Service and computation of time.

(a) Under this subpart, a party may serve any pleading or document by regular mail. Service on a party is complete upon mailing to the last known address. No additional time for filing or response is authorized where service is by mail. In the interest of expeditious proceedings, the administrative law judge may direct the parties to serve pleadings or documents by a method other than regular mail.

(b) Two (2) copies of all pleadings and other documents in any administrative law judge proceeding shall be served on the attorneys for the Administrator. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–2716, Washington, DC 20210, and one copy shall be served on the attorney representing the Administrator in the proceeding.

(c) Time will be computed beginning with the day following the action and includes the last day of the period unless it is a Saturday, Sunday, or federally-observed holiday, in which case the time period includes the next business day.

§ 655.835 Administrative law judge proceedings.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 655.820 of this part, the Chief Administrative Law Judge shall promptly appoint an administrative law judge to hear the case.

(b) Within 7 calendar days following the assignment of the case, the administrative law judge shall notify all interested parties of the date, time and place of the hearing. All parties shall be given at least fourteen calendar days notice of such hearing.

(c) The date of the hearing shall be not more than 60 calendar days from the date of the Administrator's determination. Because of the time constraints imposed by the INA, no request for postponement shall be granted except for compelling reasons. Even where such reasons are shown, no request for postponement of the hearing beyond the 60-day deadline shall be granted except by consent of all the parties to the proceeding.

(d) The administrative law judge may prescribe a schedule by which the parties are permitted to file a prehearing brief or other written statement of fact or law. Any such brief or statement shall be served upon each other party in accordance with § 655.830 of this part. Posthearing briefs will not be permitted except at the request of the administrative law judge. When permitted, any such brief shall be limited to the issue or issues specified by the administrative law judge, shall be due within the time prescribed by the administrative law judge, and shall be served on each other party in accordance with § 655.830 of this part.

§ 655.840 Decision and order of administrative law judge.

(a) Within 60 calendar days after the date of the hearing, the administrative law judge shall issue a decision. If any party desires review of the decision, including judicial review, a petition for Secretary's review thereof shall be filed as provided in § 655.845 of this subpart. If a petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the Secretary issues an order affirming the decision, or, unless and

until 30 calendar days have passed after the Secretary's receipt of the petition for review and the Secretary has not issued notice to the parties that the Secretary will review the administrative law judge's decision.

(b) The decision of the administrative law judge shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator; the reason or reasons for such order shall be stated in the decision.

(c) In the event that the Administrator's determination(s) of wage violation(s) and computation of back wages are based upon a wage determination obtained by the Administrator from ETA during the investigation (pursuant to §655.731(d) of this part), and the administrative law judge determines that the Administrator's request was not warranted (under the standards in §655.731(d) of this part), the administrative law judge shall remand the matter to the Administrator for further proceedings on the issue(s) of the existence of wage violation(s) and/or the amount(s) of back wages owed. If there is no such determination and remand by the administrative law judge, the administrative law judge shall accept such wage determination as accurate. Such wage determination is one made by ETA, from which the employer did not file a timely complaint through the Employment Service complaint system or from which the employer has appealed through the ES complaint system and a final decision therein has been issued. See §655.731 of this part; see also 20 CFR 658.420 through 658.426. Under no circumstances shall the administrative law judge determine the validity of the wage determination or require source data obtained in confidence by ETA or the SESA, or the names of establishments contacted by ETA or the SESA, to be submitted into evidence or otherwise disclosed.

(d) The administrative law judge shall not render determinations as to the legality of a regulatory provision or the constitutionality of a statutory provision.

(e) The decision shall be served on all parties in person or by certified or regular mail.

§ 655.845 Secretary's review of administrative law judge's decision.

(a) The Administrator or any interested party desiring review of the decision and order of an administrative law judge shall petition the Secretary to review the decision and order. To be effective, such petition shall be received by the Secretary within 30 calendar days of the date of the decision and order. Copies of the petition shall be served on all parties and on the administrative law judge.

(b) No particular form is prescribed for any petition for Secretary's review permitted by this subpart. However, any such petition shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;

(4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;

(5) Be signed by the party filing the petition or by an authorized representative of such party;

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(7) Attach copies of the administrative law judge's decision and order, and any other record documents which would assist the Secretary in determining whether review is warranted.

(c) Whenever the Secretary determines to review the decision and order of an administrative law judge, a notice of the Secretary's determination shall be served upon the administrative law judge and upon all parties to the proceeding within 30 calendar days after the Secretary's receipt of the petition for review.

(d) Upon receipt of the Secretary's notice, the Office of Administrative Law Judges shall within fifteen calendar days forward the complete hearing record to the Secretary.

(e) The Secretary's notice shall specify:

(1) The issue or issues to be reviewed;

(2) The form in which submissions shall be made by the parties (*e.g.*, briefs);

(3) The time within which such submissions shall be made.

(f) All documents submitted to the Secretary shall be filed with the Secretary of Labor, U.S. Department of Labor, Washington, DC 20210, Attention: Executive Director, Office of Administrative Appeals, Room S–4309. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Secretary until actually received by the Secretary. All documents, including documents filed by mail, shall be received by the Secretary either on or before the due date.

(g) Copies of all documents filed with the Secretary shall be served upon all other parties involved in the proceeding. Service upon the Administrator shall be in accordance with § 655.830(b) of this part.

(h) The Secretary's final decision shall be issued within 180 calendar days from the date of the notice of intent to review. The Secretary's decision shall be served upon all parties and the administrative law judge.

(i) Upon issuance of the Secretary's decision, the Secretary shall transmit the entire record to the Chief Administrative Law Judge for custody pursuant to § 655.850 of this part.

§ 655.850 Administrative record.

The official record of every completed administrative hearing procedure provided by subparts H and I of this part shall be maintained and filed under the custody and control of the Chief Administrative Law Judge. Upon receipt of a complaint seeking review of the final agency action in a United States District Court, the Chief Administrative Law Judge shall certify the official record and shall transmit such record to the clerk of the court.

§ 655.855 Notice to the Employment and Training Administration and the Attorney General.

(a) The Administrator shall notify the Attorney General and ETA of the final determination of a violation listed under § 655.805(a) (1) through (5) by an employer upon the earliest of the following events:

(1) Where the Administrator determines that there is a basis for a finding of violation by an employer, and no timely request for hearing is made pursuant to § 655.820 of this part; or

(2) Where, after a hearing, the administrative law judge issues a decision and order finding a violation by an employer, and no timely petition for review to the Secretary is made pursuant to § 655.845 of this part; or

(3) Where a petition for review is taken from an administrative law judge's decision finding a violation and the Secretary either declines within thirty days to entertain the appeal, pursuant to § 655.845(c) of this part, or the Secretary affirms the administrative law judge's determination; or

(4) Where the administrative law judge finds that there was no violation by an employer, and the Secretary, upon review, issues a decision pursuant to § 655.845 of this part, holding that a violation was committed by an employer.

(b) The Attorney General, upon receipt of notification from the Administrator pursuant to paragraph (a) of this section, shall not approve petitions filed with respect to that employer under sections 204 or 214(c) of the INA (8 U.S.C. 1154 and 1184(c)) during a period of at least one year for nonimmigrants to be employed by the employer.

(c) ETA, upon receipt of the Administrator's notice pursuant to paragraph (a) of this section, shall invalidate the employer's labor condition application(s) under subparts H and I of this part, and shall not accept for filing any application or attestation submitted by the employer under 20 CFR part 656 or subparts A, B, C, D, E, H, or I of this part, for a period of 12 months or for a longer period if such is specified by the Attorney General for visa petitions filed by that employer under sections 204 and 214(c) of the INA.

Subpart J—Attestations by Employers Using F–1 Students in Off-Campus Work

SOURCE: 56 FR 56865, 56876, Nov. 6, 1991, unless otherwise noted.

§ 655.900 Purpose, procedure and applicability of subparts J and K of this part.

(a) *Purpose.* The Immigration Act of 1990 (Act) at section 221 creates a three-year work authorization program beginning October 1, 1991, for aliens admitted as F–1 students described in subparagraph (F) of section 101 (a)(15) of the Immigration and Nationality Act. 8 U.S.C. 1101(a)(15)(F). The Act specifies that the Attorney General shall grant an alien authorization to be employed in a position unrelated to the alien's field of study (*i.e.,* a position not involving curricular or post-graduate practical training) and off-campus if:

(1) The alien has completed one year of school as an F–1 student and is maintaining good academic standing at the educational institution;

(2) The employer provides the educational institution and the Secretary of Labor with an attestation regarding recruitment and rate of pay specified in paragraph (b) of this section; and

(3) The alien will not be employed more than 20 hours each week during the academic term (but may be employed on a full-time basis during vacation periods and between academic terms).

Subpart J of this part sets forth the procedure for filing attestations with the Department of Labor (the Department or DOL) for employers who seek to use F–1 students for off-campus work. Subpart K of this part sets forth complaint, investigation, and disqualification provisions with respect to such attestations.

(b) *Procedure.* (1) An employer must comply with the following procedure in order to hire F–1 students for off-campus employment:

(i) Recruit for 60 days before filing an attestation;

(ii) File the attestation with the DOL and the Designated School Official (DSO) of the educational institution before hiring any F–1 student(s);

(iii) Hire F–1 student(s) during the 90-day period following the last day of the recruitment period; and

(iv) Initiate a new 60-day recruitment effort in order to hire any F–1 student(s), under the valid attestation, after the 90-day hiring period. (A job order placed with the SESA as part of the employer's initial recruitment which remains ''open'' with the SESA shall satisfy the requirement regarding a new 60-day recruitment effort.)

(2) The employer's attestation shall state that the employer:

(i) Has recruited unsuccessfully for at least 60 days for the position and will recruit for 60 days for each position in which an F–1 student is hired under that attestation until September 30, 1996; and

(ii) Will provide for payment to the alien and to other similarly situated workers at a rate not less than the actual wage for the occupation at the place of employment, or if greater, the prevailing wage for the occupation in the area of intended employment.

(3) The employer shall file the attestation with the Designated School Official (DSO) of each educational institution from which it seeks to hire F–1 students. In fulfilling this requirement, the employer may file the attestation initially:

(i) With the appropriate Regional Office of ETA only; or

(ii) Simultaneously with the DSO and the appropriate Regional Office of ETA.

In either instance, under paragraph (b)(3) of this section, ETA will return to the employer a copy of the attestation with ETA's acceptance indicated thereon. The employer must then send a copy of each accepted attestation to the DSO. Where the employer has chosen to file the attestation simultaneously with DOL and the DSO, as described in paragraph (b)(3)(ii) of this section, the employer shall provide a copy of the accepted attestation to the DSO within 15 days after receiving the accepted attestation from DOL. The employer shall also retain the accepted attestation and produce it in the event the Department conducts an investigation to determine if the employer has made an attestation that is materially false or has failed to pay wages in accordance with the attestation. In no case may an employer hire an F–1 student for off-campus employment without first filing an attestation with DOL and the DSO. The employer may not

file the attestation with the DSO before it is filed with DOL or in the absence of filing the attestation with DOL. The DSO may treat an attestation as accepted for filing by DOL for the purpose of authorizing F–1 student employment upon its receipt by the school.

(4) The employer may file an attestation for one or more openings in the same occupation, or one or more positions in more than one occupation, provided that all occupations are listed on the attestation and all positions are located within the same geographic area of intended employment.

(5) The attestation shall be deemed ''accepted for filing'' on the date it is received by DOL. Where the attestation is not completed as set forth at §655.940(f)(1) of this part, it shall be returned to the employer which will have 15 days to correct the deficiency or it will be rejected. If the attestation is rejected, DOL will notify INS. Attestations deemed unacceptable under §655.940(f)(2) of this part may not be resubmitted.

(c) *Applicability*. Subparts J and K of this part apply to all employers who seek to employ F–1 students in off-campus work in positions unrelated to their field(s) of study.

(d) *Final date.* ETA will not accept attestations under this program after September 30, 1996.

(e) *Revalidation of employer attestations in effect on November 30, 1995.* Any employer's attestation which was valid on November 30, 1995, is revalidated effective on November 30, 1995, and shall remain valid through September 30, 1996, unless withdrawn or invalidated.

[56 FR 56865, 56876, Nov. 6, 1991, as amended at 59 FR 64776, 64777, Dec. 15, 1994; 60 FR 61210, 61211, Nov. 29, 1995]

§655.910 Overview of process.

This section provides a context for the attestation process to facilitate understanding by employers that seek to employ F–1 students in off-campus work.

(a) *Department of Labor's responsibilities.* The Department of Labor (DOL) administers the attestation process. Within DOL, the Employment and Training Administration (ETA) shall have responsibility for accepting and filing employer attestations on behalf of F–1 students; the Employment Standards Administration (ESA) shall be responsible for conducting any investigations concerning such attestations.

(b) *Employer attestation responsibilities.* Prior to hiring any F–1 student(s) for off-campus employment, an employer must submit an attestation on Form ETA–9034, as described in §655.940 of this part, to the Employment and Training Administration (ETA) of DOL at the address set forth at §655.930 of this part.

(1) The attesting employer shall file the attestation with the Designated School Official (DSO) of each educational institution from which it seeks to hire F–1 students. If the employer is filing the attestation with the DSO simultaneously to filing it with DOL, or prior to DOL's accepting it, the employer must provide the DSO with a copy of the accepted attestation within 15 days after receiving the attestation from DOL.

(2)(i) Each attestation shall be valid through September 30, 1996. Throughout the validity period of the attestation, the employer may hire F–1 students as needed, during the 90-day period immediately following each 60-day recruitment period, for the positions specified on Form ETA–9034, at the required wage rate, from any educational institution in the geographic area of intended employment. In order to employ F–1 students in any occupation(s) different from the occupation(s) specified in the attestation, the employer shall file a new attestation with ETA.

(ii) The employer shall have the burden of proving the truthfulness and accuracy of each attestation element in the event that such attestation element is challenged in an investigation.

(iii) Substantiating documentation in support of each attestation element must be maintained by the employer and shall be made available to DOL for inspection and copying upon request. If the employer maintains the specific documentation recommended in appendix A of this subpart, and the documentation is found to be truthful, accurate, and substantiates compliance, it shall meet the burden of proof. If the

employer chooses to support its attestation in a manner other than in accordance with appendix A of this subpart, the employer's documentation must be of equal probative value to that shown in appendix A of this subpart in the event of an investigation.

(c) *Designated School Official (DSO) responsibilities.* The Department notes that the basic responsibilities of the DSO are outlined in INS regulations at 8 CFR 214.2(f).

(1) DOL understands INS regulations to mean that the DSO at the educational institution is expected to assure that, prior to authorizing the off-campus employment of any F–1 student(s):

(i) It has received an attestation from the prospective employer;

(ii) The prospective employer has not been disqualified from participation in the F–1 student work authorization program (Employers disqualified from participation in the program are listed in the FEDERAL REGISTER. See § 655.950(b) of this part); and

(iii) The F–1 student(s) has completed one year of study and is maintaining good academic standing at the institution.

(2) It is also understood that the DSO will not authorize F–1 student(s) to work in excess of 20 hours per week during the academic term, and that the DSO shall notify ETA when the employer of F–1 student(s) has not provided the educational institution with an accepted copy of the attestation within 90 days of its receipt of the attestation from the employer.

(d) *Complaints.* (1) Complaints alleging that an attestation is materially false or that wages were not paid in accordance with the attestation may be filed by any aggrieved party with the Wage and Hour Division (Administrator), of the Employment Standards Administration, DOL, according to the procedures set forth in subpart K of this part.

(i) Examples of violations that may be alleged in a complaint include:

(A) The employer failed to pay an F–1 student the prevailing wage for the occupation in the area of intended employment;

(B) The employer failed to pay the actual wage for the position(s) at the employer's place of business; or

(C) The employer's recruitment efforts demonstrated that qualified U.S. workers were available for the position(s) filled by F–1 students.

(ii) The Administrator shall review the allegations contained in the complaint to determine if there are reasonable grounds to conduct an investigation. If, after investigation, the Administrator finds a violation, the Administrator shall disqualify the employer (after notice and opportunity for a hearing) from employing F–1 students and shall so notify INS.

(2) Complaints alleging that an F–1 student is not maintaining the required academic standing or is working in excess of the authorized number of hours of employment per week shall be filed with the INS.

(e) *Termination of program.* The pilot F–1 student visa program of section 221 of the Immigration Act of 1990 expires after September 30, 1996, and the Department of Labor will not accept any further employer attestations after that date. 8 U.S.C. 1184 note. However, complaints and appeals arising out of actions occurring prior to September 30, 1996, will continue to be received, investigated, and processed under the standards and procedures of subparts J and K of this part. Therefore, subparts J and K of this part remain in effect through the completion of such enforcement.

[56 FR 56865, 56876, Nov. 6, 1991, as amended at 59 FR 64777, Dec. 15, 1994; 60 FR 61210, 61211, Nov. 29, 1995]

§ 655.920 Definitions.

For the purposes of subparts J and K of this part:

Accepted for filing means that an attestation submitted by the employer or his designated agent or representative has been received and filed by the Employment and Training Administration of the Department of Labor.

Act means the Immigration Act of 1990, as amended.

Actual wage means the wage rate paid by the attesting employer to all similarly situated employees in the occupation at the worksite at the time of employment.

Administrative Law Judge means an official appointed pursuant to 5 U.S.C. 3105.

Administrator means the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor, or such authorized representatives as may be designated to perform any of the functions of the Administrator under subparts J and K of this part.

Area of intended employment means the geographic area within normal commuting distance of the place (address) of intended employment. If the place of intended employment is within a Metropolitan Statistical Area (MSA), any place within the MSA is deemed to be within normal commuting distance of the place of intended employment.

Attestation means a properly completed Form ETA–9034.

Attesting employer means any employer who has filed an attestation required by section 221 of the Act.

Attorney General means the chief official of the U.S. Department of Justice or the Attorney General's designee.

Chief Administrative Law Judge means the chief official of the Office of the Administrative Law Judges of the Department of Labor or the Chief Administrative Law Judge's designee.

Date of filing means the date an attestation is received by ETA as indicated by the date stamped on the attestation.

Department and *DOL* mean the United States Department of Labor.

Designated School Official (DSO) means the official of the educational institution who has authority to authorize off-campus employment of F–1 students pursuant to Immigration and Naturalization Service regulations at 8 CFR parts 214 and 274a.

Educational institution means the educational institution at which an alien admitted to the United States as an F–1 student is enrolled in a full course of study.

Employer means a person, firm, corporation, or other association or organization, which suffers or permits a person to work; and

(1) Which has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ workers at a place within the United States; and

(2) Which has an employer-employee relationship with respect to employees under subparts J and K of this part, as indicated by the fact that it may hire, fire, supervise or otherwise control the work of any such employee.

Employment and Training Administration (ETA) means the agency within the Department which includes the United States Employment Service (USES).

Employment Standards Administration (ESA) means the agency within the Department which includes the Wage and Hour Division.

F–1 nonimmigrant student (F–1 student) means an alien who has an F–1 visa. See 8 U.S.C. 1101(A)(15)(F)(i). lNS grants such a visa to an alien who has a residence in a foreign country which he/she has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who entered the United States temporarily and solely for the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States, particularly designated by him/her and approved by the Attorney General after consultation with the Department of Education of the United States. For purposes of subparts J and K, the term ''F–1 student'' shall refer to F–1 student(s) who will be employed in off-campus employment unrelated to their field(s) of study.

Immigration and Naturalization Service (lNS) means the component of the Department of Justice which administers the Department of Justice's principal functions under the Act.

INA means the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq.*

Independent authoritative source means a professional, business, trade, educational or governmental association, organization, or other similar entity, not owned or controlled by the employer, which has a recognized expertise in the occupational field.

Independent authoritative source survey means a survey of wages conducted by an independent authoritative source and published in a book, newspaper, periodical, looseleaf service, newsletter, or other similar medium, within the 24-

month period immediately preceding the filing of the employer's attestation and each succeeding annual prevailing wage update. Such survey shall:

(1) Reflect the average wage paid to workers similarly employed in the area of intended employment;

(2) Be based upon recently collected data—e.g., within the 24-month period immediately preceding the date of publication of the survey; and

(3) Represent the latest published prevailing wage finding by the authoritative source for the occupation in the area of intended employment.

Position means a single job opening in an occupation for which the attesting employer has recruited and either proposes to fill or has filled with an F–1 student.

Regional Certifying Officer means the official in the Employment and Training Administration in a Department of Labor regional office (or his/her designee) who is authorized to act on labor certifications and employment attestations on behalf of the Secretary of Labor.

Required wage rate means the rate of pay which is the higher of:

(1) The actual establishment wage rate for the occupation in which the F–1 student is to be (or is) employed; or

(2) The prevailing wage rate (adjusted on an annual basis) for the occupation in which the F–1 student is to be (or is) employed in the geographic area of intended employment.

Secretary means the Secretary of Labor or the Secretary's designee.

United States is defined at 8 U.S.C. 1101(a)(38).

United States (U.S.) worker means any U.S. citizen or alien who is legally permitted to work indefinitely within the United States.

§ 655.930 Addresses of Department of Labor regional offices.

Region I (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont): One Congress Street 10th Floor, Boston, MA 02114–2021. Telephone: 617–565–4446.

Region II (New York, New Jersey, Puerto Rico, and the Virgin Islands): 201 Varick Street, room 755, New York, NY 10014. Telephone: 212–660–2185.

Region III (Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia): Post Office Box 8796, Philadelphia, PA 19101. Telephone: 215–596–6363.

Region IV (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee): 1371 Peachtree Street, NE., Atlanta, GA 30309. Telephone: 404–347–3938.

Region V (Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin): 230 South Dearborn Street, room 605, Chicago, IL 60604. Telephone: 312–353–1550.

Region VI (Arkansas, Louisiana, New Mexico, Oklahoma, and Texas): 525 Griffin Street, room 314, Dallas, TX 75202. Telephone: 214–767–4989.

Region VII (Iowa, Kansas, Missouri, and Nebraska) 911 Walnut Street, Kansas City, MO 64106. Telephone: 816–426–3796.

Region VIII (Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming) 1961 Stout Street, 16th Floor, Denver, CO 80294. Telephone: 303–844–4613.

Region IX (Arizona, California, Guam, Hawaii, and Nevada) 71 Stevenson Street, room 830, San Francisco, CA 94119. Telephone: 415–744–6647.

Region X (Alaska, Idaho, Oregon, and Washington) 1111 Third Avenue, room 900, Seattle, WA 98101. Telephone: 206–553–5297.

The telephone numbers set forth in this section are not toll-free.

§ 655.940 Employer attestations.

(a) *Who may submit attestations?* An employer (or the employer's designated agent or representative) seeking to employ F–1 student(s) for off-campus work shall submit an attestation on Form ETA–9034. The attestation shall be signed by the employer (or the employer's designated agent or representative). For this purpose, the employer's authorized agent or representative shall mean an official of the employer who has the legal authority to commit the employer to the terms and conditions of F–1 student attestations.

(b) *Where and when should attestations be submitted?* (1) Attestations shall be submitted, by U.S. mail, private carrier, or facsimile transmission, to the appropriate ETA Regional office, as defined in § 655.920 of this part, not later than 60 days after the employer's recruitment period (see paragraph (d) of this section) has ended and shall be accepted for filing, returned, or rejected by ETA in accordance with paragraph (f) of this section.

(2) Attestations shall also be submitted to the Designated School Official (DSO) at each educational institution from which the employer seeks to hire any F–1 student(s). Attestations may be filed simultaneously with ETA and the DSO, or the employer may file the approved attestation with the DSO. However, in no case shall the employer file the attestation with the DSO before filing the attestation with ETA or in the absence of filing the attestation with ETA.

(3) If the attestation is submitted simultaneously with ETA and the DSO, and ETA does not receive its copy of the attestation, the Administrator, for purposes of enforcement proceedings under subpart K of this part, shall consider that the attestation was accepted for filing by ETA as of the date the attestation is received by the DSO.

(c) *What should be submitted?* (1) Form ETA–9034. One completed and dated original Form ETA–9034 (or a facsimile), containing the attestation elements referenced in paragraphs (d) and (e) of this section, and the original signature (or a facsimile of the original signature) of the employer (or the employer's authorized agent or representative) and one copy of Form ETA–9034 shall be submitted to ETA. Each attestation form shall identify the position(s) for which the attestation is provided, state the occupational division in which the position is located, by Dictionary of Occupational Titles (DOT) Two-Digit Occupational Divisions code, and shall state the rate(s) of pay for the position(s). The DOT Two-Digit Occupational Division code is required for DOL recordkeeping and reporting purposes only and should not be used by the employer to determine the prevailing wage, as it is too general for this purpose. (Copies of Form ETA–9034 are available at the addresses listed in §655.930 of this part). When an employer has filed an attestation by facsimile transmission, the employer shall retain in its files the original of the attestation which contains the employer's original signature.

(2) The employer may file an attestation for a single position or for multiple positions in the same occupation, or in multiple occupations, provided that all positions are located within the same geographic area of intended employment.

(3) If the employer files the attestation simultaneously with ETA and the DSO, or files the attestation first with ETA and subsequently files with the DSO before an accepted copy is returned from ETA to the employer, the employer shall, within fifteen days of receipt of ETA's notification of acceptance of the attestation for filing, provide an exact copy of the accepted attestation to the DSO at each educational institution from which the employer seeks to employ an F–1 student. The DSO shall notify ETA if the educational institution has not been provided with a copy of the attestation indicating that it was accepted for filing by ETA within 90 days from the date that the attestation was filed with the DSO.

(4) *Attestation Elements.* The attestation elements referenced in §655.940 (d) and (e) of this section are mandated by section 221(a)(2) of the Act (8 U.S.C. 1184 note). Section 221(a)(2) of the Act provides that one of the conditions for the Attorney General to grant F–1 students work authorization, as described in INA section 101(a)(15)(F), to be employed off-campus in positions unrelated to their field of study, is that the employer provides the educational institution and the Secretary with an attestation that the employer:

(i) Has recruited for at least 60 days for the position; and

(ii) Will pay the F–1 student and all other similarly situated workers at a rate not less than the ''required wage rate'' (see §655.920 of this part).

(d) *The first attestation element: 60-day recruitment.* An employer seeking to employ an F–1 student shall attest on Form ETA–9034 that it has recruited for at least 60 days for the position(s) and that a sufficient number of U.S. workers were not able, qualified, and available for the position(s).

(1) *Establishing the 60-day recruitment requirement.* (i) The first attestation element is demonstrated if the employer attests that:

(A) It has recruited unsuccessfully for U.S. workers for at least 60 days for the position prior to filing the attestation; and

(B) It will conduct at least 60 days of unsuccessful recruitment for U.S. workers for each position in which, and at each time at which (until September 30, 1996), an F–1 student is subsequently employed.

(ii) To satisfy paragraph (d)(1)(i)(A) of this section, the employer shall recruit for the position for 60 consecutive days by posting the job vacancy (or help wanted) notice at the worksite and by placing a job order with the State Employment Service agency (SESA) local office which services the worksite.

(iii) To satisfy paragraph (d)(1)(i)(B) of this section, the employer shall either:

(A) Recruit for each position vacancy in the manner required by paragraph (d)(1)(ii) of this section; or

(B) File an ''open job order'' with the SESA local office which services the worksite. The employer shall accept referrals from the SESA local office on the ''open job order''.

(2) *Documenting the first attestation element.* In the event of an investigation, the employer shall have the burden of proving that it has complied with the elements described in paragraph (d)(1) of this section and attested to on ETA Form 9034. Documentation that is truthful, accurate and substantiates compliance as identified in Appendix A to this subpart shall be sufficient to meet the employer's burden of proof. The employer retains the right to meet its burden of proof in proving its attestation through other sufficient means.

(i) Documentation shall not be submitted to ETA or to the DSO with the attestation, but employers must be able to produce sufficient documentary evidence to substantiate the attestation in the event of an investigation. Such documentation shall be made available to DOL as described in §§ 655.900(b)(3) and 655.1000(c) of this part.

(ii) Because complaints may be filed and enforcement proceedings may be conducted during a considerable period after the recruitment, the employer should be able to produce such substantiating documentary evidence for a period of no less than 18 months after the close of the recruitment period or, in the event of an investigation, for the period of the enforcement proceeding under subpart K of this part.

(e) *The second attestation element: wages.* An employer seeking to employ F–1 students shall state on Form ETA–9034 that it will pay the F–1 student(s) and other similarly employed worker(s) the ''required wage rate'' as defined in § 655.920 of this part. For purposes of this paragraph ''similarly employed'' shall mean employees of the employer working in the same positions under like conditions, such as the same shift on the same days of the week. Neither the actual wage rate nor a prevailing wage determination for attestation purposes made pursuant to this section shall permit an employer to pay a wage lower than that required under any other Federal, State, or local law.

(1) *Establishing the wage requirement.* The second attestation element shall be satisfied when the employer signs Form ETA–9034, attesting that for the validity period of the attestation the ''required wage rate'' will be paid to the F–1 student(s) and other similarly situated workers; that is, that the wage will be no less than the actual wage rate paid to workers similarly employed at the worksite, or the prevailing wage (adjusted on an annual basis) for the occupation in the area of intended employment, whichever is higher. The employer's obligation to pay the ''required wage rate'' for the position(s) named in the attestation shall continue throughout the validity period of the attestation; the employer's determination of the prevailing wage shall be updated annually, beginning with the date of the attestation. The prevailing wage rate for a position(s) named in the attestation, unless the subject of a Davis-Bacon Act or McNamara-O'Hara Service Contract Act wage determination described in paragraph (b)(4)(i) of appendix A of this subpart or a union contract as described in paragraph (b)(4)(ii) of appendix A of this subpart, shall be: The average rate of wages paid to workers

similarly employed in the area of intended employment. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages. For purposes of this section, ''similarly employed'' means having substantially comparable jobs in the occupational category in the area of intended employment, except that if no such workers are employed by employers other than the employer applicant in the area of intended employment ''similarly employed'' shall mean:

(i) Having jobs requiring a substantially similar level of skills within the area of intended employment; or

(ii) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

(2) *Documentation of the second attestation element.* In the event of a complaint and investigation, the employer shall have the burden of proving the validity of and compliance with the attestation element referenced in paragraph (e)(1) of this section and attested to on ETA Form 9034. Documentation that the Department finds to be truthful, accurate and substantiates compliance as identified in appendix A of this subpart should be sufficient to meet the employer's burden of proof. The employer retains the right to meet its burden of proof in proving its attestation through other sufficient means.

(i) Documentation shall not be submitted to ETA or to the DSO with the attestation, but the employer must substantiate its attestation with appropriate documentation in the event of an investigation. Such documentation shall be made available to DOL as described in §§ 655.900(b)(3) and 655.1000(c) of this part.

(ii) Because complaints may be filed and enforcement proceedings may be conducted during a considerable period after the determination the employer should be able to produce documentation substantiating its attestation for a period of no less than 18 months after the determination or update, or in the event of an investigation, for the period of the enforcement proceedings under subpart K of this part.

(f) *Actions on attestations submitted for filing.* Upon receipt of an attestation pursuant to this subpart, the Regional Certifying Officer shall determine whether the attestation is properly completed and whether there is cause to return the attestation to the employer as unacceptable.

(1) *Acceptable Attestations.* (i) Where all items on Form ETA–9034 have been completed and the attestation contains the signature of the employer or its authorized representative, the Regional Certifying Officer, except as provided in paragraph (f)(2)(ii) of this section, shall accept the attestation for filing. The Regional Certifying Officer shall return a copy of the accepted attestation to the employer or the employer's designated agent or representative, with ETA's acceptance indicated thereon. An attestation which is properly filled out in accordance with this section shall be deemed accepted for filing as of the date it is received by ETA as indicated by the date stamped thereon.

(ii) The employer shall file a copy of the accepted attestation with the DSO at the educational institution pursuant to § 655.940(c)(3) of this part.

(2) *Unacceptable Attestations.* ETA shall not accept an attestation for filing and shall return such attestation as unaccepted to the employer or the employer's designated agent or representative, when any one of the following conditions exists:

(i) Form ETA–9034 is not properly completed. Examples of Form ETA–9034 which is not properly completed include: instances where the employer has failed to complete all of the necessary items; or where the employer has failed to identify the position(s) or state the rate(s) of pay; or where the attestation does not contain the original signature (or facsimile of the signature when the attestation is submitted by facsimile transmission) of the employer or its authorized representative.

(ii) The Administrator, Wage and Hour Division, after notice and opportunity for a hearing pursuant to subpart K of this part, has notified ETA in writing that the employer has been disqualified from employing F–1 students

under section 221 of the Immigration Act.

(3) If the attestation is not accepted for filing pursuant to paragraph (f)(2)(i) of this section, ETA shall return it to the employer or the employer's agent or representative with written and dated notification of the reason(s) that the attestation is unacceptable. If the employer does not complete and return the attestation within 15 days of the date of such notification (as stated in paragraph (f)(4) of this section), ETA shall invalidate the attestation and shall notify the Attorney General of such invalidation. The Attorney General may then use such notification in its enforcement responsibilities. Employers shall not employ F–1 students without a valid attestation.

(4) *Resubmission.* When the attestation is determined to be unacceptable and is returned to the employer for completion pursuant to paragraph (f)(2)(i) of this section, the employer may resubmit the attestation. The employer shall resubmit the attestation within 15 days of the date of nonacceptance to avoid the invalidation of its attestation and ETA's notice to the Attorney General. Upon resubmission, if the attestation is determined to be acceptable pursuant to paragraph (f)(1) of this section, the Regional Certifying Officer shall accept the attestation for filing as of the original date of receipt by ETA, and shall return a copy of the attestation to the employer with ETA's acceptance indicated thereon.

(g) *Challenges to Attestations.* (1) ETA will not consider, prior to the acceptance or return of the attestation, information contesting an attestation received by ETA. Such information shall not be made part of ETA's administrative record on the attestation, but shall be referred to the Administrator to be processed as a complaint pursuant to subpart K of this part, and, if such attestation is accepted for filing by ETA, the complaint shall be handled by ESA under subpart K of this part.

(2) DOL is not the guarantor of the accuracy, truthfulness or adequacy of an attestation accepted for filing pursuant to this subpart.

(h) *Effective date and validity of filed attestations.* (1) A properly completed attestation accepted pursuant to paragraph (f)(1) of this section shall be deemed accepted for filing as of the date it is received and date stamped by the Regional Certifying Officer and shall be valid for the duration of the F–1 student work authorization program which expires on September 30, 1996, unless withdrawn pursuant to paragraph (i) of this section or invalidated pursuant to paragraph (j) of this section or subpart K of this part.

(2) During the validity period of an attestation which has been accepted for filing as described in paragraph (f)(1) of this section, the attesting employer may hire, during the 90-day period following the last day of its 60-day recruitment period, or at any time if the employer has placed an ''open job order'' with the SESA as part of their recruitment effort, F–1 students as needed from as many educational institutions as it deems necessary to fill the positions described in the attestation, at the location(s) specified in the attestation, and at the ''required wage rate.'' The employer shall provide a copy of the accepted attestation to the DSO at each educational institution from which it hires any F–1 student(s).

(3) The DSO may grant work authorization for an F–1 student to be employed by a particular attesting employer for the duration of the F–1 student's course of study or until September 30, 1996, whichever period is shorter, provided the F–1 student continues to be employed by the attesting employer and is otherwise eligible for F–1 student work authorization as determined by the Attorney General.

(i) *Withdrawal of accepted attestations.* (1) An employer who has submitted an attestation which has been accepted for filing may withdraw such attestation at any time before the expiration of the validity period of the attestation, unless the Administrator has found reasonable cause to commence an investigation of the attestation under subpart K of this part. Requests for such withdrawals shall be in writing and shall be directed to the Regional Certifying Officer with whom the attestation was filed.

(2) Upon the Regional Certifying Officer's receipt of an employer's written request to withdraw an attestation, it shall be the employer's responsibility

to promptly notify the DSO at each school where F–1 students it employs are enrolled.

(3) Withdrawal of an attestation shall not affect an employer's liability with respect to any failure to meet the conditions attested to which took place before the withdrawal, or for material misrepresentations in an attestation. However, if an employer has not yet employed any F–1 student(s) pursuant to the attestation, the Administrator shall not find reasonable cause to investigate unless it is alleged, and there is reasonable cause to believe, that the employer has made material misrepresentations in the attestation.

(j) *Invalidation of filed attestation.* Invalidation of an attestation may result from enforcement action(s) by the Administrator, Wage and Hour Division, under subpart K of this part (*i.e.,* investigation(s) conducted by the Administrator regarding the employer's material misrepresentation of an attestation element or failure to pay wages in accordance with attestation). Invalidation of an attestation may also result where ETA determines that the attestation is unacceptable and the employer fails to resubmit the attestation to ETA within 15 days.

(1) *Result of Wage and Hour Division action.* Upon a determination of a violation under subpart K of this part, the Administrator shall notify ETA and shall notify the Attorney General of the violation and of the Administrator's notice to ETA.

(2) *Result of ETA action.* If, after accepting an attestation for filing, ETA finds that it is unacceptable because it falls within one of the categories set forth at paragraph (f)(2)(i) of this section, ETA shall return the attestation to the employer for correction and resubmission within 15 days. If the employer fails to resubmit the attestation within 15 days of the date of the notification, ETA shall invalidate the attestation. ETA shall notify the Attorney General of such invalidation. Where the attestation has been invalidated, ETA shall return a copy of the attestation form to the employer, or the employer's agent or representative, and shall notify the employer in writing of the reason(s) that the attestation is invalidated. When an attestation is invalidated pursuant to paragraph (f)(2)(ii) of this section, ETA shall invalidate all attestations filed by the employer. Such action shall be the final decision of the Secretary of Labor and is not subject to appeal.

(k) *Employers subject to disqualification.* No attestation shall be accepted for filing from an employer which has been found to be disqualified from participation in the F–1 student work authorization program as determined in a final agency action following an investigation by the Administrator pursuant to subpart K of this part.

(Approved by the Office of Management and Budget under control number 1205–0315)

[56 FR 56865, 56876, Nov. 6, 1991, as amended at 59 FR 64777, Dec. 15, 1994; 60 FR 61210, 61211, Nov. 29, 1995]

§ 655.950 Public access.

(a) *Public examination at ETA.* ETA shall compile and maintain a list of employers who filed attestations specifying the occupation(s), geographical location, and wage rate(s) attested to. The list shall be available for public inspection at the ETA office at which the attestation was filed and such list shall be updated monthly.

(b) *Notice to Public.* ETA shall publish semiannually a list in the FEDERAL REGISTER of employers which have been disqualified from participating in the F–1 student work authorization program pursuant to § 655.940(k) of this part.

APPENDIX A TO SUBPART J TO PART 655—DOCUMENTATION IN SUPPORT OF ATTESTATIONS MADE BY EMPLOYERS

This appendix sets forth the documentation that the Department of Labor considers to be sufficient to satisfy the employer's burden of proof regarding substantiate attestations made on Form ETA–9034, pursuant to subpart J of this part, provided the documentation is found to be truthful, accurate, and substantiates compliance. The employer retains the right to meet its burden of proof in proving its attestations through other sufficient means. The employer's failure to substantiate its attestation in the event of an investigation shall be found to be a violation.

(a) *Documenting the first attestation element.* The employer shall have the burden of proving that it has complied with the recruitment requirements described in regulations

at §655.940(d)(1) of this part and attested to on ETA Form–9034. The employer's failure to satisfy the burden of proof through the production of adequate documentation shall be found to be a violation.

(1) Documentation shall not be submitted to ETA or to the DSO with the attestation, but shall be made available to DOL as described in §§655.900(b)(3) and 655.1000(c) of this part. To be effective in satisfying the burden of proof, the documentation should be contemporaneous with the recruitment, not created after the fact and particularly not after the commencement of an investigation under subpart K of this part.

(2) Because complaints may be filed and enforcement proceedings may be conducted during a considerable period after the recruitment, the employer should maintain the documentation for a period of no less than 18 months after the close of the recruitment period or, in the event of an investigation, for the period of the enforcement proceeding under subpart K of this part.

(3) The employer should be able to produce the following documentation:

(i) Evidence that a job order for the position was on file with the SESA local office within the area of intended employment for at least 60 consecutive days. Such evidence of a job order should include the employer's contemporaneous written statement setting forth the name and address of the SESA office with which the job order was placed; the name of the SESA employee with whom the job order was placed; the date on which the order was placed; and the dates on which the job order was on file with the SESA office.

(ii) Evidence that a vacancy notice announcing the position was posted for 60 consecutive days at the worksite. Evidence should include a copy of the notice that was posted at the worksite, the dates when the notice was posted, and a description of the specific location at the worksite at which the notice was posted.

(iii) Evidence that a job order for the position was continuously on file and ''open'' with the SESA local office within the area of intended employment, throughout the validity period of the attestation. Such evidence should include the employer's contemporaneous written statement setting forth the name and address of the SESA office with which the job order was placed; the name of the SESA employee with whom the job order was placed; the date on which the order was placed; and the dates on which the job order was on file with the SESA office.

(iv) Evidence that the employer was unsuccessful in recruiting a sufficient number of U.S. workers who are able, qualified, and available for the position(s) through the SESA job order and the worksite posting notice. Such evidence should include a contemporaneous written summary of the results of recruitment for each position for which an attestation was filed by the employer. Such summary should include:

(A) The number of job openings in each occupation included in the occupation;

(B) The number of U.S. workers and F–1 students that applied for each position;

(C) The number of U.S. workers that were hired;

(D) The number of F–1 students that were hired;

(E) The number of U.S. workers that were not hired; and

(F) The lawful job-related reason(s) for which each U.S. worker was not hired. An example of a job-related reason for which a U.S. worker can be rejected for a job opportunity is that the U.S. worker does not have the training and experience required for the position.

(4) *Investigations.* In the event that an investigation is conducted pursuant to regulations at subpart K of this part, concerning whether the employer failed to satisfy its recruitment requirement, in that it failed to conduct recruitment or to hire qualified U.S. worker(s) for a position for which an F–1 student(s) was hired, the Administrator shall determine whether the employer has produced documentation sufficient to prove the employer's compliance with the attestation requirements.

(i) Where the focus of the investigation is upon whether recruitment was conducted, the employer shall have satisfied its burden of proof if the documentation described in paragraphs (a)(3) (i), (ii), and (iii) of this appendix is produced, provided the documentation is found to be truthful, accurate and substantiates compliance.

(ii) Where the focus of the investigation is upon whether the employer's recruitment of U.S. workers was unsuccessful because the employer declined to hire U.S. worker(s) without lawful reason(s) for such action, the employer shall have satisfied the burden of proof if the documentation described in paragraph (a)(3)(iv) of this appendix is produced, provided that the Administrator has no significant evidence which reasonably shows that the employer's recruitment or hiring was deficient. In determining whether the employer has demonstrated that U.S. workers were rejected for lawful job-related reasons, the Administrator may contact ETA which shall provide the Administrator with advice as to whether U.S. workers were properly rejected.

(b) *Documentation of the second attestation element.* The employer shall have the burden of proving the validity of and compliance with the attestation element referenced in §655.940(e) of this part and attested to on Form ETA–9034.

(1) The employer shall be prepared to produce documentation sufficient to satisfy this requirement. Documentation shall not be submitted to ETA or to the DSO with the

attestation, but shall be made available to DOL as described in §§655.900(b)(3) and §655.1000(c) of this part. The documentation specified in paragraphs (b) (4) and (5) of this appendix will be sufficient to satisfy the employer's burden of proof, provided the documentation is found to be truthful, accurate and substantiates compliance upon investigation. The employer's failure to satisfy the burden of proof through the production of adequate documentation shall be found to be a violation.

(2) To be effective in satisfying the employer's burden of proof regarding the determination of the prevailing wage, the employer's documentation should be contemporaneous with the determination or the annual update of the prevailing wage, not created after the fact and particularly not after the commencement of an investigation under subpart K of this part.

(3) Because complaints may be filed and enforcement proceedings may be conducted during a considerable period after the determination or the annual update, the employer should be prepared to produce documentation for a period of no less than 18 months after the determination or update, or in the event of an investigation, for the period of the enforcement proceedings under subpart K of this part.

(4) Documentation described in paragraphs (b) (1) through (3) of this appendix should consist of the following:

(i) If the position is in an occupation which is the subject of a wage determination in the area under the provisions of the Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, (see 29 CFR part 1) or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.*, (see 29 CFR part 4), an excerpt from the wage determination showing the wage rate for the occupation in the area of intended employment; or

(ii) If the position is covered by a union contract which was negotiated at arms-length between a union and the employer, an excerpt from the union contract showing the wage rate(s) for the occupation(s) set forth in the union contract.

(iii) If position is not covered by the provisions of paragraph (b)(4) (i) or (ii) of this appendix, the employers's documentation shall consist of:

(A) A prevailing wage finding from the SESA for the occupation within the area of employment; or

(B) A prevailing wage survey for the occupation in the area of intended employment published by an independent authoritative source as defined in §655.920 of this part. For purposes of this paragraph (b)(4)(iii)(B) ''prevailing wage survey'' means a survey of wages published in a book, newspaper, periodical, looseleaf service, newsletter, or other similar medium, within the 24-month period immediately preceding the filing of the employer's attestation and each succeeding annual prevailing wage update. Such survey shall:

(*1*) Reflect the average wage paid to workers similarly employed in the area of intended employment;

(*2*) Be based upon recently collected data, *e.g.*, within the 24-month period immediately preceding the date of publication of the survey; and

(*3*) Represent the latest published prevailing wage finding by the authoritative source for the occupation in the area of intended employment.

(5) The employer should be prepared to produce documentation to prove the payment of the required wage, including payroll records, commencing on the date on which the employer first employs the F–1 student, showing the wages paid to employees in the occupation(s) named in the attestation at the worksite. Such payroll records maintained in accordance with regulations under the Fair Labor Standards Act (see 29 CFR part 516) would include for each employee in the occupation:

(i) The rate(s) of pay, including shift differentials, if any;

(ii) The employee's earnings per pay period;

(iii) The number of hours worked per week by the employee; and

(iv) The amount of and reasons for any and all deductions made from the employee's wages.

(6) *Investigations.* In the event that an investigation is conducted pursuant to subpart K of this part, concerning whether the employer made a material misrepresentation regarding the required wage or failed to pay the required wage, the Administrator shall determine whether the employer has produced documentation sufficient to satisfy the burden of proof.

(i) The employer's documentation of the prevailing wage determination shall be found to be sufficient where the determination is pursuant to the Davis-Bacon Act or Service Contract Act wage determination or a SESA determination.

(ii) Where the employer's prevailing wage determination is based on a survey by an independent authoritative source, the Administrator shall consider the employer's documentation to be sufficient, provided that it satisfies the standards for independent authoritative source surveys and is properly applied, and provided further that the Administrator has no significant evidence which reasonably shows that the prevailing wage finding obtained by the employer from an independent authoritative source varies substantially from the wage prevailing for the occupation in the area of intended employment. In the event such significant evidence shows a substantial variance, the Administrator may contact ETA, which shall provide the Administrator with a

prevailing wage determination, which the Administrator shall use as the basis for the determination as to violations. ETA may consult with the appropriate SESA to ascertain the prevailing wage applicable to the occupation under investigation.

(Approved by the Office of Management and Budget under control number 1205–0315)

Subpart K—Enforcement of the Attestation Process for Attestations Filed by Employers Utilizing F–1 Students in Off-Campus Work

SOURCE: 56 FR 56872, 56876, Nov. 6, 1991, unless otherwise noted.

§ 655.1000 Enforcement authority of Administrator, Wage and Hour Division.

(a) The Administrator shall perform all the Secretary's investigative and enforcement functions under section 221 of the Act and subparts J and K of this part.

(b) The Administrator shall conduct such investigations as may be appropriate and, in connection therewith, enter and inspect such places and such records (and make transcriptions or copies thereof), question such persons and gather such information as deemed necessary to determine compliance with section 221(a) of the Act and subparts J and K of this part.

(c) An employer being investigated pursuant to this subpart shall have the burden of proof as to compliance with section 221(a) of the Act and the validity of its attestation, and in this regard shall make available to the Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. No employer subject to the provisions of section 221 of the Act and subparts J and K of this part shall interfere with any official of the Department of Labor performing an investigation, inspection or law enforcement function pursuant to section 221 of the Act or subpart J or K of this part. Any such interference shall be a violation of the attestation and subparts J and K of this part, and the Administrator may take such further actions as the Administrator deems appropriate.

NOTE: Federal criminal statutes prohibit certain interference with a Federal officer in the performance of official duties. 18 U.S.C. 111 and 18 U.S.C. 1114.)

(d) An employer subject to subparts J and K of this part shall at all times cooperate in administrative and enforcement proceedings. No employer shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person because such person has:

(1) Filed a complaint or appeal under or related to section 221 of the Act or subparts J or K of this part;

(2) Testified or is about to testify in any proceeding under or related to section 221 of the Act or subpart J or K of this part;

(3) Exercised or asserted on behalf of himself or herself or others any right or protection afforded by section 221 of the Act or subpart J or K of this part.

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to section 221 of the Act or to subpart J or K of this part or any other DOL regulation promulgated pursuant to section 221 of the Act. In the event of any intimidation or restraint as described in this section, the conduct shall be a violation of the attestation and these regulations, and the Administrator may take such further actions as the Administrator considers appropriate.

(e) The Administrator shall, to the extent possible under existing law, protect the confidentiality of any person, including any complainant, who provides information to the Department in confidence during the course of an investigation or otherwise under subpart J or K of this part.

§ 655.1005 Complaints and investigative procedures.

(a) The Administrator, through an investigation, shall determine whether an employer of F–1 students has:

(1) Provided an attestation which is materially false

NOTE: Federal criminal statutes provide penalties of up to $10,000 and/or imprisonment of up to 5 years for knowing and willful submission of false statements to the Federal Government. 18 U.S.C. 1001; see also 18 U.S.C. 1546.

(2) Failed to pay the appropriate wage rate as required under § 655.940(e) of this part; or

(3) Failed to comply with the provisions of subpart J or K of this part.

(b) Any aggrieved person or organization may file a complaint alleging a violation of the provisions of subpart J or K of this part. No particular form is required, except that the complaint shall be written or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the complaint. The complaint shall set forth sufficient facts for the Administrator to determine whether there is reasonable cause to believe that a particular part or parts of the attestation or regulations may have been violated. The complaint may be submitted to any local Wage and Hour Division office, the addresses of which can be found in local telephone directories. The office or person receiving such a complaint shall refer it to the office of the Wage and Hour Division administering the area in which the reported violation is alleged to have occurred.

(c) The Administrator shall determine whether there is reasonable cause to believe that a complaint warrants investigation. If it is determined that a complaint fails to present reasonable cause, the Administrator shall so notify the complainant, who may submit a new complaint with such additional information as may be available. If the Administrator determines that reasonable cause exists, an investigation will be conducted.

(d) In the event that the Administrator, after an investigation, determines that the employer has committed any violation(s) described in paragraph (a) of this section, the Administrator shall issue a written determination to the employer in accordance with § 655.1015 of this part and an opportunity for a hearing shall be afforded in accordance with the procedures specified in § 655.1020 of this part.

§ 655.1010 Remedies.

Where the Administrator, after notice and opportunity for a hearing, determines that an employer has committed a violation identified in § 655.1005(a) of this part, the employer shall be disqualified from employing F–1 student(s) under section 221 of the Act. The Administrator shall so notify the Attorney General and ETA pursuant to § 655.1055 of this part. Upon receipt of the Administrator's notice, the Attorney General and ETA shall take the action specified in § 655.1055 of this part, *i.e.*, cancel any existing attestation(s) or work authorizations, and shall not accept future attestation(s) or grant new work authorization(s) with respect to that employer.

§ 655.1015 Written notice and service of Administrator's determination.

(a) The Administrator's written determination, issued pursuant to §§ 655.1005 and 655.1010 of this part, shall be served on the employer by personal service or by certified mail at the address of the employer or the employer's agent shown on the attestation. Where service by certified mail is not accepted by the employer, the Administrator may exercise discretion to serve the determination by regular mail.

(b) The Administrator's written determination, issued pursuant to §§ 655.1005 and 655.1010 of this part, shall:

(1) Set forth the Administrator's determination of the violation(s) and the Administrator's reason or reasons therefor.

(2) Inform the employer that it may request a hearing pursuant to § 655.1020 of this part.

(3) Inform the employer that in the absence of a timely request for a hearing, received by the Chief Administrative Law Judge within 15 calendar days of the date of the determination, the determination of the Administrator shall become final and not appealable.

(4) Set forth the procedure for requesting a hearing, and give the addresses of the Chief Administrative Law Judge (with whom the request must be filed) and the representative of the Solicitor of Labor (who must be served with a copy of the request).

(5) Inform the employer that, if no timely request for a hearing is filed pursuant to § 655.1020 of this part, the employer shall be disqualified from employing F–1 students, effective upon the expiration of the period for filing a request for a hearing. In such event, the Administrator shall, pursuant to

§ 655.1055 of this part, notify ETA and the Attorney General of the occurrence of a violation by the employer, and that the employer has been disqualified from employing F–1 students.

§ 655.1020 Request for hearing.

(a) An employer desiring to request an administrative hearing on a determination issued pursuant to § 655.1015 of this part shall make such request in writing to the Chief Administrative Law Judge at the address stated in the notice of determination. Copies of the request shall be served upon the Wage and Hour Division official who issued the notice of determination and upon the representative of the Solicitor of Labor identified in the notice of determination.

(b) No particular form is prescribed for any request for hearing permitted by this section. However, any such request shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the notice of determination giving rise to such request;

(4) State the specific reason or reasons why the employer believes such determination is in error;

(5) Be signed by the employer making the request or by an authorized representative of the employer; and

(6) Include the address at which the employer or authorized representative desires to receive further communications relating thereto.

(c) The request for such hearing must be received by the Chief Administrative Law Judge, at the address stated in the Administrator's notice of determination, no later than 15 calendar days after the date of the determination.

(d) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service. For the requesting party's protection, if the request is by mail, it should be by certified mail. If the request is by facsimile transmission, the original of the request, signed by the employer or authorized representative, shall be filed within ten days thereafter.

(e) A copy of the request for a hearing shall be sent by the requestor to the Administrator at the address shown on the Administrator's notice of determination.

§ 655.1025 Rules of practice for administrative law judge proceedings.

(a) Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the ''Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges'' established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings under this

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) shall not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

§ 655.1030 Service and computation of time.

(a) Under this subpart, a party may serve any pleading or document by regular mail. Service on a party is complete upon mailing to the last known address. No additional time for filing or response is authorized where service is by mail. In the interest of expeditious proceedings, the administrative law judge may direct the parties to serve pleadings or documents by a method other than regular mail.

(b) Two (2) copies of all pleadings and other documents in any administrative law judge proceeding shall be served on the attorneys for the Administrator. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW., room N–2716, Washington, DC 20210, and one copy on the attorney representing the Administrator in the proceeding.

(c) Time under this subpart shall be computed beginning with the day following the action and includes the last day of the period unless it is a Saturday, Sunday, or federally-observed holiday, in which case the time period includes the next business day.

§ 655.1035 Administrative law judge proceedings.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 655.1020 of this part, the Chief Administrative Law Judge shall promptly appoint an administrative law judge to hear the case.

(b) The date of the hearing shall be not more than 60 calendar days from the date of the Chief Administrative Law Judge's receipt of the request for hearing.

(c) The administrative law judge may prescribe a schedule by which the parties are permitted to file a prehearing brief or other written statement of fact or law. Any such brief or statement shall be served upon each other party in accordance with § 655.1030 of this part. Posthearing briefs shall not be permitted except at the request of the administrative law judge. When permitted, any such brief shall be limited to the issue or issues specified by the administrative law judge, shall be due within the time prescribed by the administrative law judge, and shall be served in accordance with § 655.1030 of this part.

(d) Amicus curiae participation or intervention by interested parties may be permitted by the administrative law judge in his/her discretion pursuant to 29 CFR 18.10. If such participation is granted, the amicus curiae and/or intervenor shall serve all documents and be served by the parties in accordance with § 655.1030 of this part. In no event, however, shall such participation be permitted to delay the proceedings beyond the deadline specified in paragraphs (b) and (c) of this section.

§ 655.1040 Decision and order of administrative law judge.

(a) Within 90 calendar days after receipt of the transcript of the hearing, the administrative law judge shall issue a decision.

(b) The decision of the administrative law judge shall include a statement of findings and conclusions, with reasons and basis therefore, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator; the reason or reasons for such order shall be stated in the decision.

(c) The administrative law judge, in accordance with § 655.940 (d) and (e) of this part, shall impose upon the employer the burden of proving the validity of and compliance with the attestation.

(d) If the administrative law judge finds that the employer has failed to pay the required wage rate or has provided an attestation which is materially false, the judge shall order that the employer be disqualified from employing F–1 students.

(e) In the event that the Administrator's determination(s) of wage violation(s) is based upon a wage determination obtained by the Administrator from ETA during the investigation (paragraph (b)(6) of appendix A of subpart J of this part), the administrative law judge shall not determine the prevailing wage rate *de novo,* but shall, based on the evidence (including the ETA administrative record), either accept the wage determination or vacate the wage determination. If the wage determination is vacated, the administrative law judge shall remand the case to the Administrator, who may then refer the matter to ETA and, upon the issuance of a new wage determination by ETA, resubmit the case to the administrative law judge. Under no circumstances shall source data obtained in confidence by ETA, or the names of establishments contacted by ETA, be submitted into evidence or otherwise disclosed.

(f) The administrative law judge shall not render determinations as to the legality of a regulatory provision or the constitutionality of a statutory provision.

(g) The decision shall be served on all parties in person or by certified or regular mail.

§ 655.1045 Secretary's review of administrative law judge's decision.

(a) Any party desiring review of the decision and order of an administrative law judge shall petition the Secretary to review the decision and order. To be effective, such petition must be received by the Secretary within 30 calendar days of the date of the decision and order. Copies of the petition shall be served on all parties and the administrative law judge.

(b) No particular form is prescribed for any petition for the Secretary's review permitted by this subpart. However, any such petition shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;

(4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;

(5) Be signed by the party filing the petition or by an authorized representative of such party;

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(7) Attach copies of the administrative law judge's decision and order, and any other record documents which would assist the Secretary in determining whether review is warranted.

(c) Whenever the Secretary determines to review the decision and order of an administrative law judge, a notice of the Secretary's determination shall be served upon the administrative law judge and all parties within 30 calendar days after the Secretary's receipt of the petition for review.

(d) Upon receipt of the Secretary's notice, the Office of Administrative Law Judges shall within 15 calendar days forward the complete hearing record to the Secretary.

(e) The Secretary's notice may specify:

(1) The issue or issues to be reviewed;

(2) The form in which submissions shall be made by the parties (*e.g.*, briefs);

(3) The time within which such submissions shall be made.

(f) All documents submitted to the Secretary shall be filed with the Secretary of Labor, U.S. Department of Labor, Washington, DC 20210, Attention: Executive Director, Office of Administrative Appeals, room S–4309. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Secretary until actually received by the Secretary. All documents, including documents filed by mail, must be received by the Secretary either on or before the due date.

(g) Copies of all documents filed with the Secretary shall be served upon all other parties involved in the proceeding. Service upon the Administrator shall be in accordance with § 655.1030(b) of this part.

(h) The Secretary's final decision shall be issued within 180 calendar days from the date of the notice of intent to review. The Secretary's decision shall be served upon all parties and the administrative law judge.

(i) Upon issuance of the Secretary's decision, the Secretary shall transmit the entire record to the Chief Administrative Law Judge for custody pursuant to § 655.1050 of this part.

§ 655.1050 Administrative record.

The official record of every completed administrative hearing procedure provided by subpart K of this part shall be maintained and filed under the custody and control of the Chief Administrative Law Judge. Upon receipt of a complaint seeking review of the final agency action in a United States District Court, the Chief Administrative Law Judge shall certify the official record and shall transmit such record to the clerk of the court.

§ 655.1055 Notice to the Employment and Training Administration (ETA) and the Attorney General (AG).

(a) The Administrator shall notify the Attorney General and ETA of the final determination of a violation by an employer, and of the disqualification of the employer from employing F–1 students, upon the earliest of the following events:

(1) When the Administrator issues a written determination that the employer has committed a violation, and

no timely request for hearing is made by the employer pursuant to §655.1020 of this part; or

(2) When, after a hearing on a timely request pursuant to §655.1020 of this part, the administrative law judge issues a decision and order finding a violation by the employer; or

(3) When, although the administrative law judge found that there was no violation by the employer, the Secretary, upon subsequent review upon a timely request pursuant to §655.1045 of this part, issues a decision finding that a violation was committed by the employer.

(b) The Attorney General, upon receipt of notification from the Administrator pursuant to paragraph (a) of this section, shall take appropriate action to cancel work authorization to F–1 students for employment with that employer, and to prevent issuance of new work authorization with respect to that employer.

(1) The Administrator's notice to the Attorney General shall, to the extent known from the investigation, specify the school(s) which issued work authorization for the F–1 students who were employed by the employer. The Attorney General shall inform the appropriate authority at each of the specified school(s) that any work authorization(s) issued for F–1 student(s) to be employed by that employer shall immediately be revoked, and that no new work authorization shall be issued for employment of F–1 student(s) by that employer. The Attorney General shall, in addition, take any other appropriate action to effectuate the disqualification of that employer through revocation of work authorization(s) at any other school(s) that may authorize employment with the disqualified employer.

(2) A copy of the Administrator's notice to the Attorney General may also be sent by the Administrator to each school identified in the notice as a school from which F–1 students have been employed by the disqualified employer. Such copy of the Administrator's notice, upon receipt by the school, shall constitute sufficient notice for the DSO to revoke work authorization(s) and to refuse to issue new work authorization(s) for employment of F–1 students by that employer. Any school which issued or may issue work authorization(s) for employment of any F–1 student(s) by the employer, but which was not known by the Administrator to have done so, or notified by copy of the Administrator's decision, shall comply with any instructions from the Attorney General regarding revocation and nonissuance of work authorization for employment of any F–1 student(s) by the employer. In addition, any school (whether or not it received a copy of the Administrator's notice to the Attorney General regarding the employer) shall revoke F–1 work authorization(s) and refuse to issue new F–1 work authorization(s) for any employer which is identified as a disqualified employer on the list published periodically in the FEDERAL REGISTER by ETA.

(3) Continued or new employment of any F–1 student by the employer shall constitute a violation of the INA's employer sanctions provisions, irrespective of whether the F–1 student's work authorization has been formally revoked by the DSO or INS.

(c) ETA, upon receipt of the Administrator's notice pursuant to paragraph (a) of this section, shall cancel any F–1 attestation filed by the employer under subpart J of this part, shall not accept for filing any attestation submitted by the employer, and shall so notify the employer.

§ 655.1060 Non-applicability of the Equal Access to Justice Act.

A proceeding under subpart K of this part is not subject to the Equal Access to Justice Act, as amended, 5 U.S.C. 504. In such a proceeding, the administrative law judge shall have no authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act.

PART 656—LABOR CERTIFICATION PROCESS FOR PERMANENT EMPLOYMENT OF ALIENS IN THE UNITED STATES

Subpart A—Purpose and Scope of Part 656

Sec.

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Subpart F—Addresses

656.60 Addresses of Department of Labor regional offices.
656.62 Locations of Immigration and Naturalization Service offices.

AUTHORITY: 8 U.S.C. 1182(a)(5)(A); 29 U.S.C. 49 *et seq.;* section 122, Pub. L. 101–649, 109 Stat. 4978.

SOURCE: 45 FR 83933, Dec. 19, 1980, unless otherwise noted.

Subpart A—Purpose and Scope of Part 656

§ 656.1 Purpose and scope of part 656.

(a) Under section 212(a)(5)(A) of the Immigration and Nationality Act (lNA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:

(1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and

(2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

(b) The regulations under this part set forth the procedures whereby such immigrant labor certifications may be applied for, and given or denied.

(c) Correspondence and questions concerning the regulations in this part should be addressed to: Division of Foreign Labor Certifications, United States Employment Service, Department of Labor, Washington, DC 20210.

[45 FR 83933, Dec. 19, 1980, as amended at 56 CFR 54927, Oct. 23, 1991]

§ 656.2 Description of the Immigration and Nationality Act and of the Department of Labor's role thereunder.

(a)(1) *Description of the Act.* The Immigration and Nationality Act (Act) (8 U.S.C. 1101 *et seq.*) regulates the admission of aliens into the United States. The Act designates the Attorney General and the Secretary of State as the principal administrators of its provisions.

(2) The Immigration and Naturalization Service (INS) performs most of the Attorney General's functions under the Act. See 8 CFR 2.1.

(3) The consular offices of the Department of State throughout the world are generally the initial contact for aliens in foreign countries who wish to come to the United States. These offices determine the type of visa for

which an alien may be eligible, obtain visa eligibility documentation, and issue visas.

(b) *Burden of Proof under the Act.* Section 291 of the Act (8 U.S.C. 1361) states in pertinent part, that:

> Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act * * *.

(c)(1) *Role of the Department of Labor.* The role of the Department of Labor under the Act derives from section 212(a)(5)(A) (8 U.S.C. 1182(a)(5)(A)), which provides that any alien who seeks admission or status as an immigrant for the purpose of employment under paragraph (2) or (3) of section 203(b) of the Act shall be excluded unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:

(i) There are not sufficient United States workers, who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(ii) The employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(2) The certification is referred to in this part 656 as a ''labor certification''.

(3) The Department of Labor issues labor certifications in two instances: For the permanent employment of aliens; and for temporary employment of aliens in the United States classified under 8 U.S.C. 1101(a)(15)(H)(ii) pursuant to regulations of the Immigration and Naturalization Service at 8 CFR 214.2(h)(4) and sections 101(a)(15)(H)(ii), 214, and 218 of the Act. See 8 U.S.C. 1101(a)(15)(H)(ii), 1184, and 1188. The Department also administers attestation and labor condition application programs relating to the admission and/or work authorization of the following nonimmigrants: registered nurses (H–1A visas), professionals (H–1B visas), crewmembers performing longshore work (D visas), and students (F–1 visas), classified under 8 U.S.C. 1101(a)(15)(H)(i)(a), 1101(a)(15)(H)(i)(b), 1101(a)(15)(D), and 1101(a)(15)(F), respectively. See also 8 U.S.C. 1184 (c), (m), and (n), and 1288; and Public Law 101–649 section 221, 8 U.S.C. 1184 note. The regulations under this part 656 apply only to labor certifications for permanent employment.

[56 CFR 54927, Oct. 23, 1991]

§ 656.3 Definitions, for purposes of this part, of terms used in this part.

Act means the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 et seq.

Administrative Law Judge means an official appointed pursuant to 5 U.S.C. 3105.

Agent means a person who is not an employee of an employer, and who has been designated in writing to act on behalf of an alien or employer in connection with an application for labor certification.

Application means an *Application for Alien Employment Certification* form and any other documents submitted by an alien and/or employer (or their agents) in applying for a labor certification under this part.

Area of intended employment means the area within normal commuting distance of the place (address) of intended employment. If the place of intended employment is within a Metropolitan Statistical Area (MSA), any place within the MSA is deemed to be within normal commuting distance of the place of intended employment.

Assistant Secretary means the Assistant Secretary of Labor for Employment and Training, the chief official of the Employment and Training Administration.

Attorney means any person who is a member in good standing of the bar of the highest court of any State, Possession, Territory, or Commonwealth of the United States, or the District of Columbia, and who is not under any order of any court or of the Board of Immigration Appeals suspending, enjoining, restraining, disbarring, or otherwise restricting him or her in the practice of law.

Attorney General means the chief official of the U.S. Department of Justice

or the designee of the Attorney General.

Board of Alien Labor Certification Appeals means the permanent Board of Alien Labor Certification Appeals established by this part, chaired by the Chief Administrative Law Judge, and consisting of Administrative Law Judges assigned to the Department of Labor and designated by the Chief Administrative Law Judge to be members of the Board of Alien Labor Certification Appeals. The Board of Alien Labor Certification Appeals is located in Washington, DC, and reviews and decides appeals in Washington, DC.

Certifying Officer means a Department of Labor official who makes determinations about whether or not to grant applications for labor certifications:

(1) A regional Certifying Officer designated by a Regional Administrator, Employment and Training Administration (RA) makes such determinations in a regional office of the Department;

(2) A national Certifying Officer makes such determinations in the national office of the USES.

(3) The addresses of the regional Certifying Officers are set forth in § 656.60 of this part.

Chief Administrative Law Judge means the chief official of the Office of Administrative Law Judges of the Department of Labor.

Consular Officer means an official of the U.S. Department of State who handles applications for labor certifications pursuant to this part.

Director means the chief official of the United States Employment Service or the Director's designee.

Employment means permanent full-time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee.

Employment and Training Administration (ETA) means the agency within the Department of Labor (DOL) which includes the United States Employment Service (USES).

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation. For purposes of this definition an ''authorized representative'' means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters.

Federal research agency means a major organizational component of a Federal cabinet level agency or other agency operating with appropriated funds that has as its primary purpose the performance of scientific research. Federal research agencies are presumed to be doing nonproprietary research. To be considered a major organizational component of a cabinet level agency or other agency operating with appropriated funds for the purpose of this part the organizational component or other agency must be administered by a person who is no lower than Level V (or the equivalent) of the Executive Schedule (see 5 U.S.C. 5316).

Final Determination form means the form used by the Certifying Officer to notify employers (and aliens) of labor certification determinations (and was formerly known as the ''*Determination and Transmittal* form'').

Immigration and Naturalization Service (INS) means the agency within the U.S. Department of Justice which administers that Department's principal functions under the Act.

Immigration Officer means an official of the Immigration and Naturalization Service (INS) who handles applications for labor certifications pursuant to this part.

INS, see Immigration and Naturalization Service.

Job opportunity means a job opening for employment at a place in the United States to which U.S. workers can be referred.

Labor certification means the certification to the Secretary of State and to the Attorney General of the determination by the Secretary of Labor pursuant to section 212(a)(14) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(14)):

(1) That there are not sufficient U.S. workers who are able, willing, qualified, and available at the time of an

alien's application for a visa and admission to the United States and at the place where the alien is to perform the work; and

(2) That the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers.

Local Employment Service office and *local office* mean a full-time office of a State Employment Service agency (also known as a State Employment Security Agency (SESA) also known as a State employment service), which is maintained for the purpose of providing placement and other services of the Employment Service System, and which serves a particular geographic area within a State. Unless specified otherwise in this part, the local office performing the functions required by this part shall be the local Employment Service office serving the area where the job opportunity is located.

Notice of Findings means a notice which sets for the bases upon which a Certifying Officer intends to deny a labor certification unless the bases are satisfactorily rebutted.

Occupation designated for special handling means an occupation, described at §656.21a, for which DOL has determined that special labor market tests are appropriate.

Physicians (and/or surgeons) means persons who apply the art and science of medicine or surgery primarily in patient care to the diagnosis, prevention, and treatment of human diseases, disorders of the mind, and pregnancy. This definition includes persons practicing medicine, surgery, osteopathy, psychiatry, and opthamology. The physician or surgeon may specialize in treating a specific area of the body, or a particular disease, sex, or age group.

Professional nurses means persons who apply the art and science and nursing, which reflects comprehension of principles derived from the physical, biological, and behavioral sciences. Professional nursing generally includes the making of clinical judgements concerning the observation, care, and counsel of persons requiring nursing care; and administering of medicines and treatments prescribed by the physician or dentist; the participation in activities for the promotion of health and the prevention of illness in others. A program of study for professional nurses generally includes theory and practice in clinical areas such as: obstetrics, surgery, pediatrics, psychiatry, and medicine. This definition includes only those occupations within Occupational Group No. 075 of the *Dictionary of Occupational Title* (4th ed.)

Regional Administrator, Employment and Training Administration (RA) means the chief official of the Employment and Training Administration (ETA) in a Department of Labor (DOL) regional office.

Schedule A means the list of occupations set forth at §656.10, with respect to which the Director has determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

Schedule B means the list of occupations set forth in §656.11, with respect to which the Director has determined that there are generally sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will generally adversely affect the wages and working conditions of the United States workers similarly employed.

Secretary means the Secretary of Labor, the chief official of the U.S. Department of Labor, or the Secretary's designee.

Secretary of State means the chief official of the U.S. Department of State or the Secretary of State's designee.

United States, when used in a geographic sense, means the fifty States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam.

United States Employment Service (USES) means the agency of the U.S. Department of Labor, established under the Wagner-Peyser Act (29 U.S.C. 49 *et seq.*), which is charged with administering the national system of public employment offices (the Employment Service (ES) System) and with carrying out the functions of the Secretary under section 212(a)(14) of

the Immigration and Nationality Act (8 U.S.C. 1182(a)(14)).

United States worker means any worker who is a U.S. citizen; is a U.S. national; is lawfully admitted for permanent residence; is granted the status of an alien lawfully admitted for permanent residence under 8 U.S.C. 1160(a), 1161(a), or 1255a(a)(1); is admitted as a refugee under 8 U.S.C. 1157; or is granted asylum under 8 U.S.C. 1158.

[45 FR 83933, Dec. 19, 1980, as amended at 52 FR 11219, Apr. 8, 1987; 52 FR 20596, June 2, 1987; 56 FR 54930, Oct. 23, 1991. Redesignated and amended at 56 FR 54930, Oct. 23, 1991; 63 FR 13767, Mar. 20, 1998]

Subpart B—Occupational Labor Certification Determinations

§ 656.10 Schedule A.

The Director, United States Employment Service (Director), has determined that there are not sufficient United States workers who are able, willing, qualified, and available for the occupations listed below on *Schedule A* and that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in *Schedule A* occupations. An alien seeking a labor certification for an occupation listed on *Schedule A* may apply for that labor certification pursuant to § 656.22.

SCHEDULE A

(a) Group I:

(1) Persons who will be employed as physical therapists, and who possess all the qualifications necessary to take the physical therapist licensing examination in the State in which they propose to practice physical therapy.

(2) Aliens who will be employed as professional nurses; and (i) who have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination; or (ii) who hold a full and unrestricted license to practice professional nursing in the State of intended employment.

(3) Definitions of Group I occupations:

(i) ''Physical therapist'' means a person who applies the art and science of physical therapy to the treatment of patients with disabilities, disorders and injuries to relieve pain, develop or restore function, and maintain performance, using physical means, such as exercise, massage, heat, water, light, and electricity, as prescribed by a physician (or surgeon).

(ii) ''Professional nurse'' is defined in § 656.50.

(b) Group II:

Aliens (except for aliens in the performing arts) of exceptional ability in the sciences or arts including college and university teachers of exceptional ability who have been practicing their science or art during the year prior to application and who intend to practice the same science or art in the United States. For purposes of this group, the term ''science or art'' means any field of knowledge and/or skill with respect to which colleges and universities commonly offer specialized courses leading to a degree in the knowledge and/or skill. An alien, however, need not have studied at a college or university in order to qualify for the Group II occupation.

[45 FR 83933, Dec. 19, 1980, as amended at 52 FR 20596, June 2, 1987; 56 FR 54927, Oct. 23, 1991]

§ 656.11 Schedule B.

(a) The Director has determined that there generally are sufficient United States workers who are able, willing, qualified and available for the occupations listed below on *Schedule B* and that the wages and working conditions of United States workers similarly employed will generally be adversely affected by the employment in the United States of aliens in *Schedule B* occupations. An employer seeking a labor certification for an occupation listed on *Schedule B* may petition for a waiver pursuant to § 656.23.

SCHEDULE B

(1) Assemblers
(2) Attendants, Parking Lot
(3) Attendants (Service Workers such as Personal Service Attendants, Amusement and Recreation Service Attendants)
(4) Automobile Service Station Attendants
(5) Bartenders
(6) Bookkeepers II
(7) Caretakers
(8) Cashiers
(9) Charworkers and Cleaners
(10) Chauffeurs and Taxicab Drivers
(11) Cleaners, Hotel and Motel
(12) Clerks, General
(13) Clerks, Hotel
(14) Clerks and Checkers, Grocery Stores
(15) Clerk Typists
(16) Cooks, Short Order
(17) Counter and Fountain Workers
(18) Dining Room Attendants
(19) Electric Truck Operators
(20) Elevator Operators

(21) Floorworkers
(22) Groundskeepers
(23) Guards
(24) Helpers, any industry
(25) Hotel Cleaners
(26) Household Domestic Service Workers
(27) Housekeepers
(28) Janitors
(29) Key Punch Operators
(30) Kitchen Workers
(31) Laborers, Common
(32) Laborers, Farm
(33) Laborers, Mine
(34) Loopers and Toppers
(35) Material Handlers
(36) Nurses' Aides and Orderlies
(37) Packers, Markers, Bottlers and Related
(38) Porters
(39) Receptionists
(40) Sailors and Deck Hands
(41) Sales Clerks, General
(42) Sewing Machine Operators and Handstitchers
(43) Stock Room and Warehouse Workers
(44) Streetcar and Bus Conductors
(45) Telephone Operators
(46) Truck Drivers and Tractor Drivers
(47) Typists, Lesser Skilled
(48) Ushers, Recreation and Amusement
(49) Yard Workers

(b) *Descriptions of Schedule B occupations*—(1) *Assemblers* perform one or more repetitive tasks to assemble components and subassemblies using hand or power tools to mass produce a variety of components, products or equipment. They perform such activities as riveting, drilling, filing, bolting, soldering, spot welding, cementing, gluing, cutting and fitting. They may use clamps or other work aids to hold parts during assembly, inspect or test components, or tend previously set-up or automatic machines.

(2) *Attendants, Parking Lot* park automobiles for customers in parking lots or garages and may collect fees based on time span of parking.

(3) *Attendants (Service Workers such as Personal Service Attendants, Amusement and Recreation Service Attendants)* perform a variety of routine tasks attending to the personal needs of customers at such places as amusement parks, bath houses, clothing check-rooms, and dressing rooms, including such tasks as taking and issuing tickets, checking and issuing clothing and supplies, cleaning premises and equipment, answering inquiries, checking lists, and maintaining simple records.

(4) *Automobile Service Station Attendants* service automotive vehicles with fuel, lubricants, and automotive accessories at drive-in service facilities; may also compute charges and collect fees from customers.

(5) *Bartenders* prepare, mix, and dispense alcoholic beverages for consumption by bar customers, and compute and collect charges for drinks.

(6) *Bookkeepers II* keep records of one facet of an establishment's financial transactions by maintaining one set of books; specialize in such areas as accounts-payable, accounts-receivable, or interest accrued rather than a complete set of records.

(7) *Caretakers* perform a combination of duties to keep a private home clean and in good condition such as cleaning and dusting furniture and furnishings, hallways and lavatories; beating, vacuuming, and scrubbing rugs; washing windows, waxing and polishing floors; removing and hanging draperies; cleaning and oiling furnances and other equipment; repairing mechanical and electrical appliances; and painting.

(8) *Cashiers* receive payments made by customers for goods or services, make change, give receipts, operate cash registers, balance cash accounts, prepare bank deposits and perform other related duties.

(9) *Charworkers and Cleaners* keep the premises of commercial establishments, office buildings, or apartment hosues in clean and orderly condition by performing, according to a set routine, such tasks as mopping and sweeping floors, dusting and polishing furniture and fixtures, and vacuuming rugs.

(10) *Chauffeurs and Taxicab Drivers* drive automobiles to convey passengers according to the passengers' instructions.

(11) *Cleaners, Hotel and Motel* clean hotel rooms and halls, sweep and mop floors, dust furniture, empty wastebaskets, and make beds.

(12) *Clerks, General* perform a variety of routine clerical tasks not requiring knowledge of systems or procedures such as copying and posting data, proofreading records or forms, counting, weighing, or measuring material, routing correspondence, answering

telephones, conveying messages, and running errands.

(13) *Clerks, Hotel* perform a variety of routine tasks to serve hotel guests such as registering guests, dispensing keys, distributing mail, collecting payments, and adjusting complaints.

(14) *Clerks and Checkers, Grocery Stores* itemize, total, and receive payments for purchases in grocery stores, usually using cash registers; often assist customers in locating items, stock shelves, and keep stock-control and sales-transaction records.

(15) *Clerk Typists* perform general clerical work which, for the majority of duties, requires the use of typewriters: perform such activities as typing reports, bills, application forms, shipping tickets, and other matters from clerical records, filing records and reports, posting information to records, sorting and distributing mail, answering phones and similar duties.

(16) *Cooks—Short Order* prepare and cook to order all kinds of short-preparation-time foods; may perform such activities as carving meats, filling orders from a steamtable, preparing sandwiches, salads and beverages, and serving meals over a counter.

(17) *Counter and Fountain Workers* serve food to patrons at lunchroom counters, cafeterias, soda fountains, or similar public eating places; take orders from customers and frequently prepare simple items, such as desert dishes; itemize and total checks; receive payment and make change; clean work areas and equipment.

(18) *Dining Room Attendants* facilitate food service in eating places by performing such tasks as removing dirty dishes, replenishing linen and silver supplies, serving water and butter to patrons, and cleaning and polishing equipment.

(19) *Electric Truck Operators* drive gasoline- or electric-powered industrial trucks or tractors equipped with forklift, elevating platform, or trailer hitch to move and stack equipment and materials in a warehouse, storage yard, or factory.

(20) *Elevator Operators* operate elevators to transport passengers and freight between building floors.

(21) *Floorworkers* perform a variety of routine tasks in support of other workers in and around such work sites as factory floors and service areas, frequently at the beck and call of others; perform such tasks as cleaning floors, materials and equipment, distributing materials and tools to workers, running errands, delivering messages, emptying containers, and removing materials from work areas to storage or shipping areas.

(22) *Groundskeepers* maintain grounds of industrial, commercial, or public property in good condition by performing such tasks as cutting lawns, trimming hedges, pruning trees, repairing fences, planting flowers, and shoveling snow.

(23) *Guards* guard and patrol premises of industrial or business establishments or similar types of property to prevent theft and other crimes and prevent possible injury to others.

(24) *Helpers (any industry)* perform a variety of duties to assist other workers who are usually of a higher level of competency of expertness by furnishing such workers with materials, tools, and supplies, cleaning work areas, machines and equipment, feeding or offbearing machines, and/or holding materials or tools.

(25) *Hotel Cleaners* perform routine tasks to keep hotel premises neat and clean such as cleaning rugs, washing walls, ceilings and windows, moving furniture, mopping and waxing floors, and polishing metalwork.

(26) *Household Domestic Service Workers* perform a variety of tasks in private households, such as cleaning, dusting, washing, ironing, making beds, maintaining clothes, marketing, cooking, serving food, and caring for children or disabled persons. This definition, however, applies only to workers who have had less than one year of documented full-time paid experience in the tasks to be performed, working on a live-in or live-out basis in private households or in public or private institutions or establishments where the worker has performed tasks equivalent to tasks normally associated with the maintenance of a private household. This definition does not include household workers who primarily provide health or instructional services.

(27) *Housekeepers* supervise workers engaged in maintaining interiors of

commercial residential buildings in a clean and orderly fashion, assign duties to cleaners (hotel and motel), charworkers, and hotel cleaners, inspect finished work, and maintain supplies of equipment and materials.

(28) *Janitors* keep hotels, office buildings, apartment houses, or similar buildings in clean and orderly condition, and tend furnaces and boilers to provide heat and hot water; perform such tasks as sweeping and mopping floors, emptying trash containers, and doing minor painting and plumbing repairs; often maintain their residence at their places of work.

(29) *Keypunch Operators,* using machines similar in action to typewriters, punch holes in cards in such a position that each hole can be identified as representing a specific item of information. These punched cards may be used with electronic computers or tabulating machines.

(30) *Kitchen Workers* perform routine tasks in the kitchens of restaurants. Their primary responsibility is to maintain work areas and equipment in a clean and orderly fashion by performing such tasks as mopping floors, removing trash, washing pots and pans, transferring supplies and equipment, and washing and peeling vegetables.

(31) *Laborers, Common* perform routine tasks, upon instructions and according to set routine, in an industrial, construction or manufacturing environment such as loading and moving equipment and supplies, cleaning work areas, and distributing tools.

(32) *Laborers, Farm* plant, cultivate, and harvest farm products, following the instructions of supervisors, often working as members of a team. Their typical tasks are watering and feeding livestock, picking fruit and vegetables, and cleaning storage areas and equipment.

(33) *Laborers, Mine* perform routine tasks in underground or surface mines, pits, or quarries, or at tipples, mills, or preparation plants such as cleaning work areas, shoveling coal onto conveyors, pushing mine cars from working faces to haulage roads, and loading or sorting material onto wheelbarrows.

(34) *Loopers and Toppers* (i) tend machines that shear nap, loose threads, and knots from cloth surfaces to give uniform finish and texture, (ii) operate looping machines to close openings in the toes of seamless hose or join knitted garment parts, (iii) loop stitches or ribbed garment parts on the points of transfer bars to facilitate the transfer of garment parts to the needles of knitting machines.

(35) *Material Handlers* load, unload, and convey materials within or near plants, yards, or worksites under specific instructions.

(36) *Nurses' Aides and Orderlies* assist in the care of hospital patients by performing such activities as bathing, dressing and undressing patients and giving alcohol rubs, serving and collecting food trays, cleaning and shaving hair from the skin areas of operative cases, lifting patients onto and from beds, transporting patients to treatment units, changing bed linens, running errands, and directing visitors.

(37) *Packers, Markers, Bottlers, and Related* pack products into containers, such as cartons or crates, mark identifying information on articles, insure that filled bottles are properly sealed and marked, often working in teams on or at end of assembly lines.

(38) *Porters* (i) carry baggage by hand or handtruck for airline, railroad or bus passengers, and perform related personal services in and around public transportation environments.

(ii) Keep building premises, working areas in production departments of industrial organizations, or similar sites in clean and orderly condition.

(39) *Receptionists* receive clients or customers coming into establishments, ascertain their wants, and direct them accordingly; perform such activities as arranging appointments, directing callers to their destinations, recording names, times, nature of business and persons seen and answering phones.

(40) *Sailors and Deck Hands* stand deck watches and perform a variety of tasks to preserve painted surfaces of ships and to maintain lines, running gear, and cargo handling gear in safe operating condition; perform such tasks as mopping decks, chipping rust, painting chipped areas, and splicing rope.

(41) *Sales Clerks, General* receive payment for merchandise in retail establishments, wrap or bag merchandise, and keep shelves stocked.

(42) *Sewing Machine Operators and Hand-Stitchers* (i) operate single- or multiple-needle sewing machines to join parts in the manufacture of such products as awnings, carpets, and gloves; specialize in one type of sewing machine limited to joining operations.

(ii) Join and reinforce parts of articles such as garments and curtains, sew button-holes and attach fasteners to such articles, or sew decorative trimmings on such articles, using needles and threads.

(43) *Stock Room and Warehouse Workers* receive, store, ship, and distribute materials, tools, equipment, and products within establishments as directed by others.

(44) *Streetcar and Bus Conductors* collect fares or tickets from passengers, issue transfers, open and close doors, announce stops, answer questions, and signal operators to start or stop.

(45) *Telephone Operators* operate telephone switchboards to relay incoming and internal calls to phones in an establishment, and make connections with external lines for outgoing calls; often take messages, supply information and keep records of calls and charges; often are involved primarily in establishing, or aiding telephone users in establishing, local or long distance telephone connections.

(46) *Truck Drivers and Tractor Drivers* (i) drive trucks to transport materials, merchandise, equipment or people to and from specified destinations, such as plants, railroad stations, and offices.

(ii) Drive tractors to move materials, draw implements, pull out objects imbedded in the ground, or pull cables of winches to raise, lower, or load heavy materials or equipment.

(47) *Typists, Lesser Skilled* type straight-copy material, such as letters, reports, stencils, and addresses, from drafts or corrected copies. They are not required to prepare materials involving the understanding of complicated technical terminology, the arrangement and setting of complex tabular detail or similar items. Their typing speed in English does not exceed 52 words per minute on a manual typewriter and/or 60 words per minute on an electric typewriter and their error rate is 12 or more errors per 5 minute typing period on representative business correspondence.

(48) *''Ushers (Recreation and Amusement)''* assist patrons at entertainment events to find seats, search for lost articles, and locate facilities.

(49) *Yard Workers* maintain the grounds of private residences in good order by performing such tasks as mowing and watering lawns, planting flowers and shrubs, and repairing and painting fences. They work on the instructions of private employers.

(c) *Requests for waivers from Schedule B.* Any employer who desires a labor certification involving a *Schedule B* occupation may request such a waiver by submitting a written request along with the *Application for Alien Employment Certification* form at the appropriate local employment service office pursuant to § 656.23.

(d) The Administrator may revise *Schedule B* from time to time on the Administrator's own initiative, upon the request of a Regional Administrator, Employment and Training Administration, or upon the written request of any other person which sets forth reasonable grounds therefor. Such requests should be mailed to the Administrator, United States Employment Service, room 8000, Patrick Henry Building, 601 D Street, NW., Washington, DC 20213.

[45 FR 83933, Dec. 19, 1980, as amended at 56 FR 54927, Oct. 23, 1991]

Subpart C—Labor Certification Process

§ 656.20 General filing instructions.

(a) A request for a labor certification on behalf of any alien who is required by the Act to become a beneficiary of a labor certification in order to obtain permanent resident status in the United States may be filed as follows:

(1) Except as provided in paragraphs (a)(2) through (4) of this section, an application for a labor certification shall be filed pursuant to this section and § 656.21.

(2) An employer seeking a labor certification for an occupation designated

for special handling shall apply for a labor certification pursuant to this section and § 656.21a.

(3) An alien seeking labor certification for an occupation listed on *Schedule A* may apply for a labor certification pursuant to this section and § 656.22.

(4) An employer seeking a labor certification for an occupation listed on *Schedule B* shall apply for a waiver and a labor certification pursuant to this section and §§ 656.21 and 656.23.

(b) (1) Aliens and employers may have agents represent them throughout the labor certification process. If an alien and/or an employer intends to be represented by an agent, the alien and/or the employer shall sign the statement set forth on the *Application for Alien Employment Certification* form: That the agent is representing the alien and/or employer and that the alien and/or employer takes full responsibility for the accuracy of any representations made by the agent.

(2) Aliens and employers may have attorneys represent them. Each attorney shall file a notice of appearance on Immigration and Naturalization Service (INS) Form G–28, naming the attorney's client or clients. Whenever, under this part, any notice or other document is required to be sent to an employer or alien, the document shall be sent to their attorney or attorneys who have filed notices of appearance on INS Form G–28, if they have such an attorney or attorneys.

(3) (i) It is contrary to the best interests of U.S. workers to have the alien and/or agents or attorneys for the alien participate in interviewing or considering U.S. workers for the job offered the alien. As the beneficiary of a labor certification application, the alien cannot represent the best interests of U.S. workers in the job opportunity. The alien's agent and/or attorney cannot represent the alien effectively and at the same time truly be seeking U.S. workers for the job opportunity. Therefore, the alien and/or the alien's agent and/or attorney may not interview or consider U.S. workers for the job offered to the alien, unless the agent and/or attorney is the employer's representative as described in paragraph (b)(3)(ii) of this section.

(ii) The employer's representative who interviews or considers U.S. workers for the job offered to the alien shall be the person who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered the alien, but which do not involve labor certifications.

(4) No person under suspension or disbarment from practice before the United States Department of Justice's Board of Immigration Appeals pursuant to 8 CFR 292.3 shall be permitted to act as an agent, representative, or attorney for an employer and/or alien under this part.

(c) Job offers filed on behalf of aliens on the *Application for Alien Employment Certification* form must clearly show that:

(1) The employer has enough funds available to pay the wage or salary offered the alien;

(2) The wage offered equals or exceeds the prevailing wage determined pursuant to § 656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work;

(3) The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis;

(4) The employer will be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States;

(5) The job opportunity does not involve unlawful discrimination by race, creed, color, national origin, age, sex, religion, handicap, or citizenship;

(6) The employer's job opportunity is not:

(i) Vacant because the former occupant is on strike or is being locked out in the course of a labor dispute involving a work stoppage; or

(ii) At issue in a labor dispute involving a work stoppage;

(7) The employer's job opportunity's terms, conditions and occupational environment are not contrary to Federal, State or local law; and

(8) The job opportunity has been and is clearly open to any qualified U.S. worker.

(9) The conditions of employment listed in paragraphs (c) (1) through (8) of this section shall be sworn (or affirmed) to, under penalty of perjury pursuant to 28 U.S.C. 1746, on the *Application for Alien Employment Certification* form.

(d) If the application involves labor certification as a physician (or surgeon) (except a physician (or surgeon) of international renown), the labor certification application shall include the following documentation:

(1) (i) Documentation which shows clearly that the alien has passed parts I and II of the National Board of Medical Examiners Examination (NBMEE), or the Foreign Medical Graduate Examination in the Medical Sciences (FMGEMS) offered by the Educational Commission for Foreign Medical Graduates (ECFMG); or

(ii) Documentation which shows clearly that:

(A) The alien was on January 9, 1978, a doctor of medicine fully and permanently licensed to practice medicine in a State within the United States;

(B) The alien was on January 9, 1978, practicing medicine in a State within the United States; or

(iii) The alien is a graduate of a school of medicine accredited by a body or bodies approved for the purpose by the Secretary of Education or that Secretary's designee (regardless of whether such school of medicine is in the United States).

(e) Whenever any document is submitted to a State or Federal agency pursuant to this part, the document either shall be in the English language or shall be accompanied by a written translation into the English language, certified by the translator as to the accuracy of the translation and his/her competency to translate.

(f) The forms required under this part for applications for labor certification are available at U.S. Consular offices abroad, at INS offices in the United States, and at local offices of the State; job service agencies. The forms will contain instructions on how to comply with the documentation requirements for applying for a labor certification under this part.

(g)(1) In applications filed under §§ 656.21 (Basic Process), 656.21a (Special Handling) and 656.22 (Schedule A), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:

(i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment.

(ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice shall be posted for at least 10 consecutive days. The notice shall be clearly visible and unobstructed while posted and shall be posted in conspicuous places, where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a).

(2) In the case of a private household, notice is required under this paragraph (g) only if the household employs one or more U.S. workers at the time the application for labor certification is filed with a local Employment Service office.

(3) Any notice of the filing of an Application for Alien Employment Certification shall:

(i) state that applicants should report to the employer, not to the local Employment Service office;

(ii) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity; and

(iii) State that any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor.

(4) If an application is filed under § 656.21 and does not involve a request for reduction in recruitment, the notice shall be provided in conjunction

with the recruitment required under § 656.21(f) of this part, shall contain the information required for advertisements by §§ 656.21 (g)(3) through (g)(8), and shall contain the information required by paragraph (g)(3) of this section.

(5) If an application is filed under the reduction in recruitment provisions at § 656.21(i) of this part, the notice does not have to be posted in conjunction with the recruitment required under § 656.21(f) of this part, but shall include the information required for advertisements by §§ 656.21 (g)(3) through (g)(8), and the requirements of paragraph (g)(3) of this section;

(6) If an application is filed on behalf of a college and university teacher pursuant to § 656.21a(a)(1)(iii) of this part, the notice shall include the information required for advertisements by § 656.21a(a)(1)(iii)(B), and the requirements of paragraph (g)(3) of this section.

(7) If an application is filed on behalf of an alien represented to be of exceptional ability in the performing arts, the notice required by this paragraph (g) shall include the information required for advertisements by §§ 656.21a(a)(iv)(B) (1) through (7) of this part, and the requirements of paragraph (g)(3) of this section.

(8) If an application is filed under the Schedule A procedures at § 656.22 of this part, the notice shall contain a description of the job and rate of pay, and the requirements of paragraphs (g)(3) (ii) and (iii) of this section.

(h)(1)(i) Any person may submit to the local Employment Service office or to the Certifying Officer documentary evidence bearing on an application for permanent alien labor certification filed under the basic labor certification process at § 656.21 of this part or under the special handling procedures at § 656.21a of this part.

(ii) Documentary evidence submitted pursuant to paragraph (h)(1)(i) of this section may include information on available workers, information on wages and working conditions, and information on the employer's failure to meet terms and conditions with respect to the employment of alien workers and co-workers. The Certifying Officer shall consider this information in making his or her determination.

(2)(ii) Any person may submit to the appropriate INS office documentary evidence of fraud or willful misrepresentation in a Schedule A application filed under § 656.22 of this part or a sheepherder application filed under § 656.21a(b) of this part.

(B) Documentary evidence submitted pursuant to paragraph (h)(2)(i) of this section shall be limited to information relating to possible fraud or willful misrepresentation. The INS may consider this information pursuant to § 656.31 of this part.

(Approved by the Office of Management and Budget under control number 1205–0015)

[45 FR 83933, Dec. 19, 1980, as amended at 49 FR 18295, Apr. 30, 1984; 56 FR 54927, Oct. 23, 1991]

§ 656.21 Basic labor certification process.

(a) Except as otherwise provided by §§ 656.21a and 656.22, an employer who desires to apply for a labor certification on behalf of an alien shall file, signed by hand and in duplicate, a Department of Labor *Application for Alien Employment Certification* form and any attachments required by this part with the local Employment Service office serving the area where the alien proposes to be employed. The employer shall set forth on the *Application for Alien Employment Certification* form, as appropriate, or in attachments:

(1) A statement of the qualifications of the alien, signed by the alien;

(2) A description of the job offer for the alien employment, including the items required by paragraph (b) of this section; and

(3) If the application involves a job offer as a live-in household domestic service worker:

(i) A statement describing the household living accommodations;

(ii) Two copies of the employment contract, each signed and dated by both the employer and the alien (not by their agents). The contract shall clearly state:

(A) The wages to be paid on an hourly and weekly basis;

(B) Total hours of employment per week, and exact hours of daily employment;

(C) That the alien is free to leave the employer's premises during all non-work hours except that the alien may work overtime if paid for the overtime at no less than the legally required hourly rate;

(D) That the alien will reside on the employer's premises;

(E) Complete details of the duties to be performed by the alien;

(F) The total amount of any money to be advanced by the employer with details of specific items, and the terms of repayment by the alien of any such advance by the employer;

(G) That in no event shall the alien be required to give more than two weeks' notice of intent to leave the employment contracted for and that the employer must give the alien at least two weeks' notice before terminating employment;

(H) That a duplicate contract has been furnished to the alien;

(I) That a private room and board will be provided at no cost to the worker; and

(J) Any other agreement or conditions not specified on the *Application for Alien Employment Certification* form; and

(iii) (A) Documentation of the alien's paid experience in the form of statements from past or present employers setting forth the dates (month and year) employment started and ended, hours of work per day, number of days worked per week, place where the alien worked, detailed statement of duties performed on the job, equipment and appliances used, and the amount of wages paid per week or month. The total paid experience must be equal to one full year's employment on a full-time basis. For example, two year's experience working half-days is the equivalent of one year's full time experience. Time spent in a household domestic service training course cannot be included in the required one year of paid experience.

(B) Each statement must contain the name and address of the person who signed it and show the date on which the statement was signed. A statement not in the English language shall be accompanied by a written translation into the English language certified by the translator as to the accuracy of the translation, and as to the translator's competency to translate.

(b) Except for labor certification applications involving occupations designated for special handling (see §656.21a) and *Schedule A* occupations (see §§656.10 and 656.22), the employer shall submit, as a part of every labor certification application, on the *Application for Alien Employment Certification* form or in attachments, as appropriate, the following clear documentation:

(1) If the employer has attempted to recruit U.S. workers prior to filing the application for certification, the employer shall document the employer's reasonable good faith efforts to recruit U.S. workers without success through the Employment Service System and/or through other labor referral and recruitment sources normal to the occupation:

(i) this documentation shall include documentation of the employer's recruitment efforts for the job opportunity which shall:

(A) List the sources the employer may have used for recruitment, including, but not limited to, advertising; public and/or private employment agencies; colleges or universities; vocational, trade, or technical schools; labor unions; and/or development or promotion from within the employer's organization;

(B) Identify each recruitment source by name;

(C) Give the number of U.S. workers responding to the employer's recruitment;

(D) Give the number of interviews conducted with U.S. workers;

(E) Specify the lawful job-related reasons for not hiring each U.S. worker interviewed; and

(F) Specify the wages and working conditions offered to the U.S. workers; and

(ii) If the employer advertised the job opportunity prior to filing the application for certification, the employer shall include also a copy of at least one such advertisement.

(2) The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements:

(i) The job opportunity's requirements, unless adequately documented as arising from business necessity:

(A) Shall be those normally required for the job in the United States;

(B) Shall be those defined for the job in the *Dictionary of Occupational Titles (D.O.T.)* including those for subclasses of jobs;

(C) Shall not include requirements for a language other than English.

(ii) If the job opportunity involves a combination of duties, for example engineer-pilot, the employer must document that it has normally employed persons for that combination of duties and/or workers customarily perform the combination of duties in the area of intended employment, and or the combination job opportunity is based on a business necessity.

(iii) If the job opportunity involves a requirement that the worker live on the employer's premises, the employer shall document adequately that the requirement is a business necessity.

(iv) If the job opportunity has been or is being described with an employer preference, the employer preference shall be deemed to be a job requirement for purposes of this paragraph (b)(2).

(3) The employer shall document that its other efforts to locate and employ U.S. workers for the job opportunity, such as recruitment efforts by means of private employment agencies, labor unions, advertisements placed with radio or TV stations, recruitment at trade schools, colleges, and universities or attempts to fill the job opportunity by development or promotion from among its present employees, have been and continue to be unsuccessful. Such efforts may be required after the filing of an application if appropriate to the occupation.

(4) If unions are customarily used as a recruitment source in the area or industry, the employer shall document that they were unable to refer U.S. workers.

(5) The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

(6) If U.S. workers have applied for the job opportunity, the employer shall document that they were rejected solely for lawful job-related reasons.

(c) The local office shall determine if the application is for a labor certification involving *Schedule A*. If the application is for a *Schedule A* labor certification, the local office shall advise the employer that the forms must be filed with an INS or Consular Office pursuant to § 656.22, and shall explain that the Administrator has determined that U.S. workers in the occupation are unavailable throughout the United States (unless a geographic limitation is applicable) and that the employment of the alien in the occupation will not adversely affect U.S. workers similarly employed.

(d) The local office shall date stamp the application (see § 656.30 for the significance of this date), and shall make sure that the *Application for Alien Employment Certification* form is complete. If it is not complete the local office shall return it to the employer and shall advise the employer to refile it when it is completed.

(e) The local office shall calculate, to the extent of its expertise using wage information available to it, the prevailing wage for the job opportunity pursuant to § 656.40 and shall put its finding into writing. If the local office finds that the rate of wages offered is below the prevailing wage, it shall advise the employer in writing to increase the amount offered. If the employer refuses to do so, the local office shall advise the employer that the refusal is a ground for denial of the application by the Certifying Officer; and that if the denial becomes final, the application will have to be refiled at the local office as a new application.

(f) The local office, using the information on job offer portion of the *Application for Alien Employment Certification* form, shall prepare and process an Employment Service job order:

(1) If the job offer is acceptable, the local office, in cooperation with the employer, then shall attempt to recruit

United States workers for the job opportunity for a period of thirty days, by placing the job order into the regular Employment Service recruitment system.

(2) If the employer's job offer is discriminatory or otherwise unacceptable as a job order under the Employment Service (ES) Regulations (parts 651–658 of this chapter), the local office, as appropriate, either shall contact the employer to try to remedy the defect or shall return the *Application for Alien Employment Certification* form to the employer with instructions on how to remedy the defect. If the employer refuses to remedy the defect, the local office shall advise the employer that it is unable to recruit U.S. workers for the job opportunity and that the application will be transmitted to the Certifying Officer for determination.

(g) In conjunction with the recruitment efforts under paragraph (f) of this section, the employer shall place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication, whichever is appropriate to the occupation and most likely to bring responses from able, willing, qualified, and available U.S. workers. The employer may request the local office's assistance in drafting the text. The advertisement shall:

(1) Direct applicants to report or send resumes, as appropriate for the occupation to the local office for referral to the employer;

(2) Include a local office identification number and the complete address or telephone number of the local office, but shall not identify the employer;

(3) Describe the job opportunity with particularity;

(4) State the rate of pay, which shall not be below the prevailing wage for the occupation, as calculated pursuant to § 656.40;

(5) Offer prevailing working conditions;

(6) State the employer's minimum job requirements;

(7) Offer training if the job opportunity is the type for which employers normally provide training;

(8) Offer wages, terms, and conditions of employment which are no less favorable than those offered to the alien; and

(9) If published in a newspaper of general circulation, be published for at least three consecutive days; or, if published in a professional, trade, or ethnic publication, be published in the next published edition.

(h) The employer shall supply the local office with required documentation or requested information in a timely manner. If documentation or requested information is not received within 45 calendar days of the date of the request the local office shall return the *Application for Alien Employment Certification* form, and any supporting documents submitted by the employer and/or the alien, to the employer to be filed as a new application.

(i) The Certifying Officer may reduce the employer's recruitment efforts required by §§ 656.21(f) and/or 656.21(g) of this part if the employer satisfactorily documents that the employer has adequately tested the labor market with no success at least at the prevailing wage and working conditions; but no such reduction may be granted for job offers involving occupations listed on *Schedule B*.

(1) To request a reduction of recruitment efforts pursuant to this paragraph (i), the employer shall file a written request along with the *Application for Alien Employment Certification* form at the appropriate local Job Service office. The request shall contain:

(i) Documentary evidence (which shall include, but is not limited to, a pre-application notice posted consistent with § 656.20(g) of this part) that within the immediately preceding six months the employer has made good faith efforts to recruit U.S. workers for the job opportunity, at least at the prevailing wage and working conditions, through sources normal to the occupation; and

(ii) Any other information which the employer believes will support the contention that further recruitment will be unsuccessful.

(2) Upon receipt of a written request for a reduction in recruitment efforts pursuant to this paragraph (i), the local office shall date stamp the request and the application form and

shall review and process the application pursuant to this § 656.21, but without regard to §§ 656.21(f), 656.21(g), and 656.21(j)(1) of this part, advertisement, and job order; and the wait for results).

(3) After reviewing and processing the application pursuant to paragraph (i)(2) of this section, the local office (and the State Employment Service office) shall process the application pursuant to paragraphs (j)(2) and (k) of this section.

(4) The Certifying Officer shall review the documentation submitted by the employer and the comments of the local office. The Certifying Officer shall notify the employer and the local (or State) Employment Service office of the Certifying Officer's decision on the request to reduce partially or completely the recruitment efforts required of the employer.

(5) Unless the Certifying Officer decides to reduce completely the recruitment efforts required of the employer, the Certifying Officer shall return the application to the local (or State) office so that the employer might recruit workers to the extent required in the Certifying Officer's decision, and in the manner required by §§ 656.20(g), 656.21(f), 656.21(g), and 656.21 (j) of this part (*i.e.*, by post-application internal notice, employment service job order, and advertising; and a wait for results). If the Certifying Officer decides to reduce completely the recruitment efforts required of the employer, the Certifying Officer then shall determine, pursuant to § 656.24 whether to grant or to deny the application.

(j) (1) The employer shall provide to the local office a written report of the results of all the employer's post-application recruitment efforts during the 30-day recruitment period; except that for job opportunities advertised in professional and trade, or ethnic publications, the written report shall be provided *no less than* 30 calendar days from the date of the publication of the employer's advertisement. The report of recruitment results shall:

(i) Identify each recruitment source by name;

(ii) State the number of U.S. workers responding to the employer's recruitment;

(iii) State the names, addresses, and provide resumes (if any) of the U.S. workers interviewed for the job opportunity and job title of the person who interviewed each worker; and

(iv) Explain, with specificity, the lawful job-related reasons for not hiring each U.S. worker interviewed.

(2) If, after the required recruitment period, the recruitment is not successful, the local office shall send the application, its prevailing wage finding, copies of all documents in the particular application file, and any additional appropriate information (such as local labor market data), to the Employment Service agency's State office or, if authorized, to the regional Certifying Officer.

(k) A Employment Service agency's State office which receives an application pursuant to paragraph (j)(2) of this section may add appropriate data or comments, and shall transmit the application promptly to the appropriate Certifying Officer.

(Approved by the Office of Management and Budget under control number 1205–0015)

[45 FR 83933, Dec. 19, 1980, as amended at 46 FR 3830, Jan. 16, 1981; 49 FR 18295, Apr. 30, 1984; 56 FR 54928, Oct. 23, 1991]

§ 656.21a Applications for labor certifications for occupations designated for special handling.

(a) An employer shall apply for a labor certification to employ an alien as a college or university teacher or an alien represented to be of exceptional ability in the performing arts by filing, in duplicate, an *Application for Alien Employment Certification* form, and any attachments required by this part, with the local Employment Service office serving the area where the alien proposes to be employed.

(1) The employer shall set forth the following on the *Application for Alien Employment Certification* form, as appropriate, or in attachments:

(i) A statement of the qualifications of the alien, signed by the alien.

(ii) A full description of the job offer for the alien employment.

(iii) If the application involves a job offer as a college or university teacher, the employer shall submit documentation to show clearly that the employer

selected the alien for the job opportunity pursuant to a competitive recruitment and selection process, through which the alien was found to be more qualified than any of the United States workers who applied for the job. For purposes of this paragraph (a)(1)(iii), evidence of the ''competitive recruitment and selection process'' shall include:

(A) A statement, signed by an official who has actual hiring authority, from the employer outlining in detail the complete recruitment procedure undertaken; and which shall set forth:

(*1*) The total number of applicants for the job opportunity;

(*2*) The specific lawful job-related reasons why the alien is more qualified than each U.S. worker who applied for the job; and

(*3*) A final report of the faculty, student, and/or administrative body making the recommendation or selection of the alien, at the completion of the competitive recruitment and selection process;

(B) A copy of at least one advertisement for the job opportunity placed in a national professional journal, giving the name and the date(s) of publication; and which states the job title, duties, and requirements;

(C) Evidence of all other recruitment sources utilized; and

(D) A written statement attesting to the degree of the alien's educational or professional qualifications and academic achievements.

(E) Applications for permanent alien labor certification for job opportunities as college and university teachers shall be filed within 18 months after a selection is made pursuant to a competitive recruitment and selection process.

(iv) If the application is for an alien represented to have exceptional ability in the performing arts, the employer shall document that the alien's work experience during the past twelve months did require, and the alien's intended work in the United States will require, exceptional ability; and shall submit:

(A) Documentation to show this exceptional ability, such as:

(*1*) Documents attesting to the current widespread acclaim and international recognition accorded to the alien, and receipt of internationally recognized prizes or awards for excellence;

(*2*) Published material by or about the alien, such as critical reviews or articles in major newspapers, periodicals, and/or trade journals (the title, date, and author of such material shall be indicated);

(*3*) Documentary evidence of earnings commensurate with the claimed level of ability;

(*4*) Playbills and starbillings;

(*5*) Documents attesting to the outstanding reputation of theaters, concert halls, night clubs, and other establishments in which the alien has appeared, or is scheduled to appear; and/or

(*6*) Documents attesting to the outstanding reputation of repertory companies, ballet troupes, orchestras, or other organizations in which or with which the alien has performed during the past year in a leading or starring capacity; and

(B) A copy of at least one advertisement placed in a national publication appropriate to the occupation (and a statement of the results of that recruitment) which shall:

(*1*) Identify the employer's name, address, and the location of the employment, if other than the employer's location;

(*2*) Describe the job opportunity with particularity;

(*3*) State the rate of pay, which shall not be below the prevailing wage for the occupation, as calculated pursuant to § 656.40;

(*4*) Offer prevailing working conditions;

(*5*) State the employer's minimum job requirements;

(*6*) Offer training if the job opportunity is the type for which employers normally provide training; and

(*7*) Offer wages, terms, and conditions of employment which are no less favorable than those offered to the alien; and

(C) Documentation that unions, if customarily used as a recruitment source in the area or industry, were unable to refer equally qualified U.S. workers.

(2) The local Employment Service office, upon receipt of an application for a college or university teacher or an alien represented to have exceptional ability in the performing arts, shall follow the application processing and prevailing wage determination procedures set forth in §§ 656.21 (d) and (e), and shall transmit a file containing the application, the local office's prevailing wage findings, and any other information it determines is appropriate, to the State Employment Service agency office, or if authorized by the State office, to the appropriate Certifying Officer.

(3) If the local office transmits the file described in paragraph (a)(3) of this section to the State office, the State office shall follow the procedures set forth at § 656.21(k).

(b) (1) An employer shall apply for a labor certification to employ an alien (who has been employed legally as a nonimmigrant sheepherder in the United States for at least 33 of the preceding 36 months) as a sheepherder by filing an *Application for Alien Employment Certification* form, and any attachments required by this paragraph (b), directly with a Department of State Consular Officer or with a District Office of INS, not with a local or State office of a State Employment Service agency, and not with an office of DOL. The documentation for such an application shall include:

(i) A completed *Application for Alien Employment Certification* form, including the Job Offer for Alien Employment, and the Statement of Qualification of Alien; and

(ii) A signed letter or letters from all U.S. employers who have employed the alien as a sheepherder during the immediately preceding 36 months, attesting that the alien has been employed in the United States lawfully and continuously as a sheepherder, for at least 33 of the immediately preceding 36 months.

(2) An Immigration Officer, or a Consular Officer, shall review the application and the letters attesting to the alien's previous employment as a sheepherder in the United States, and shall determine whether or not the alien and the employer(s) have met the requirements of this paragraph (b).

(i) The determination of the Immigration or Consular Officer pursuant to this paragraph (b) shall be conclusive and final. The employer(s) and the alien, therefore, may not make use of the review procedures set forth at §§ 656.26 and 656.27.

(ii) If the alien and the employer(s) have met the requirements of this paragraph (b), the Immigration or Consular Officer shall indicate on the *Application for Alien Employment Certification* form the occupation, the immigration or consular office which made the determination pursuant to this paragraph (b), and the date of the determination (see § 656.30 of this part for the significance of this date). The Immigration or Consular Officer then shall forward promptly to the Director copies of the *Application for Alien Employment Certification* form, without the attachments.

(c) If an application for a college or university teacher, an alien represented to be of exceptional ability in the performing arts, or a sheepherder does not meet the requirements for an occupation designated for special handling under this section, the application may be filed pursuant to § 656.21.

(Approved by the Office of Management and Budget under control number 1205–0015)

[45 FR 83933, Dec. 19, 1980, as amended at 49 FR 18295, Apr. 30, 1984; 56 FR 54928, Oct. 23, 1991]

§ 656.22 Applications for labor certification for Schedule A occupations.

(a) An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification in duplicate with the appropriate Immigration and Naturalization Service office, not with the Department of Labor or a State Employment Service office.

(b) The Application for Alien Employment Certification form shall include:

(1) Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form. There is, however, no need for the employer to provide the other documentation required under § 656.21 of this part for non-Schedule A occupations.

(2) Evidence that notice of filing the application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in § 656.20(g)(3) of this part.

(c) An employer seeking labor certification under Group I of Schedule A shall file, as part of its labor certification application, documentary evidence of the following:

(1) An employer seeking Schedule A labor certification for an alien to be employed as a physical therapist (§ 656.10(a)(1) of this part) shall file as part of its labor certification application a letter or statement signed by an authorized State physical therapy licensing official in the State of intended employment, stating that the alien is qualified to take that State's written licensing examination for physical therapists. Application for certification of permanent employment as a physical therapist may be made only pursuant to this § 656.22 and not pursuant to §§ 656.21, 656.21a, or 656.23 of this part.

(2) An employer seeking a Schedule A labor certification as a professional nurse (§ 656.10(a)(2) of this part) shall file, as part of its labor certification application, documentation that the alien has passed the Commission on Graduates of Foreign Nursing Schools (CGFN) Examination; or that the alien holds a full and unrestricted (permanent) license to practice nursing in the State of intended employment. Application for certification of employment as a professional nurse may be made only pursuant to this § 656.22(c), and not pursuant to §§ 656.21, 656.21a, or 656.23 of this part.

(d) An employer seeking labor certification on behalf of an alien under Group II of Schedule A shall file, as part of its labor certification application, documentary evidence testifying to the widespread acclaim and international recognition accorded the alien by recognized experts in their field; and documentation showing that the alien's work in that field during the past year did, and the alien's intended work in the United States will, require exceptional ability. In addition, the employer shall file, as part of the labor certification application, documentation concerning the alien from at least two of the following seven groups:

(1) Documentation of the alien's receipt of internationally recognized prizes or awards for excellence in the field for which certification is sought.

(2) Documentation of the alien's membership in international associations, in the field for which certification is sought, which require outstanding achievement of their members, as judged by recognized international experts in their disciplines or fields.

(3) Published material in professional publications about the alien, relating to the alien's work in the field for which certification is sought, which shall include the title, date, and author of such published material.

(4) Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which certification is sought.

(5) Evidence of the alien's original scientific or scholarly research contributions of major significance in the field for which certification is sought.

(6) Evidence of the alien's authorship of published scientific or scholarly articles in the field for which certification is sought, in international professional journals or professional journals with an international circulation.

(7) Evidence of the display of the alien's work, in the field for which certification is sought, at artistic exhibitions in more than one country.

(e) An Immigration Officer shall determine whether the employer and alien have met the applicable requirements of § 656.20 of this part, of this section, and of Schedule A (§ 656.10 of this part); shall review the application; and shall determine whether or not the alien is qualified for and intends to pursue the Schedule A occupation.

(1) The Immigration Officer may request an advisory opinion as to whether the alien is qualified for the Schedule A occupation from the Division of Foreign Labor Certifications, United States Employment Service, Washington, DC 20210.

(2) The Schedule A determination of INS shall be conclusive and final. The employer, therefore, may not make use

of the review procedures at § 656.26 of this part.

(f) If the alien qualifies for the occupation, the Immigration Officer shall indicate the occupation on the Application for Alien Employment Certification form. The Immigration Officer then shall promptly forward a copy of the Application for Alien Employment Certification form, without attachments, to the Director, indicating thereon the occupation, the Immigration Officer who made the Schedule A determination, and the date of the determination (see § 656.30 of this part for the significance of this date).

[56 FR 54929, Oct 23, 1991]

§ 656.23 Applications for labor certifications for Schedule B occupations; requests for waivers from Schedule B.

(a) Occupations listed on *Schedule B* require little or no education or experience, and employees can be trained quickly to perform them satisfactorily. In addition, many of these occupations are entry jobs in their industries which offer opportunities for high school graduates and other U.S. workers who otherwise would have difficulty finding their first employment and gaining work experience. The Director has determined that there is generally a nationwide surplus of U.S. workers who are available for and who can qualify for *Schedule B* job opportunities which offer prevailing wages and working conditions.

(b) Some of the occupations on *Schedule B* are also often characterized by relatively low wages, long and irregular working hours, and poor working conditions which lead to excessive turnover. In most instances, the Director has determined through past experience that the employment of aliens has failed to resolve such employment problems since the aliens, like U.S. workers, often quickly move to other jobs. This results in an adverse effect upon the wages and working conditions of U.S. workers who are employed in occupations which require similar education and experience.

(c) Therefore, the Director has determined that for occupations listed on *Schedule B* U.S. workers are generally available throughout the United States, and that the employment of aliens in *Schedule B* occupations will generally adversely affect the wages and working conditions of U.S. workers similarly employed.

(d) An individual employer or the employer's attorney or agent may petition the regional Certifying Officer for the geographic area in which the job opportunity is located for a *Schedule B* waiver on behalf of an alien with respect to a specific job opportunity. The petition shall be submitted to the local office serving the geographic area of intended employment. The petition shall include a written request for a *Schedule B* waiver, a completed *Application for Alien Employment Certification* form, and the following:

(1) The documentation required by §§ 656.20(b), (c), (e), (f), and (g) and 656.21; and

(2) Documentary verification, which the employer has obtained from the local job service office which contains the job opportunity in its administrative area, that the employer has had a job order for the same job on file with the same local office for a period of 30 calendar days and that the local office and the employer, using the job order, were not able to obtain a qualified U.S. worker.

(e) The regional Certifying Officer, using the procedures and standards set forth in § 656.24, shall either grant or deny the waiver and shall inform the employer of the determination in writing.

(f) If the waiver is granted, the regional Certifying Officer shall issue a labor certification.

(g) If the waiver is denied, the regional Certifying Officer shall follow the procedures set forth at paragraphs (c) through (g) of § 656.25.

(Approved by the Office of Management and Budget under control number 1205–0015)

[45 FR 83933, Dec. 19, 1980, as amended at 49 FR 18295, Apr. 30, 1984; 56 FR 54929, Oct. 23, 1991]

§ 656.24 Labor certification determinations.

(a) If the labor certification presents a special or unique problem, the regional Certifying Officer may refer the application to the national Certifying

Officer for determination. If the Director has directed that certain types of applications or specific applications be handled in the USES national office, the regional Certifying Officer shall refer such applications to the national Certifying Officer.

(b) The regional or national Certifying Officer, as appropriate, shall make a determination either to grant the labor certification or to issue a *Notice of Findings* on the basis of whether or not:

(1) The employer has met the requirements of this part. However, where the Certifying Officer determines that the employer has committed harmless error, the Certifying Officer nevertheless may grant the labor certification, *Provided,* That the labor market has been tested sufficiently to warrant a finding of unavailability of and lack of adverse effect on U.S. workers. Where the Certifying Officer makes such a determination, the Certifying Officer shall document it in the application file.

(2) There is in the United States a worker who is able, willing, qualified and available for and at the place of the job opportunity according to the following standards:

(i) The Certifying Officer, in judging whether a U.S. worker is willing to take the job opportunity, shall look at the documented results of the employer's and the Local (and State) Employment Service office's recruitment efforts, and shall determine if there are other appropriate sources of workers where the employer should have recruited or might be able to recruit U.S. workers.

(ii) The Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed, except that, if the application involves a job opportunity as a college or university teacher, or for an alien whom the Certifying Officer determines to be currently of exceptional ability in the performing arts, the U.S. worker must be at least as qualified as the alien.

(iii) In determining whether U.S. workers are available, the Certifying Officer shall consider as many sources as are appropriate and shall look to the nationwide system of public employment offices (the ''Employment Service'') as one source.

(iv) In determining whether a U.S. worker is available at the place of the job opportunity, the Certifying Officer shall consider U.S. workers living or working in the area of intended employment, and may also consider U.S. workers who are willing to move from elsewhere to take the job at their own expenses, or, if the prevailing practice among employers employing workers in the occupation in the area of intended employment is to pay such relocation expenses, at the employer's expense.

(3) The employment of the alien will have an adverse effect upon the wages and working conditions of U.S. workers similarly employed. In making this determination the Certifying Officer shall consider such things as labor market information, the special circumstances of the industry, organization, and/or occupation, the prevailing wage in the area of intended employment, and the prevailing working conditions, such as hours, in the occupation.

[45 FR 83933, Dec. 19, 1980, as amended at 56 FR 54930, Oct. 23, 1991]

§ 656.25 Procedures following a labor certification determination.

(a) After making a labor certification determination, the Certifying Officer shall notify the employer in writing of the determination and shall send a copy of the notice to the alien.

(b) If a labor certification is granted, the Certifying Officer shall follow the document transmittal procedures set forth at § 656.28.

(c) If a labor certification is not granted, the Certifying Officer shall issue to the employer, with a copy to the alien, a *Notice of Findings,* as defined in § 656.50. The *Notice of Findings* shall:

(1) Contain the date on which the *Notice of Findings* was issued;

(2) State the specific bases on which the decision to issue the *Notice of Findings* was made;

(3) Specify a date, 35 calendar days from the date of the *Notice of Findings*, by which documentary evidence and/or written argument may be submitted to cure the defects or to otherwise rebut the bases of the determination, and advise that if the rebuttal evidence and/or argument have not been mailed by certified mail by the date specified:

(i) The *Notice of Findings* shall automatically become the final decision of the Secretary denying the labor certification;

(ii) Failure to file a rebuttal in a timely manner shall constitute a refusal to exhaust available administrative remedies; and

(iii) The administrative-judicial review procedure provided in §656.26 shall not be available; and

(4) Quote the rebuttal procedures set forth at paragraphs (d), (e), and (f) of this section.

(d) Written rebuttal arguments and evidence may be submitted;

(1) By the employer; and

(2) By the alien, but only if the employer also has submitted a rebuttal.

(e) (1) Documentary evidence and/or written arguments to rebut all of the bases of a *Notice of Findings*, which may include evidence that the defects noticed therein have been cured, shall be mailed by certified mail on or before the date specified in the *Notice of Findings* to the Certifying Officer who issued the *Notice of Findings.*

(2) Failure to file a rebuttal in a timely manner shall constitute a failure to exhaust available administrative appellate remedies.

(3) All findings in the *Notice of Findings* not rebutted shall be deemed admitted.

(f) If a rebuttal, as described above, is submitted on time, the Certifying Officer shall review that evidence in relation to the evidence in the file, and shall then either grant or deny the labor certification pursuant to the standards set forth in §656.24(b).

(g) The Certifying Officer shall send a *Final Determination* form to the employer, and shall send a copy to the alien.

(1) If a labor certification is granted, the Certifying Officer shall follow the document transmittal procedures set forth at §656.28.

(2) If the labor certification is denied, the *Final Determination* form shall:

(i) Contain the date of the determination;

(ii) State the reasons for the determination;

(iii) Quote the request for review procedures at §656.26 (a) and (b); and

(iv) Advise that, if a request for review is not made within the specified time, the denial shall become the final determination of the Secretary.

§656.26 Board of Alien Labor Certification Appeals review of denials of labor certification.

(a) If a labor certification is denied, a request for review of the denial may be made to the Board of Alien Labor Certification Appeals:

(1) By the employer; and

(2) By the alien, but only if the employer also requests such a review.

(b) (1) The request for review shall be in writing and shall be mailed by certified mail to the Certifying Officer who denied the application within 35 calendar days of the date of the determination, that is, by the date specified on the *Final Determination* form; shall clearly identify the particular labor certification determination from which review is sought; shall set forth the particular grounds for the request; and shall include all the documents which accompanied the *Final Determination* form.

(2) Failure to file a request for review in a timely manner shall constitute a failure to exhaust available administrative remedies.

(3) If the denial of labor certification involves an application for a job opportunity as a college or university teacher or an application on behalf of an alien represented to be of exceptional ability in the performing arts, the employer may designate the names and addresses of persons or organizations of specialized competence which the employer has asked to submit *amicus* briefs.

(4) The request for review, statements, briefs, and other submissions of the parties and *amicus curiae* shall contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based.

(c) Upon the receipt of a request for review, the Certifying Officer shall immediately assemble an indexed Appeal File:

(1) The Appeal File shall be in chronological order, shall have the index on top followed by the most recent document, and shall have numbered pages. The Appeal File shall contain the request for review, the complete application file, and copies of all the written material, such as pertinent parts and pages of surveys and/or reports upon which the denial was based.

(2) The Certifying Officer shall send the Appeal File to the Board of Alien Labor Certification Appeals, Office of Administrative Law Judges, 800 K Street, NW., suite 400, Washington, DC 20001-8002.

(3) In denials involving college and university teachers and aliens represented to be of exceptional ability in the performing arts, two additional copies of the Appeal File shall be sent to the Board of Alien Labor Certification Appeals.

(4) The Certifying Officer shall send a copy of the Appeal File to the Solicitor of Labor, Attn: Associate Solicitor for Employment and Training Legal Services, suite N2101—Frances Perkins Bldg., 200 Constitution Avenue NW., Washington, DC 20210.

(5) Unless the certification was denied by the national Certifying Officer, the Certifying Officer shall send a copy of the Appeal File to the Director.

(6) The Certifying Officer shall send copies of the index to the Appeal File to the employer and to the alien. The Certifying Officer shall afford the employer and the alien the opportunity to examine the complete Appeal File at the office of the Certifying Officer, for the purpose of satisfying the employer and the alien as to the contents. The employer and/or the alien may furnish or suggest directly to the Board of Alien Labor Certification Appeals the addition of any documentation which is not in the Appeal File, but which was submitted prior to the issuance of the *Final Determination* form. The employer and/or the alien shall submit such documentation in writing, and shall send a copy to the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210.

(d)—(h) [Reserved]

(i) If a labor certification has been ordered granted, the Certifying Officer shall grant the certification and shall follow the document transmittal procedures set forth at § 656.28.

[45 FR 83933, Dec. 19, 1980, as amended at 52 FR 11218, Apr. 8, 1987; 56 FR 54930, Oct. 23, 1991]

§ 656.27 Consideration by and decisions of the Board of Alien Labor Certification Appeals.

(a) *Designations.* In considering requests for review before it, the Board of Alien Labor Certification Appeals may sit in panels of three members. The Chief Administrative Law Judge may designate any Board of Alien Labor Certification Appeals member to submit proposed findings and recommendations to the Board of Alien Labor Certification Appeals or to any duly designated panel thereof to consider a particular case.

(b) *Briefs and Statements of Position.* In considering requests for review before it, the Board of Alien Labor Certification Appeals shall afford all parties 21 days to submit or decline to submit any appropriate Statement of Position or legal brief. The Department of Labor shall be represented solely by the Solicitor of Labor or the Solicitor's designated representative. In the cases involving college or university teachers and aliens represented to be of exceptional ability in the performing arts, if the employer has designated a person or organization to submit an *amicus curiae* brief, the Board of Alien Labor Certification Appeals shall afford *amicus curiae* 21 days to submit a brief. Briefs, statements, and *amicus curiae* briefs submitted pursuant to this paragraph (b) shall be deemed timely if either mailed or delivered to the Board of Alien Labor Certification Appeals on or before the end of the 21-day period set forth in this paragraph, and shall be consistent with the requirements of § 656.26(b)(4) of this part.

(c) *Review on the record.* The Board of Alien Labor Certification Appeals shall review the denial of labor certification on the basis of the record upon which the denial of labor certification was

made, the request for review, and any Statements of Position or legal briefs submitted and shall:

(1) Affirm the denial of the labor certification; or

(2) Direct the Certifying Officer to grant the certification; or

(3) Remand the matter to the Certifying Officer for further consideration or factfinding and determination; or

(4) Direct that a hearing on the case be held pursuant to paragraph (f) of this section.

(d) *Notifications of decisions.* The Board of Alien Labor Certification Appeals shall notify the employer, the alien, the Certifying Officer, and the Solicitor of Labor of the decision pursuant to paragraph (c) of this section, and shall return the record to the Certifying Officer unless the case has been set for hearing pursuant to paragraph (f) of this section.

(e) *Remanded cases.* If the case is remanded, the Certifying Officer shall do the additional factfinding or consideration in accordance with §§656.24 and 656.25 of this part, but such factfinding and consideration shall be limited to the issues for which the case has been remanded.

(f) *Hearings.* (1) *Notification of hearing.* If the case has been set for a hearing, the Board of Alien Labor Certification Appeals shall notify the employer, the alien, the Certifying Officer, and the Solicitor of Labor of the date, time, and place of the hearing, and that the hearing may be rescheduled upon written request and for good cause shown.

(2) *Hearing procedure.* (i) The ''Rules of Practice and Procedure For Administrative Hearings Before the Office of Administrative Law Judges'', set forth at 29 CFR part 18, shall apply to hearings pursuant to this paragraph (f).

(ii) For the purposes of this paragraph (f)(2), references in 29 CFR part 18 to: ''administrative law judge'' shall mean the Board of Alien Labor Certification Appeals member or the Board of Alien Labor Certification Appeals panel duly designated pursuant to §656.27(a) of this part; ''Office of Administrative Law Judges'' shall mean the Board of Alien Labor Certification Appeals; and ''Chief Administrative Law Judge'' shall mean the Chief Administrative Law Judge in that official's function of chairing the Board of Alien Labor Certification Appeals.

[52 FR 11218, Apr. 8, 1987]

§ 656.28 Document transmittal following the grant of a labor certification.

If a labor certification is granted, except for labor certifications for occupations on *Schedule A* (§656.10) and for employment as a sheepherder pursuant to §656.21a(b), the Certifying Officer shall send the certified application containing the official labor certification stamp, supporting documentation, and complete Final Determination form to the employer, or, if appropriate, to the employer's agent, indicating that the employer should file all the documents with the appropriate INS office.

[56 FR 54930, Oct. 23, 1991]

§ 656.29 Filing of a new application after the denial of a labor certification.

(a) A new application for labor certification by the same employer involving the same occupation may be filed at any time after the expiration of 6 months from the date of a denial of certification by the Certifying Officer, except that, if the certification was denied solely because the wage or salary offered was below the prevailing wage, the employer may reapply immediately pursuant to §§656.21, 656.21a, or 656.23, as appropriate.

(b) An alien who is denied a labor certification for a *Schedule A* occupation, except for employment as a physical therapist or as a professional nurse, may at any time have an employer file for a labor certification on the alien's behalf pursuant to §656.21. Labor certifications for professional nurses and for physical therapists shall be considered only pursuant to §§656.10 and 656.22.

§ 656.30 Validity of and invalidation of labor certifications.

(a) Except as provided in paragraph (d) of this section, a labor certification is valid indefinitely. Labor certifications for Household Domestic Service Workers and teachers which were granted under the previous regulations at 29 CFR part 60 and which lapsed

after one year, shall be deemed automatically revalidated on the effective date of this part.

(b) (1) Labor certifications involving job offers shall be deemed validated as of the date of the local Employment Service office date-stamped the application; and

(2) Labor certifications for *Schedule A* occupations shall be deemed validated as of the date the applications were dated by the Immigration or Consular Officer.

(c) (1) A labor certification for a *Schedule A* occupation is valid only for the occupation set forth on the *Application for Alien Employment Certification* form, the alien for whom certification was granted, and throughout the United States unless the certification contains a geographic limitation.

(2) A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the *Application for Alien Employment Certification* form.

(d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a RA or to the Director, the RA or Director, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

(e) Certifying Officers shall issue duplicate labor certifications only upon the written request of a Consular or Immigration Officer. Certifying Officers shall issue such duplicate certifications only to the Consular or Immigration Officer who submitted the written request. An alien, employer, or an employer or alien's agent, therefore, may petition an Immigration or Consular Officer to request a duplicate from a Certifying Officer.

[45 FR 83933, Dec. 19, 1980, as amended at 56 FR 54930, Oct. 23, 1991]

§ 656.31 Labor certification applications involving fraud or willful misrepresentation.

(a) If possible fraud or willful misrepresentation involving a labor certification is discovered prior to a final labor certification determination, the Certifying Officer shall refer the matter to the INS for investigation, shall notify the employer in writing, and shall send a copy of the notification to the alien, and to the Department of Labor's Office of Inspector General. If 90 days pass without the filing of a criminal indictment or information, the Certifying Officer shall continue to process the application.

(b) If it is learned that an application is the subject of a criminal indictment or information filed in a Court, the processing of the application shall be halted until the judicial process is completed. The Certifying Officer shall notify the employer of this fact in writing and shall send a copy of the notification to the alien, and to the Department of Labor's Office of Inspector General.

(c) If a Court finds that there was no fraud or willful misrepresentation, or if the Department of Justice decides not to prosecute, the Certifying Officer shall not deny the labor certification application on the grounds of fraud or willful misrepresentation. The application, of course, may be denied for other reasons pursuant to this part.

(d) If a Court, the INS or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefor shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

§ 656.32 Fees for services and documents.

(a) No Department of Labor or State job service agency employee shall charge a fee in connection with the filing, determination, reconsideration, or review of applications for labor certification. Such employees, on request, shall advise applicants on the completion of applications and on procedures set forth in this part without charge. No charge shall be made for the issuance or transmission of a labor certification.

(b) The Department of Labor's regulations under the Freedom of Information Act at 29 CFR part 70 on the Examination and Copying of Labor Department Documents provide that fees may be charged for special searching and copying services. These fees shall be applicable to requests to the Department for copies of documents in the custody of the Department which were produced pursuant to this part, except for official copies of labor certification documents.

Subpart D—Determination of Prevailing Wage

§ 656.40 Determination of prevailing wage for labor certification purposes.

(a) Whether the wage or salary stated in a labor certification application involving a job offer equals the prevailing wage as required by § 656.21(b)(3), shall be determined as follows:

(1) If the job opportunity is in an occupation which is subject to a wage determination in the area under the Davis-Bacon Act, 40 U.S.C. 276a et seq., 29 CFR part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 et seq., 29 CFR part 4, the prevailing wage shall be at the rate required under the statutory determination. Certifying Officers shall request the assistance of the DOL Employment Standards Adminstration wage specialists if they need assistance in making this determination.

(2) If the job opportunity is in an occupation which is not covered by a prevailing wage determined under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the prevailing wage for labor certification purposes shall be:

(i) The average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wage paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages; or

(ii) If the job opportunity is covered by a union contract which was negotiated at arms-length between a union and the employer, the wage rate set forth in the union contract shall be considered as not adversely affecting the wages of U.S. workers similarly employed, that is, it shall be considered the ''prevailing wage'' for labor certification purposes.

(b) For purposes of this section, except as provided in paragraph (c) of this section, ''similarly employed'' shall mean ''having substantially comparable jobs in the occupational category in the area of intended employment,'' except that, if no such workers are employed by employers other than the employer applicant in the area of intended employment, ''similarly employed'' shall mean:

(1) ''Having jobs requiring a substantially similar level of skills within the area of intended employment''; or

(2) If there are no substantially comparable jobs in the area of intended employment, ''having substantially comparable jobs with employers outside of the area of intended employment.''

(c) For purposes of this section, *similarly employed* in the case of researchers employed by colleges and universities, Federally Funded Research and Development Centers (FFRDC's) administered by colleges and universities or Federal research agencies, means researchers employed by colleges and universities, FFRDC's administered by colleges and universities, and Federal research agencies in the area of intended employment.'' If no researchers

are employed by colleges and universities, FFRDC's administered by colleges and universities, and Federal research agencies other than the employer applicant, researchers employed by colleges and universities, FFRDC's administered by colleges and universities, and Federal research agencies outside the area of intended employment shall be considered ''similarly employed.''

(d) A prevailing wage determination for labor certification purposes made pursuant to this section shall not permit an employer to pay a wage lower than that required under any other Federal, State or local law.

[45 FR 83933, Dec. 19, 1980, as amended at 63 FR 13767, Mar. 20, 1998]

Subpart E—Petitioning Process for Federal Research Agencies

SOURCE: 63 FR 13767, Mar. 20, 1998, unless otherwise noted.

EFFECTIVE DATE NOTE: At 63 FR 13767, Mar. 20, 1998, Subpart E was added, effective May 4, 1998.

§ 656.50 Petitioning process.

(a) Federal research agencies seeking to have prevailing wages determined in accordance with § 656.40(c)(2) shall file a petition with the Director, U.S. Employment Service.

(b) The procedures and information to be included in the petition shall be in accordance with administrative directives issued by ETA that will specify the procedures to be followed and information that shall be filed in support of the petition by the requesting agency.

(c) The Director shall make a determination either to grant or deny the petition on the basis of whether the petitioning agency is a Federal research agency, whether most researchers at the petitioning agency have a close relationship with teaching as well as research, and whether the employment environment for researchers at the petitioning agency provides significant intangible and nonpecuniary incentives of the nature found at colleges and universities.

(d) Denials of agency petitions may be appealed to the Board of Alien Labor Certification Appeals.

(1) The request for review shall be in writing and shall be mailed by certified mail to the Director, U.S. Employment Service, within 35 calendar days of the date of the determination, that is by the date specified in the Director's determination; shall set forth the particular grounds for the request; and shall include all the documents which accompanied the Director's determination.

(2) Failure to file a request for review in a timely manner shall constitute a failure to exhaust available administrative remedies.

(e) Upon a request for review, the Director shall immediately assemble an indexed Appeal File.

(1) The Appeal File shall be in chronological order, shall have the index on top followed by the most recent document. The Appeal File shall contain the request for review, the complete petition file, and copies of all the written material upon which the denial was based.

(2) The Director shall send the Appeal File to the Board of Alien Labor Certification Appeals.

(f) In considering requests for review of denied petitions, the Board of Alien Labor Certification Appeals shall be guided by § 656.27.

Subpart F—Addresses

§ 656.60 Addresses of Department of Labor regional offices.

Region I (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont): Room 1707, J. F. Kennedy Federal Building, Government Center, Boston, MA 02203.

Region II (New York, New Jersey, Puerto Rico, and the Virgin Islands): 201 Varick Street, room 775, New York, NY 10014.

Region III (Delaware, Maryland, Pennsylvania, Virginia, West Virginia and the District of Columbia): P.O. Box 8796, Philadelphia, PA 19101 (3535 Market Street. Do not use street address for mailing purposes.)

Region IV (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee):

Room 405, 1371 Peachtree Street, NE., Atlanta, GA 30309.

Region V (Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin): 230 S. Dearborn Street, Chicago, IL 60604.

Region VI (Arkansas, Louisiana, New Mexico, Oklahoma, and Texas): Room 317, 525 Griffin Square Building, Griffin and Young Streets, Dallas, TX 75202.

Region VII (Iowa, Kansas, Missouri, and Nebraska): Room 1000, Federal Building, 911 Walnut Street, Kansas City, MO 64106.

Region VIII (Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming): 1961 Stout Street, Denver, CO 80202.

Region IX (Arizona, California, Guam, Hawaii, and Nevada): 71 Stevenson Street, room 830, San Francisco, CA 94119.

Region X (Alaska, Idaho, Oregon, and Washington): Room 1145 Federal Office Building, 909 First Avenue, Seattle, WA 98174.

Virgin Islands—First National City Bank Building, Veterans Drive, St. Thomas, V.I. 00801.

[45 FR 83933, Dec. 19, 1980, amended at 56 FR 54930, Oct. 23, 1991]

§ 656.62 Locations of Immigration and Naturalization Service Offices.

For the purposes of §§ 656.21a(b) and 656.22, the locations of INS offices in the United States are listed at 8 CFR 100.4.

PART 657—PROVISIONS GOVERNING GRANTS TO STATE AGENCIES FOR EMPLOYMENT SERVICES ACTIVITIES [RESERVED]

PART 658—ADMINISTRATIVE PROVISIONS GOVERNING THE JOB SERVICE SYSTEM

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FEDERAL JS COMPLAINT SYSTEM

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658.700 Scope and purpose of subpart.
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658.710 Decision of the Administrative Law Judge.
658.711 Decision of the Administrative Review Board.

AUTHORITY: Wagner-Peyser Act of 1933, as amended, 29 U.S.C. 49 *et seq.*; 38 U.S.C. chapters 41 and 42; 5 U.S.C. 301 *et seq.*; sections 658.410, 658.411 and 658.413 also issued under 44 U.S.C. 3501 *et seq.*

SOURCE: 45 FR 39468, June 10, 1980, unless otherwise noted.

Subparts A–D—[Reserved]

Subpart E—Job Service Complaint System

§ 658.400 Purpose and scope of subpart.

This subpart sets forth the regulations governing the Job Service complaint system at both the State and Federal levels.

§ 658.401 Types of complaints handled by the JS complaint system.

(a) (1) The types of complaints (JS related complaints) which shall be handled to resolution by the JS complaint system are as follows: (i) Complaints against an employer about the specific job to which the applicant was referred by the JS involving violations of the terms and conditions of the job order or employment-related law (employer-related complaint) and (ii) complaints about Job Service actions or omissions under JS regulations (agency-related complaints). These complaint procedures are not applicable to UI, WIN or CETA complaints. Complaints alleging violations of UI, WIN or CETA regulations should be handled within the procedures set forth in the respective regulations.

(2) A complaint shall be handled to resolution by these regulations only if it is made within one year of the alleged occurrence.

(b) Complaints by veterans alleging employer violations of the mandatory listing requirements under 38 U.S.C. 2012 shall not be handled under this subpart. The State agency shall handle such complaints under the Department's regulations at 41 CFR part 60–250.

(c) Complaints from MSFWs alleging violations of employment-related laws enforced by ESA or OSHA shall be taken in writing by the State agency and the ETA regional office and referred to ESA or OSHA pursuant to the procedures set forth in §§ 658.414 and 658.422. All other complaints alleging violations of employment-related Federal, State or local laws other than JS regulations by employers, their agents, or DOL subagencies other than JS (non-JS related complaints) shall be logged by the State agency and the ETA regional office and the complainant shall be referred to the appropriate agency pursuant to procedures set forth in §§ 658.414 and 658.422.

(d) Certain types of complaints, such as, but not limited to, complaints by MSFWs, and complaints alleging unlawful discrimination, shall, as set forth in this subpart, be handled by specified officials of the State agency or of ETA.

STATE AGENCY JS COMPLAINT SYSTEM

§ 658.410 Establishment of State agency JS complaint system.

(a) Each State agency shall establish and maintain a Job Service complaint system pursuant to this subpart.

(b) The State Administrator shall have overall responsibility for the operation of the State agency JS complaint system. At the local office level, the local office manager shall be responsible for the management of the JS complaint system.

(c) (1) State agencies shall ensure that centralized control procedures are established for the handling of complaints and files relating to the handling of complaints. The Manager or Administrator of the local or State office taking the complaint shall ensure that a central complaint log is maintained, listing all complaints received, and specifying for each complaint:

(i) The name of the complainant,

(ii) The name of the respondent (employer or State agency),

(iii) The date the complaint is filed,

(iv) Whether the complaint is by or on behalf of an MSFW,

(v) Whether the complaint is JS-related,

(vi) If the complaint is JS-related, whether it is employer-related or agency-related,

(vii) If the complaint is non-JS-related, the information required by § 658.414(c), and

(viii) The action taken, including for JS-related complaints, whether the complaint has been resolved.

(2) Within one month after the end of the calendar quarter during which a local office receives an MSFW complaint (JS or non-JS related), the local office manager shall transmit a copy of that portion of the log containing the information on the MSFW complaint(s) or a separate listing of the relevant information from the log for each MSFW complaint to the State Administrator. Within two months after the end of each calendar quarter the State Administrator shall transmit copies of all local and State office complaint logs received for that quarter to the Regional Administrator.

(3) State agencies shall ensure that any action taken by the responsible official, including referral, on a JS-related or non-JS related complaint from an MSFW alleging a violation of employment related laws enforced by ESA or OSHA is fully documented in a file containing all relevant information, including a copy of the original complaint form, a copy of any JS reports, any related correspondence, a list of actions taken, and a record of related telephone calls.

(4) At the State office level, the State Administrator shall ensure that all JS-related complaints referred from local offices, and all correspondence relating thereto are logged with a notation of the nature of each item.

(d) State agencies shall ensure that information pertaining to the use of the JS complaint system is publicized. This shall include the prominent display of an ETA-approved JS complaint system poster in each local office, satellite or district office, and at each State agency operated day-haul facility.

(Approved by the Office of Management and Budget under control number 1205–0039)

(Pub. L. No. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[45 FR 39468, June 10, 1980, as amended at 47 FR 145, Jan. 5, 1982]

§ 658.411 Filing and assignment of JS-related complaints.

(a) JS-related complaints may be filed in any office of the State job service agency.

(b) Assignment of complaints to local office personnel shall be as follows:

(1) All JS-related complaints filed with a local office, and alleging unlawful discrimination by race, color, religion, national origin, sex, age, or physical or mental status unrelated to job performance (handicap) shall be assigned to a local office Equal Opportunity (EO) representative if the local office has a trained and designated EO representative, or, if the local office does not have such a representative, shall be sent immediately to the State agency for logging and assignment to the EO representative or, where appropriate, handled in accordance with the procedures set forth at 29 CFR part 31. The EO representative shall refer complaints alleging discrimination by employers to the Equal Employment Opportunity Commission or other appropriate enforcement agency. Complaints retained by an EO representative shall be subject to the hearing and appeal rights as are normally provided in accordance with this subpart. The State agency complaint specialist shall follow-up with the EO representative or with other responsible enforcement agency monthly regarding MSFW complaints and quarterly regarding non-MSFW complaints, and shall inform the complainants of the status of the complaint periodically.

(2) All JS-related and non-JS related complaints other than those described in paragraph (b)(1) of this section shall be handled by the local office manager or assigned by the local office manager to a local office employee trained in JS complaint procedures.

(c) Assignment of complaints to State office personnel shall be as follows:

(1) The handling of all JS-related complaints received by the State office alleging unlawful discrimination by race, color, religion, national origin, sex, age, physical or mental status unrelated to job performance (handicap)

status shall be assigned to a State EO representative and, where appropriate, handled in accordance with procedures set forth at 29 CFR part 31.

(2) The handling of all other JS-related complaints and all non-JS-related complaints received by the State office shall be assigned to a State agency official designated by the State Administrator, provided that the State agency official designated to handle MSFW complaints shall be the State MSFW Monitor Advocate.

§ 658.412 Complaint resolution.

(a) A JS-related complaint is resolved when:

(1) The complainant indicates satisfaction with the outcome, or

(2) The complainant chooses not to elevate the complaint to the next level of review, or

(3) The complainant or the complainant's authorized representative fails to respond within 20 working days or in cases where the complainant is an MSFW, 40 working days of a written request by the appropriate local or State office, or

(4) The complainant exhausts the final level of review, or

(5) A final determination has been made by the enforcement agency to which the complaint was referred.

§ 658.413 Initial handling of complaints by the State or local office.

(a) There shall be an appropriate official available during regular office hours to take complaints in each local office.

(b) Whenever an individual indicates an interest in making any complaint to a State agency office, the appropriate JS official shall offer to explain the operation of the JS complaint system. The appropriate JS official shall offer to take the complaint in writing if it is JS related, or if non-JS related, it alleges violations of employment related laws enforced by ESA or OSHA and is filed by or on behalf of an MSFW. The official shall require that the complainant put the complaint on the JS Complaint/Referral Form prescribed or approved by the ETA. The JS Complaint/Referral Form shall be used for all complaints taken by a State agency, including complaints about unlawful discrimination, except as provided in paragraph (c) of this section. The State agency official shall offer to assist the complainant in filling out the form and shall do so if the complainant desires such assistance. If the complainant also represents several other complainants, all such complainants shall be named on the JS Complaint/Referral Form. The complainant shall sign the completed form. The identity of the complainant(s) and any persons who furnish information relating to, or assisting in, an investigation of a complaint shall be kept confidential to the maximum extent possible, consistent with applicable law and a fair determination of the complaint. A copy of the completed JS Complaint/Referral Form shall be given to the complainant(s), and the complaint form shall be given to the appropriate JS official.

(c) If a JS official receives a complaint in any form (e.g., a letter) which is signed by the complainant and includes sufficient information for the JS official to initiate an investigation, the document shall be treated as if it were a properly completed JS Complaint/Referral Form filed in person by the complainant. The JS official shall send a confirming letter to this effect to the complainant and shall give the document to the appropriate JS official. If the complainant has not provided sufficient information to investigate the matter expeditiously, the JS official shall request additional information from the complainant.

(d) If the appropriate JS official determines that the complaint is not JS-related, the official shall follow the procedures set forth in § 658.414.

(e) If the appropriate JS official determines that the complaint is JS-related, the official shall ensure that the complaint is handled in accordance with this subpart E.

(f) During the initial discussion with the complainant, the JS official receiving the complaint shall:

(1) Make every effort to obtain all the information he/she perceives to be necessary to investigate the complaint;

(2) Request that the complainant indicate all of the addresses through which he or she might be contacted during the investigation of the complaint;

(3) Request that the complainant contact the JS before leaving the area if possible, and explain the need to maintain contact during the complaint investigation.

(Approved by the Office of Management and Budget under control number 1205–0039)

(Pub. L. No. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[45 FR 39468, June 10, 1980, as amended at 47 FR 145, Jan. 5, 1982]

§ 658.414 Referral of non-JS-related complaints.

(a) To facilitate the operation of the coordinated enforcement procedures established at 29 CFR part 42, the State agency shall take from MSFWs in writing non-JS related complaints which allege violations of employment related laws enforced by ESA or OSHA. The official shall immediately refer the complaint to ESA or OSHA for prompt action. The JS official shall inform the MSFW of the enforcement agency (and the individual if known) to which the complaint will be referred and refer the complainant to other agencies, attorney, consumer advocate and/or other assistance where appropriate.

(b) Upon receipt of all other non-JS related complaints, the JS official shall refer the complainant to the appropriate enforcement agency, another public agency, an attorney, a consumer advocate and/or other appropriate assistance.

(c) For all non-JS-related complaints received pursuant to paragraphs (a) and (b) of this section, the appropriate JS official shall record the referral of the complainant and the complaint where paragraph (a) is applicable, and the agency or agencies (and individual(s), if known) to which the complainant and the complaint where paragraph (a) is applicable, were referred on the complaint log specified in § 658.410(c)(1). The JS official shall also prepare and keep the file specified in § 658.410(c)(3) for the complaints filed pursuant to paragraph (a) of this section.

§ 658.415 Transferring complaints to proper JS office.

(a) Where a JS-related complaint deals with an employer, the proper office to handle the complaint initially is ordinarily the local office serving the area in which the employer is located. Where a JS-related complaint deals with an office of a State agency, the proper office to handle the complaint initially is the local office serving the area in which the alleged violation of the JS regulations occurred. Where an agency-related complaint deals with more than one office of a State agency, with an alleged agency-wide violation, or with the State office, the appropriate State agency official may direct that the State office of that agency handle the complaint initially.

(b) The State Administrator shall establish a system whereby the office in which an JS-related complaint is filed, alleging a violation in that same State, ensures that the JS Complaint/Referral Form is adequately completed and then sent to the proper State or local office of that agency. A copy of the referral letter shall be sent to the complainant.

(c) Whenever a JS-related complaint deals with an employer in another State or another State agency, the State JS agency shall send, after ensuring that the JS Complaint/Referral Form is adequately completed, a copy of the JS Complaint/Referral Form and copies of any relevant documents to the State agency in the other State. Copies of the referral letter shall be sent to the complainant, and copies of the complaint and referral letter shall be sent to the ETA Regional Office(s) with jurisdiction over the transferring and receiving State agencies.

(d) The State agency receiving the complaint after an interstate transferral under paragraph (c) of this section shall handle the complaint as if it had been initially filed with that office.

(e) The ETA regional office with jurisdiction over the receiving State shall follow-up with the receiving State agency to ensure the complaint is handled in accordance with these regulations.

(f) If the JS complaint is against more than one State JS agency, the complaint shall so clearly state. The complaint shall be handled as separate complaints and shall be handled according to procedures at § 658.416(c) and paragraph (c) of this section.

§ 658.416 Action on JS-related complaints.

(a) The appropriate State agency official handling an JS-related complaint shall offer to assist the complainant through the provision of appropriate JS services. For complaints against employers, this may include such services as referring a worker-complainant to another job.

(b) (1) If the JS-related complaint concerns violations of an employment-related law, the local or State office official shall refer the complaint to the appropriate enforcement agency and notify the complainant in writing of the referral. The agency shall follow-up with the enforcement agency monthly regarding MSFW complaints and quarterly regarding non-MSFW complaints, and shall inform the complainant of the status of the complaint periodically.

(2) If the enforcement agency makes a final determination that the employer violated an employment related law, the State JS agency shall initiate procedures for discontinuation of services immediately in accordance with subpart F. The State agency shall notify the complainant and the employer of this action.

(c) If the complaint is filed initially in a local office, and is not referred under paragraph (b), the appropriate local office official shall investigate and attempt to resolve the complaint immediately upon receipt. If resolution has not been achieved to the satisfaction of the complainant within 15 working days after receipt of the complaint, or 5 working days with respect to complaints filed by or on behalf of MSFWs, the local office official shall send the complaint to the State office for resolution or further action except that if the local office has made a written request for information pursuant to § 658.412(a)(3), these time periods shall not apply until the complainant's response is received in accordance with § 658.412(a)(3). The local office shall notify the complainant and the respondent, in writing, of the results of its investigation pursuant to this paragraph, and of the referral to the State office.

(d) If the complaint is filed initially with the State office, and is not transferred to a local office under § 658.415(a), or not referred to an enforcement agency under paragraph (b) of this section, the appropriate State office official shall investigate and attempt to resolve the complaint immediately upon receipt. If the State office receives the complaint on referral from a local office, the State official shall attempt to resolve the complaint immediately and may, if necessary, conduct a further investigation. If resolution at the State office level has not been accomplished within 30 working days (20 working days with respect to complaints by MSFWs) after the complaint was received by the State office (whether the complaint was received directly or from a local office pursuant to paragraph (c) of this section), the State office shall make a written determination regarding the complaint and shall send copies to the complainant and the respondent except that if the State office has made a written request for information pursuant to § 658.412 (a)(3) these time periods shall not apply until the complainant's response is received in accordance with § 658.412(a)(3). The determination must be sent by certified mail. The determination shall include all of the following:

(1) The results of any State office investigation pursuant to this paragraph.

(2) Conclusions reached on the allegations of the complaint.

(3) An explanation of why the complaint was not resolved.

(4) If the complaint is against an employer, and the State office has found that the employer has violated JS regulations, the determination shall state that the State will initiate procedures for discontinuation of services to the employer in accordance with subpart F.

(5) If the complaint is against an employer and has not been referred to an enforcement agency pursuant to paragraph (b)(1) of this section, and the State office has found that the employer has not violated JS regulations, an offer to the complainant of the opportunity to request a hearing within 20 working days after the certified date of receipt of the notification.

(6) If the complaint is against the State agency, an offer to the complainant of the opportunity to request in

writing a hearing within 20 working days after the certified date of receipt of the notification.

(e) If the State office, within 20 working days from the certified date of receipt of the notification provided for in paragraph (d) of this section, receives a written request for a hearing in response thereto, the State office shall refer the complaint to a State hearing official for hearing. The parties to whom the determination was sent (the State agency may also be a party) shall then be notified in writing by the State office that:

(1) The parties will be notified of the date, time and place of the hearing;

(2) The parties may be represented at the hearing by an attorney or other representative;

(3) The parties may bring witnesses and/or documentary evidence to the hearing;

(4) The parties may cross-examine opposing witnesses at the hearing;

(5) The decision on the complaint will be based on the evidence presented at the hearing;

(6) The State hearing official may reschedule the hearing at the request of a party or its representative; and

(7) With the consent of the State agency's representative and of the State hearing official, the party who requested the hearing may withdraw the request for hearing in writing before the hearing.

§ 658.417 Hearings.

(a) Hearings shall be held by State hearing officials. A State hearing official may be any State official authorized to hold hearings under State law. They may be, for example, the same referees who hold hearings under the State unemployment compensation law and/or the Work Incentive Program or any official of the State agency, authorized by State law to preside at State administrative hearings.

(b) The State hearing official may decide to conduct hearings on more than one complaint concurrently if he/she determines that the issues are related or that the complaints will be handled more expeditiously in this fashion.

(c) The State hearing official, upon the referral of a case for a hearing, shall:

(1) Notify all involved parties of the date, time and place of the hearing; and

(2) Re-schedule the hearing, as appropriate.

(d) In conducting a hearing the State hearing official shall:

(1) Regulate the course of the hearing;

(2) Issue subpoenas, if empowered to do so under State law, if necessary;

(3) Assure that all relevant issues are considered;

(4) Rule on the introduction of evidence and testimony; and

(5) Take any other action which is necessary to insure an orderly hearing.

(e) The testimony at the hearing shall be recorded and may be transcribed when appropriate.

(f) The parties shall be afforded the opportunity to present, examine, and cross-examine witnesses.

(g) The State hearing official may elicit testimony from witnesses, but shall not act as advocate for any party.

(h) The State hearing official shall receive and include in the record, documentary evidence offered by any party and accepted at the hearing. Copies thereof shall be made available by the party submitting the document to other parties to the hearing upon request.

(i) Technical rules of evidence shall not apply to hearings conducted pursuant to this section, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination, shall be applied where reasonably necessary by the State hearing official. The State hearing official may exclude irrelevant, immaterial, or unduly repetitious evidence.

(j) The case record, or any portion thereof, shall be available for inspection and copying by any party at, prior to, or subsequent to the hearing upon request. Special procedures may be used for disclosure of medical and psychological records such as disclosure to a physician designated by the individual.

(k) The State hearing official shall, if feasible, resolve the dispute by conciliation at any time prior to the conclusion of the hearing.

(l) At the State hearing official's discretion, other appropriate individuals, organizations, or associations may be permitted to participate in the hearing as *amicus curiae* (friends of the court) with respect to specific legal or factual issues relevant to the complaint. Any documents submitted by the *amicus curiae* shall be included in the record.

(m) The following standards shall apply to the location of hearings involving parties in more than one State or in locations within a State but which are separated geographically so that access to the hearing location is extremely inconvenient for one or more parties as determined by the State hearing official.

(1) Whenever possible, the State hearing official shall hold a single hearing, at a location convenient to all parties or their representatives wishing to appear and present evidence, and with all such parties and/or their representatives present.

(2) If a hearing location cannot be established by the State hearing official pursuant to paragraph (m)(1) of this section, the State hearing official may conduct, with the consent of the parties, the hearing by a telephone conference call from a State agency office with all parties and their representatives not choosing to be present at that location permitted to participate in the hearing from their distant locations.

(3) Where the State agency does not have the facilities to conduct hearings by telephone pursuant to paragraph (m)(1) or (m)(2) of this section, the State agencies in the States where the parties are located shall take evidence and hold the hearing in the same manner as used for appealed interstate unemployment claims in those States, to the extent that such procedures are consistent with §658.416.

§ 658.418 Decision of the State hearing official.

(a) The State hearing official may:

(1) Rule that the case is improperly before it, that is, that there is a lack of jurisdiction over the case;

(2) Rule that the complaint has been withdrawn properly and in writing;

(3) Rule that reasonable cause exists to believe that the request has been abandoned or that repeated requests for re-scheduling are arbitrary and for the purpose of unduly delaying or avoiding a hearing;

(4) Render such other rulings as are appropriate to the issues in question. However, the State hearing official shall not have jurisdiction to consider the validity or constitutionality of JS regulations or of the Federal statutes under which they are promulgated.

(b) Based on the entire record, including the investigations and determinations of the local and State offices and any evidence provided at the hearing, the Sate hearing official shall prepare a written decision. The State hearing official shall send a copy of the decision stating the findings and conclusions of law and fact and the reasons therefor to the complainant, the respondent, entities serving as *amicus* capacity (if any), the State office, the Regional Administrator, and the Solicitor of Labor, Attn: Associate Solicitor for Employment and Training Legal Services, Department of Labor, room N2101, 200 Constitution Avenue, NW., Washington, DC, 20210. The notification to the complainant and respondent must be sent certified mail.

(c) All decisions of a State hearing official shall be accompanied by a written notice informing the parties (not including the Regional Administrator, the Solicitor of Labor, or entities serving in an *amicus* capacity) that, if they are not satisfied, they may, within 20 working days of the certified date of receipt of the decision, file an appeal in writing with the Regional Administrator. The notice shall give the address of the Regional Administrator.

FEDERAL JS COMPLAINT SYSTEM

§ 658.420 Establishment of JS complaint system at the ETA regional office.

(a) Each Regional Administrator shall establish and maintain a JS complaint system at the DOL regional office level.

(b) The Regional Administrator shall designate DOL officials to handle JS-related complaints as follows:

(1) The handling of all JS-related complaints alleging discrimination by race, color, religion, national origin, sex, age, or physical or mental status

unrelated to job performance (handicap), shall be assigned to a Regional Director for Equal Opportunity and Special Review (RDEOSR) and, where appropriate, handled in accordance with procedures at 29 CFR part 31.

(2) The handling of all JS-related complaints other than those described in paragraphs (b)(1) of this section, shall be assigned to a regional office official designated by the Regional Administrator, provided that the regional office official designated to handle MSFW complaints shall be the Regional MSFW Monitor Advocate.

(c) The Regional Administrator shall designate DOL officials to handle non-JS-related complaints in accordance with §658.422: *Provided,* That the regional official designated to handle MSFW non-JS-related complaints shall be the Regional MSFW Monitor Advocate.

(d) The Regional Administrator shall assure that all JS-related complaints and all correspondence relating thereto are logged, with a notation of the nature of each item.

§658.421 Handling of JS-related complaints.

(a) No JS-related complaint shall be handled at the ETA regional office level until the complainant has exhausted the State agency administrative remedies set forth at §§658.410 through 658.418. Therefore, if the Regional Administrator determines that any complainant, who has filed a JS-related complaint with the regional office, has not yet exhausted the administrative remedies at the State agency level, the Regional Administrator shall inform the complainant within 10 working days in writing that the complainant must first exhaust those remedies before the complaint may be filed in the regional office. A copy of this letter shall be sent to the State Administrator. However, nothing in this provision shall prevent an ETA regional office from accepting and handling to resolution a JS-related complaint pursuant to §658.423 or §658.702(c).

(b) The ETA regional office shall be responsible for handling appeals of determinations made on complaints at the State level. An ''appeal'' shall include any letter or other writing requesting review if it is received by the regional office and signed by a party to the complaint. Upon receipt of an appeal by the Regional Administrator after the exhaustion of State agency administrative remedies, the Regional Administrator immediately shall send for the complete State agency file, including the original JS Complaint/Referral Form.

(c) The Regional Administrator shall review the file in the case and shall determine within ten (10) days whether any further investigation or action is appropriate, provided however that the Regional Administrator shall have twenty (20) working days to make this determination if legal advice is necessary.

(d) If the Regional Administrator determines that no further action is warranted, the Regional Administrator shall send this determination in writing by certified mail to the appellant within five (5) days of his/her determination and may, in the Regional Administrator's discretion, offer the appellant a hearing before a DOL Administrative Law Judge, provided the appellant requests such a hearing in writing from the Regional Administrator within 20 working days of the certified date of receipt of the Regional Administrator's offer of hearing.

(e) If the Regional Administrator determines that further investigation or other action is warranted, the Regional Administrator immediately shall undertake such an investigation, informal resolution or other action.

(f) If the Regional Administrator determines to reverse or modify the decision of the State hearing official or the State Administrator, the Regional Administrator shall offer in writing by certified mail each party to the State hearing official's hearing or to whom the State office determination was sent, the opportunity for a hearing before a DOL Administrative Law Judge, provided the party requests such a hearing in writing within 20 working days of the certified date of the Regional Administrator's offer of hearing.

(g) If the Regional Administrator finds reason to believe that a State agency or one of its local offices has violated JS regulations, the Regional

Administrator shall follow the procedures set forth at subpart H of this part.

(h) If the appeal is not resolved, pursuant to paragraph (e) of this section, to the appellant's satisfaction, the Regional Administrator may, in the Regional Administrator's discretion, offer the appellant in writing by certified mail a hearing before a DOL Administrative Law Judge provided the appellant requests such a hearing in writing from the Regional Administrator within 20 working days of the certified date of receipt of the Regional Administrator's offer of hearing.

§ 658.422 Handling of non-JS-related complaints by the Regional Administrator.

(a) Each non-JS-related complaint filed by an MSFW alleging violations of employment related laws enforced by ESA or OSHA shall be taken in writing, and referrred to ESA or OSHA for prompt action pursuant to 29 CFR part 42.

(b) Upon referring the complaint in accordance with paragraph (a) of this section, the regional official shall inform the complainant of the enforcement agency (and individual, if known) to which the complaint was referred and shall also refer the complainant to the enforcement agency, another public agency, an attorney, a consumer advocate and/or other appropriate assistance.

(c) All other non–JS related complaints alleging violations of employment related laws shall be logged. The complainant shall be referred to the appropriate agency for assistance.

(d) For all non-JS-related complaints received and/or referred, the appropriate regional official shall record the referral of the complainant (or complaint filed on behalf of an MSFW), and the agency or agencies (and individual(s) if known) to which the complainant (or complaint) was referred on a complaint log, similar to the one described in § 658.410(c)(1). The appropriate regional official shall also prepare and keep the file specified in § 658.410(c)(3).

§ 658.423 Handling of other complaints by the Regional Administrator.

Whenever the regional office receives a JS-related complaint and the appropriate official determines that the nature and scope of the complaint are such that the time required to exhaust the administrative procedures at the State level would adversely affect a significant number of applicants, he/she shall take the complaint and follow up on the complaint as follows: for a complaint against an employer, the regional office shall handle the complaint in a manner consistent with the requirements imposed upon State agencies by §§ 658.413 and 658.416 of this part. A hearing shall be offered to the parties once the Regional Administrator makes a determination on the complaint. For a complaint against a State agency, the regional office shall follow procedures established at § 658.702(c).

§ 658.424 Federal hearings.

(a) If a party requests a hearing pursuant to § 658.421 (d), (f), or (h) or § 658.423, the Regional Administrator shall:

(1) Send the party requesting the hearing and all other parties to the prior State agency hearing, a written notice containing the statements set forth at § 658.416(e);

(2) Compile four hearing files containing copies of all documents relevant to the case, indexed and compiled chronologically;

(3) Send simultaneously one hearing file to the DOL Chief Administrative Law Judge, 800 K Street, NW., suite 400, Washington, DC 20001-8002, one hearing file to the Administrator, and one hearing file to the Solicitor of Labor, Attn: Associate Solicitor for Employment and Training Legal Services, and retain one hearing file.

(b) Upon the receipt of a hearing file, the DOL Administrative Law Judge designated by the Chief Administrative Law Judge shall notify the party requesting the hearing, all parties to the prior State hearing official hearing (if any), the State agency, the Regional Administrator, the Administrator, and the Solicitor of the receipt of the case. The DOL Administrative Law Judge shall afford the non-Federal parties 20

working days to submit legal arguments and supporting documentation, if any, in the case. The DOL Administrative Law Judge shall afford the Solicitor 20 working days to submit legal arguments and supporting documentation, if any, in the case on behalf of the Federal parties. After the 20 working days elapse, the Hearing Officer shall decide whether to schedule a hearing, or make a determination on the record.

(c) The DOL Administrative Law Judge may decide to conduct hearings on more than one complaint concurrently if he/she determines that the issues are related or that the complaints will be handled more expeditiously in this fashion.

(d) At the DOL Administrative Law Judge's discretion, other appropriate individuals, organizations, or associations may be permitted to participate in the hearing as *amicus curiae* with respect to specific legal or factual issues relevant to the complaint. Any documents submitted by the *amicus curiae* shall be included in the record.

(e) The following standards shall apply to the location of hearings involving parties in more than one State or in locations which are within a State but which are separated geographically so that access to the hearing location is extremely inconvenient for one or more parties as determined by the Administrative Law Judge.

(1) Whenever possible, the Administrative Law Judge shall hold a single hearing, at a location convenient to all parties or their representatives wishing to appear and present evidence, and with all such parties and/or their representatives present.

(2) If a hearing location cannot be established by the Administrative Law Judge at a location pursuant to paragraph (e)(1) of this section, the Administrative Law Judge may conduct, with the consent of the parties, the hearing by a telephone conference call from an office with all parties and their representatives not choosing to be present at that location permitted to participate in the hearing from their distant locations.

(3) Where the Administrative Law Judge is unable to locate facilities to conduct hearings by telephone pursuant to paragraph (e)(1) or (e)(2) of this section, the Administrative Law Judge shall take evidence in the States where the parties are located and hold the hearing in the same manner as used for appealed interstate unemployment claims in those States, to the extent that such procedures are consistent with § 658.416.

(f) The DOL Administrative Law Judge shall:

(1) Notify all involved parties of the date, time and place of the hearing; and

(2) Re-schedule the hearing, as appropriate.

(g) In conducting a hearing the DOL Administrative Law Judge shall:

(1) Regulate the course of the hearing;

(2) Issue subpoenas if necessary;

(3) Consider all relevant issues which are raised;

(4) Rule on the introduction of evidence and testimony;

(5) Take any other action which is necessary to insure an orderly hearing.

(h) The testimony at the hearing shall be recorded, and shall be transcribed if appropriate.

(i) The parties to the hearing shall be afforded the opportunity to present, examine, and cross-examine witnesses. The DOL Administrative Law Judge may elicit testimony from witnesses, but shall not act as advocate for any party.

(j) The DOL Administrative Law Judge shall receive, and make part of the record, documentary evidence offered by any party and accepted at the hearing. Copies thereof shall be made available by the party submitting the documentary evidence, to any part to the hearing upon request.

(k) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the Administrative Law Judge conducting the hearing. The Administrative Law Judge may exclude irrelevant, immaterial, or unduly repetitious evidence.

(l) The case record, or any portion thereof, shall be available for inspection and copying by any party to the

hearing at, prior to, or subsequent to the hearing upon request. Special procedures may be used for disclosure of medical and psychological records such as disclosure to a physician designated by the individual concerned.

(m) The DOL Administrative Law Judge shall, if feasible, encourage resolution of the dispute by conciliation at any time prior to the conclusion of the hearing.

[45 FR 39468, June 10, 1980, as amended at 56 FR 54708, Oct. 22, 1991]

§ 658.425 Decision of DOL Administrative Law Judge.

(a) The DOL Administrative Law Judge may:

(1) Rule that there is a lack of jurisdiction over the case;

(2) Rule that the appeal has been withdrawn properly and in writing, with the written consent of all the parties;

(3) Rule that reasonable cause exists to believe that the appeal has been abandoned or that repeated requests for re-scheduling are arbitrary and for the purpose of unduly delaying or avoiding a hearing; or

(4) Render such other rulings as are appropriate to the issues in question. However, the DOL Administrative Law Judge shall not have jursidiction to consider the validity or constitutionality of JS regulations or of the Federal statutes under which they are promulgated.

(b) Based on the entire record, including any legal briefs, the record before the State agency, the investigation (if any) and determination of the Regional Administrator, and evidence provided at the hearing, the DOL Administrative Law Judge shall prepare a written decision. The DOL Administrative Law Judge shall send a copy of the decision stating the findings and conclusions of law and fact and the reasons therefor to the parties to the hearing, including the State agency, the Regional Administrator, the Administrator, and the Solicitor, and to entities filing amicus briefs (if any).

(c) The decision of the DOL Administrative Law Judge shall be the final decision of the Secretary.

§ 658.426 Complaints against USES.

Complaints alleging that an ETA regional office or the national office of USES has violated JS regulations should be mailed to the Assistant Secretary for Employment and Training, U.S. Department of Labor, Washington, DC 20210. Such complaints should include:

(a) The allegations of wrong-doing, (b) the date of the incident, (c) location of the incident, (d) who the complaint is against, and (e) any other relevant information available to the complainant. The Assistant Secretary or the Regional Administrator as designated shall make a determination and respond to the complainant after investigation of the complaint.

Subpart F—Discontinuation of Services to Employers by the Job Service System

§ 658.500 Scope and purpose of subpart.

This subpart contains the regulations governing the discontinuation of services provided pursuant to 20 CFR part 653 to employers by the USES, including State agencies.

§ 658.501 Basis for discontinuation of services.

(a) The State agency shall initiate procedures for discontinuation of services to employers who:

(1) Submit and refuse to alter or withdraw job orders containing specifications which are contrary to employment-related laws;

(2) Submit job orders and refuse to provide assurances, in accordance with paragraph (d) above, that the jobs offered are in compliance with employment-related laws, or to withdraw such job orders;

(3) Are found through field checks or otherwise to have either misrepresented the terms or conditions of employment specified on job orders or failed to comply fully with assurances made on job orders;

(4) Are found by a final determination by an appropriate enforcement agency to have violated any employment-related laws and notification of

this final determination has been provided to the JS by that enforcement agency;

(5) Are found to have violated JS regulations pursuant to § 658.416(d)(4);

(6) Refuse to accept qualified workers referred through the clearance system;

(7) Refuse to cooperate in the conduct of field checks conducted pursuant to § 653.503; or

(8) Repeatedly cause the initiation of the procedures for discontinuation of services pursuant to paragraphs (a)(1) through (6) of this section.

(b) The State agency may discontinue services immediately if, in the judgment of the State Administrator, exhaustion of the administrative procedures set forth in this subpart at §§ 658.501 through 658.502 would cause substantial harm to a significant number of workers. In such instances, procedures at § 658.503 (b) *et seq.* shall be followed.

(c) For employers who are alleged to have not complied with the terms of the temporary labor certification, State agencies shall notify the Regional Adminstrator of the alleged non-compliance for investigation and pursuant to § 655.210 consideration of ineligibility for subsequent temporary labor certification.

§ 658.502 Notification to employers.

(a) The State agency shall notify the employer in writing that it intends to discontinue the provision of JS services pursuant to 20 CFR part 653 and the reason therefore:

(1) Where the decision is based on submittal and refusal to alter or to withdraw job orders containing specifications contrary to employment-related laws, the State agency shall specify the date the order was submitted, the job order involved, the specifications contrary to employment-related laws and the laws involved. The employer shall be notified in writing that all JS services will be terminated in 20 working days unless the employer within that time:

(i) Provides adequate evidence that the specifications are not contrary to employment-related laws, or

(ii) Withdraws the specifications and resubmits the job order in compliance with all employment-related laws, or

(iii) If the job is no longer available makes assurances that all future job orders submitted will be in compliance with all employment-related laws, or

(iv) Requests a hearing from the State agency pursuant to § 658.417.

(2) Where the decision is based on the employer's submittal of an order and refusal to provide assurances that the job is in compliance with employment-related laws or to withdraw the order, the State agency shall specify the date the order was submitted, the job order involved and the assurances involved. The employer shall be notified that all JS services will be terminated within 20 working days unless the employer within that time:

(i) Resubmits the order with the appropriate assurances,

(ii) If the job is no longer available, make assurances that all future job orders submitted will contain all necessary assurances that the job offered is in compliance with employment-related laws, or

(iii) Requests a hearing from the State agency pursuant to § 658.417.

(3) Where the decision is based on a finding that the employer has misrepresented the terms or conditions of employment specified on job orders or failed to comply fully with assurances made on job orders, the State agency shall specify the basis for that determination. The employer shall be notified that all JS services will be terminated in 20 working days unless the employer within that time:

(i) Provides adequate evidence that terms and conditions of employment were not misrepresented, or

(ii) Provides adequate evidence that there was full compliance with the assurances made on the job orders, or

(iii) Provides resolution of a complaint which is satisfactory to a complainant referred by the JS, and

(iv) Provides adequate assurance that specifications on future orders will accurately represent the terms and conditions of employment and that there will be full compliance with all job order assurances, or

(v) Requests a hearing from the State agency pursuant to § 658.417.

(4) Where the decision is based on a final determination by an enforcement agency that the employer-related laws,

the State agency shall specify the determination. The employer shall be notified that all JS services will be terminated in 20 working days unless the employer within that time:

(i) Provides adequate evidence that the enforcement agency has reversed its ruling and that the employer did not violate employment-related laws, or

(ii) Provides adequate evidence that the appropriate fines have been paid and/or appropriate restitution has been made, and

(iii) Provides assurances that any policies, procedures, or conditions responsible for the violation have been corrected and the same or similar violations are not likely to occur in the future.

(5) Where the decision is based on a finding of a violation of JS regulations under § 658.416(d)(4), the State agency shall specify the finding. The employer shall be notified that all JS services will be terminated in 20 working days unless the employer within that time:

(i) Provides adequate evidence that the employer did not violate JS regulations, or

(ii) Provides adequate evidence that appropriate restitution has been made or remedial action taken, and

(iii) Provides assurances that any policies, procedures, or conditions responsible for the violation have been corrected and the same or similar violations are not likely to occur in the future, or

(iv) Requests a hearing from the State agency pursuant to § 658.417.

(6) Where the decision is based on an employer's failure to accept qualified workers referred through the clearance system, the State agency shall specify the workers referred and not accepted. The employer shall be notified that all JS services will be terminated in 20 working days unless the employer within that time:

(i) Provides adequate evidence that the workers were accepted, or

(ii) Provides adequate evidence that the workers were not available to accept the job, or

(iii) Provides adequate evidence that the workers were not qualified, and

(iv) Provides adequate assurances that qualified workers referred in the future will be accepted; or

(v) Requests a hearing from the State agency pursuant to § 658.417.

(7) Where the decision is based on lack of cooperation in the conduct of field checks, the State agency shall specify the lack of cooperation, the employer shall be notified that all JS services will be terminated in 20 working days unless the employer within that time:

(i) Provides adequate evidence that he did cooperate, or

(ii) Cooperates immediately in the conduct of field checks, and

(iii) Provides assurances that he/she will cooperate in future field checks in further activity, or

(iv) Requests a hearing from the State agency pursuant to § 658.417.

(b) If the employer chooses to respond pursuant to this section by providing documentary evidence or assurances, he/she must at the same time request a hearing if such hearing is desired in the event that the State agency does not accept the documentary evidence or assurances as adequate.

(c) Where the decision is based on repeated initiation of procedures for discontinuation of services, the employer shall be notified that services have been terminated.

(d) If the employer makes a timely request for a hearing, in accordance with this section, the State agency shall follow procedures set forth at § 658.417 and notify the complainant whenever the discontinuation of services is based on a complaint pursuant to § 658.501(a)(5).

§ 658.503 Discontinuation of services.

(a) If the employer does not provide a satisfactory response in accordance with § 658.502, within 20 working days, or has not requested a hearing, the State agency shall immediately terminate services to the employer.

(b) If services are discontinued to an employer subject to Federal Contractor Job Listing Requirements, the State agency shall notify the ETA regional office immediately.

§ 658.504 Reinstatement of services.

(a) Services may be reinstated to an employer after discontinuation under § 658.503, if:

(1) The State is ordered to do so by a Federal Administrative Law Judge or Regional Administrator, or

(2) (i) The employer provides adequate evidence that any policies, procedures or conditions responsible for the previous discontinuation of services have been corrected and that the same or similar difficulties are not likely to occur in the future, and

(ii) The employer provides adequate evidence that the employer has responded adequately to any findings of an enforcement agency, State JS agency, or USES, including restitution to the complainant and the payment of any fines, which were the basis of the discontinuation of services.

(b) The State agency shall notify, within 20 working days, the employer requesting reinstatement whether his request has been granted. If the State denies the request for reinstatement, the basis for the denial shall be specified and the employer shall be notified that he/she may request a hearing within 20 working days.

(c) If the employer makes a timely request for a hearing, the State agency shall follow the procedures set forth at § 658.417.

(d) The State agency shall reinstate services to an employer if ordered to do so by a State hearing officer, Regional Administrator, or Federal Administrative Law Judge as a result of a hearing offered pursuant to paragraph (c) of this section.

Subpart G—Review and Assessment of State Agency Compliance With Job Service Regulations

AUTHORITY: Wagner-Peyser Act of 1933, as amended, 29 U.S.C. 49 *et seq.* 5 U.S.C. 301 *et seq.*

§ 658.600 Scope and purpose of subpart.

This subpart sets forth the regulations governing review and assessment of State agency compliance with the Job Service regulations at 20 CFR parts 601, 602, 603, 604, 620, 621, 651–658 and 29 CFR part 8. All recordkeeping and reporting requirements contained in parts 653 and 658 have been approved by the Office of Management and Budget as required by the Federal Reports Act of 1942.

§ 658.601 State agency responsibility.

(a) Each State agency shall establish and maintain a self-appraisal system for job service operations to determine success in reaching goals and to correct deficiencies in performance. The self-appraisal system shall include numerical (quantitative) appraisal and non-numerical (qualitative) appraisal.

(1) Numerical appraisal at the local office level shall be conducted as follows:

(i) Performance shall be measured on a quarterly-basis against planned service levels as stated in the State Program and Budget Plan (PBP). The State plan shall be consistent with numerical goals contained in local office plans.

(ii) To appraise numerical activities/indicators, actual results as shown on the Employment Security Automated Reporting System (ESARS) tables and Cost Accounting Reports shall be compared to planned levels. Variances between achievement and plan shall be identified.

(iii) When the numerical appraisal of required activities/indicators identifies significant variances from planned levels, additional analysis shall be conducted to isolate possible contributing factors. This data analysis shall include, as appropriate, comparisons to past performance, attainment of PBP goals and consideration of pertinent non-numerical factors.

(iv) Results of local office numerical reviews shall be documented and significant deficiencies identified. A corrective action plan as described in paragraph (a)(6) shall be developed to address these deficiencies.

(v) The result of local office appraisal, including corrective action plans, shall be communicated in writing to the next higher level of authority for review. This review shall cover adequacy of analysis, appropriateness of corrective actions, and need for

higher level involvement. When this review is conducted at an area or district office, a report describing local office performance within the area or district jurisdiction shall be communicated to the central office on a quarterly basis.

(2) Numerical appraisal at the central office level shall be conducted as follows:

(i) Performance shall be measured on a quarterly basis against planned service levels as stated in the State Program and Budget Plan (PBP). The State plan shall be consistent with numerical goals contained in local office plans.

(ii) To appraise these key numerical activities/indicators, actual results as shown on the Employment Security Automated Reporting System (ESARS) tables and Cost Accounting Reports shall be compared to planned levels. Variances between achievement and plan shall be identified.

(iii) The central office shall review Statewide data, and performance against planned service levels as stated in the State Program and Budget Plan (PBP) on at least a quarterly basis to identify significant Statewide deficiencies and to determine the need for additional analysis, including identification of trends, comparisons to past performance, and attainment of PBP goals.

(iv) Results of numerical reviews shall be documented and significant deficiencies identified. A corrective action plan as described in paragraph (a)(5) of this section shall be developed to address these deficiencies. These plans shall be submitted to the ETA Regional Office as part of the periodic performance process described at 20 CFR 658.603(d)(2).

(3) Nonnumerical (qualitative) appraisal of local office job service title III activities shall be conducted at least annually as follows:

(i) Each local office shall assess the quality of its services to applicants, employers, and the community and its compliance with Federal regulations.

(ii) At a minimum, nonnumerical review shall include an assessment of the following factors:

(A) Appropriateness of services provided to applicants and employers;

(B) Timely delivery of services to applicants and employers;

(C) Staff responsiveness to individual applicant and employer needs;

(D) Thoroughness and accuracy of documents prepared in the course of service delivery; and

(E) Effectiveness of JS interface with external organizations, i.e., other ETA funded programs, community groups, etc.

(iii) Nonnumerical review methods shall include:

(A) Observation of processes;

(B) Review of documents used in service provisions; and

(C) Solicitation of input from applicants, employers, and the community.

(iv) The result of nonnumerical reviews shall be documented and deficiencies identified. A corrective action plan that addresses these deficiencies as described in paragraph (a)(6) of this section shall be developed.

(v) The result of local office nonnumerical appraisal, including corrective actions, shall be communicated in writing to the next higher level of authority for review. This review shall cover thoroughness and adequacy of local office appraisal, appropriateness of corrective actions, and need for higher level involvement. When this review is conducted at an area or district level, a report summarizing local office performance within that jurisdiction shall be communicated to the central office on an annual basis.

(4) As part of its oversight responsibilities, the central office shall conduct onsite reviews in those local offices which show continuing internal problems or deficiencies in performance as indicated by such sources as data analysis, nonnumerical appraisal, or other sources of information.

(5) Nonnumerical (qualitative) review of central office job service activities shall be conducted as follows:

(i) Central office operations shall be assessed annually to determine compliance with Federal regulations and to assess progress made on annually established work plans established for central office staff.

(ii) Results of nonnumerical reviews shall be documented and deficiencies identified. A corrective action plan

that addresses these deficiencies shall be developed.

(6) Corrective action plans developed to address deficiencies uncovered at any administrative level within the State as a result of the self-appraisal process shall include:

(i) Specific descriptions of the type of action to be taken, the time frame involved and the assignment of responsibility.

(ii) Provision for the delivery of technical assistance as needed.

(iii) A plan to conduct follow-up on a timely basis to determine if action taken to correct the deficiencies has been effective.

(7) (a) The provisions of the JS regulations which require numerical and nonnumerical assessment of service to special applicant groups, e.g., services to veterans at 20 CFR 653.221 through 653.230 and services to MSFWs at 20 CFR 653.108, are supplementary to the provisions of this section.

(b) Each State Administrator and local office manager shall assure that their staffs know and carry out JS regulations, including regulations on performance standards and program emphases, and any corrective action plans imposed by the State agency or by the ETA.

(c) Each State Administrator shall assure that the State agency complies with its approved program budget plan.

(d) Each State Administrator shall assure to the maximum extent feasible the accuracy of data entered by the State agency into ETA required management information systems. Each State agency shall establish and maintain a data validation system pursuant to ETA instructions. The system shall review every local office at least once every four years. The system shall include the validation of time distribution reports and the review of data gathering procedures.

§ 658.602 ETA national office responsibility.

The ETA national office shall:

(a) Monitor ETA regional offices' carrying out of JS regulations;

(b) From time to time, conduct such special reviews and audits as necessary to monitor ETA regional office and State agency compliance with JS regulations;

(c) Offer technical assistance to the ETA regional offices and State agencies in carrying out JS regulations and programs;

(d) Have report validation surveys conducted in support of resource allocations;

(e) Develop tools and techniques for reviewing and assessing State agency performance and compliance with JS regulations.

(f) ETA shall appoint a National MSFW Monitor Advocate, who shall devote full time to the duties set forth in this subpart. The National MSFW Monitor Advocate shall:

(i) Review the effective functioning of the Regional and State MSFW Monitor Advocates;

(ii) Review the performance of State agencies in providing the full range of JS services to MSFWs;

(iii) Take steps to resolve or refer JS-related problems of MSFWs which come to his/her attention;

(iv) Take steps to refer non JS-related problems of MSFWs which come to his/her attention;

(v) Recommend to the Administrator changes in policy toward MSFWs; and

(vi) Serve as an advocate to improve services for MSFWs within JS. The National MSFW Monitor Advocate shall be a member of the National Farm Labor Coordinated Enforcement Staff Level Working Committee.

(1) The National MSFW Monitor Advocate shall be appointed by the Administrator after informing farmworker organizations and other organizations with expertise concerning MSFWs of the openings and encouraging them to refer qualified applicants to apply through the federal merit system. Among qualified candidates, determined through merit systems procedures, individuals shall be sought who meet the criteria used in the selection of the State MSFW Monitor Advocates, as provided in § 653.108(b).

(2) The National MSFW Monitor Advocate shall be assigned staff necessary to fulfill effectively all the responsibilities set forth in this subpart.

(3) The National MSFW Monitor Advocate shall submit an annual report

(''Annual Report'') to the Administrator, the ETA Assistant Secretary, and the National Farm Labor Coordinating Committee covering the matters set forth in this subpart.

(4) The National MSFW Monitor Advocate shall monitor and assess State agency compliance with JS regulations affecting MSFWs on a continuing basis. His/her assessment shall consider

(i) Information from Regional and State MSFW Monitor Advocates;

(ii) Program performance data, including the service indicators;

(iii) Periodic reports from regional offices;

(iv) All federal on-site reviews;

(v) Selected State on-site reviews;

(vi) Other relevant reports prepared by USES;

(vii) Information received from farmworker organizations and employers; and

(viii) His/her personal observations from visits to State JS offices, agricultural work sites and migrant camps. In the Annual Report, the National MSFW Monitor Advocate shall include both a quantitative and qualitative analysis of his/her findings and the implementation of his/her recommendations by State and federal officials, and shall address the information obtained from all of the foregoing sources.

(5) The National MSFW Monitor Advocate shall review the activities of the State/federal monitoring system as it applies to services to MSFWs and the JS complaint system including the effectiveness of the regional monitoring function in each region and shall recommend any appropriate changes in the operation of the system. The National MSFW Monitor Advocate's findings and recommendations shall be fully set forth in the Annual Report.

(6) If the National MSFW Monitor Advocate finds that the effectiveness of any Regional MSFW Monitor Advocate has been substantially impeded by the Regional Administrator or other Regional Office official, he/she shall, if unable to resolve such problems informally, report and recommend appropriate actions directly to the Administrator. If the National MSFW Monitor Advocate receives information that the effectiveness of any State Monitor Advocate has been substantially impeded by the State Administrator or other State or federal JS official, he/she shall, in the absence of a satisfactory informal resolution at the regional level, report and recommend appropriate actions directly to the Administrator.

(7) The National MSFW Monitor Advocate shall be informed of all proposed changes in policy and practice within USES, including JS regulations, which may affect the delivery of services to MSFWs. The National MSFW Monitor Advocate shall advise the Administrator concerning all such proposed changes which may adversely affect MSFWs. The National MSFW Monitor Advocate shall propose directly to the Administrator changes in JS policy and administration which may substantially improve the delivery of services *to* MSFWs. He/she shall also recommend changes in the funding of state agencies and/or adjustment or reallocation of the discretionary portions of funding formulae.

(8) The National MSFW Monitor Advocate shall participate in the review and assessment activities required in this section and § 658.700 *et seq.* As part of such participation, the National MSFW Monitor Advocate, or if he/she is unable to participate a Regional MSFW Monitor Advocate, shall accompany the National Office review team on National Office on-site reviews. The National MSFW Monitor Advocate shall engage in the following activities in the course of each State on-site review:

(i) He/she shall accompany selected outreach workers on their field visits.

(ii) He/she shall participate in a random field check[s] of migrant camps or work site[s] where MSFWs have been placed on inter or intra state clearance orders.

(iii) He/she shall contact local CETA 303 groups or other farmworker organizations as part of the on-site review, and, conduct an interview with representatives of the organizations.

(iv) He/she shall meet with the State MSFW Monitor Advocate and discuss the full range of the JS services to MSFWs, including the monitoring and complaint systems.

(9) In addition to the duties specified in paragraph (f)(8) of this section, the

National MSFW Monitor Advocate each year during the harvest season shall visit the four states with the highest level of MSFW activity during the prior fiscal year, if they are not scheduled for a National Office on-site review during the current fiscal year, and shall:

(i) Meet with the State MSFW Monitor Advocate and other central office staff to discuss MSFW service delivery, and (ii) contact representatives of MSFW organizations and interested employer organizations to obtain information concerning JS service delivery and coordination with other agencies.

(10) The National MSFE Monitor Advocate shall perform the duties specified in §658.700. As part of this function, he/she shall monitor the performance of regional offices in imposing corrective action. The National MSFW Monitor Advocate shall report any deficiencies in performance to the Administrator.

(11) The National MSFW Monitor Advocate shall establish routine and regular contacts with CETA 303 groups, other farmworker organizations and agricultural employers and/or employer organizations. He/she shall attend conferences or meetings of these groups wherever possible and shall report to the Administrator and the National Farm Labor Coordinated Enforcement Committee on these contacts when appropriate. The National MSFW Monitor Advocate shall include in the Annual Report recommendations as to how DOL might better coordinate JS and CETA 303 services as they pertain to MSFWs.

(12) In the event that any State or Regional MSFW Monitor Advocate, enforcement agency or MSFW group refers a matter to the National MSFW Monitor Advocate which requires emergency action, he/she shall assist them in obtaining action by appropriate agencies and staff, inform the originating party of the action taken, and, upon request, provide written conformation.

(13) Through all the mechanisms provided in this subpart, the National MSFW Monitor Advocate shall aggressively seek to ascertain and remedy, if possible, systemic deficiencies in the provisions of JS services and protections afforded by these regulations to MSFWs. The National MSFW Monitor Advocate shall:

(i) Use the regular reports on complaints submitted by State agencies and ETA regional offices to assess the adequacy of these systems and to determine the existence of systemic deficiencies.

(ii) Provide technical assistance to ETA regional office and State agency staffs for administering the JS complaint system.

(iii) Recommend to the Administrator specific instructions for action by regional office staff to correct any JS-related systemic deficiencies. Prior to any ETA review of regional office operations concerning JS services to MSFWs, the National MSFW Monitor Advocate shall provide to the Administrator a brief summary of JS-related services to MSFWs in that region and his/her recommendations for incorporation in the regional review materials as the Administrator and ETA reviewing organization deem appropriate.

(iv) Recommend to the National Farm Labor Coordinated Enforcement Committee specific instructions for action by ESA and OSHA regional office staff to correct any non-JS-related systemic deficiencies of which he/she is aware.

§658.603 ETA regional office responsibility.

(a) The Regional Administrator shall have responsibility for the regular review and assessment of State agency performance and compliance with JS regulations.

(b) The Regional Administrator shall review and approve annual program budget plans for the State agencies within the region. In reviewing the program budget plans the Regional Administrator shall consider relevant factors including the following:

(1) State agency compliance with JS regulations;

(2) State agency performance against the goals and objectives established in the previous year's program budget plan;

(3) The effect which economic conditions and other external factors considered by the ETA in the resource allocation process may have had or are expected to have on State agency performance;

(4) State agency adherence to national program emphasis; and

(5) The adequacy and appropriateness of the program budget plan for carrying out JS programs.

(c) The Regional Administrator shall assess the overall performance of State agencies on an ongoing basis through desk reviews and the use of required reporting systems and other available information.

(d) As appropriate, Regional Administrators shall conduct or have conducted:

(1) Comprehensive on-site reviews of State agencies and their offices to review State agency organization, management, and program operations;

(2) Periodic performance reviews of State agency operation of JS programs to measure actual performance against the program budget plan, past performance, the performance of other State agencies, etc.;

(3) Audits of State agency programs to review State agency program activity and to assess whether the expenditure of grant funds has been in accordance with the approved budget. Regional Administrators may also conduct audits through other agencies or organizations or may require the State agency to have audits conducted;

(4) Validations of data entered into management information systems to assess:

(i) The accuracy of data entered by the State agencies into management information system;

(ii) Whether the State agencies' data validating and reviewing procedures conform to ETA instructions; and

(iii) Whether State agencies have implemented any corrective action plans required by the ETA to remedy deficiencies in their validation programs;

(5) Technical assistance programs to assist State agencies in carrying out JS regulations and programs;

(6) Reviews to assess whether the State agency has complied with corrective action plans imposed by the ETA or by the State agency itself; and

(7) Random, unannounced field checks of a sample of agricultural work sites to which JS placements have been made through the clearance system to determine and document whether wages, hours, working and housing conditions are as specified on the job order. If regional office staff find reason to believe that conditions vary from job order specifications, findings should be documented on the JS Complaint Referral Form and provided to the State agency to be handled as a complaint under § 658.411(b).

(e) The Regional Administrator shall provide technical assistance to State agencies to assist them in carrying out JS regulations and programs.

(f) The Regional Administrator shall appoint a Regional MSFW Monitor Advocate who shall devote full time to the duties set forth in this subpart. The Regional MSFW Monitor Advocate shall:

(i) Review the effective functioning of the State MSFW Monitor Advocates in his/her region;

(ii) Review the performance of State agencies in providing the full range of JS services to MSFWs;

(iii) Take steps to resolve JS-related problems of MSFWs which come to his/her attention;

(iv) Recommend to the Regional Administrator changes in policy towards MSFWs;

(v) Review the operation of the JS complaint system; and

(vi) Serve as an advocate to improve service for MSFWs within JS. The Regional MSFW Monitor Advocate shall be a member of the Regional Farm Labor Coordinated Enforcement Committee.

(1) The Regional MSFW Monitor Advocate shall be appointed by the Regional Administrator after informing farmworker organizations and other organizations in the region with expertise concerning MSFWs of the opening and encouraging them to refer qualified applicants to apply through the federal merit system. The Regional MSFW Monitor Advocate shall have direct personal access to the Regional Administrator wherever he/she finds it necessary. Among qualified candidates, individuals shall be sought who meet the criteria used in the selection of the

State MSFW Monitor Advocates, as provided in § 653.108(b).

(2) The Regional Administrator shall ensure that staff necessary to fulfill effectively all the regional office responsibilities set forth in this subsection are assigned. The Regional MSFW Monitor Advocate shall notify the Regional Administrator of any staffing deficiencies and the Regional Administrator shall take appropriate action.

(3) The Regional MSFW Monitor Advocate within the first three months of their tenure shall participate in a training session(s) approved by the National office.

(4) At the regional level, the Regional MSFW Monitor Advocate shall have primary responsibility for (i) monitoring the effectiveness of the JS complaint system set forth at subpart E of this part; (ii) apprising appropriate State and ETA officials of deficiencies in the complaint system; and (iii) providing technical assistance to State MSFW Monitor Advocates in the region.

(5) At the ETA regional level, the Regional MSFW Monitor Advocate shall have primary responsibility for ensuring that State agency compliance with JS regulations as they pertain to services to MSFWs is monitored by the regional office. He/she shall independently assess on a continuing basis the provision of JS services to MSFWs, seeking out and using:

(i) Information from State MSWF Monitor Advocates, including all reports and other documents; (ii) program performance data; (iii) the periodic and other required reports from State JS offices; (iv) federal on-site reviews; (v) other reports prepared by the National office; (vi) information received from farmworker organizations and employers; and (vii) any other pertinent information which comes to his/her attention from any possible source. In addition, the Regional MSFW Monitor Advocate shall consider his/her personal observations from visits to JS offices, agricultural work sites and migrant camps. The Regional MSFW Monitor Advocate shall assist the Regional Administrator and other appropriate line officials in applying appropriate corrective and remedial actions to State agencies.

(6) The Regional Administrator's quarterly report to the National office shall include the Regional MSFW Monitor Advocate's summary of his/her independent assessment as required in paragraph (f)(5) of this section. The fourth quarter summary shall include an annual summary from the region. The summary also shall include both a quantitative and a qualitative analysis of his/her reviews and shall address all the matters with respect to which he/she has responsibilities under these regulations.

(7) The Regional MSFW Monitor Advocate shall review the activities and performance of the State MSFW Monitor Advocates and the State monitoring system in the region, and shall recommend any appropriate changes in the operation of the system to the Regional Administrator. The Regional MSFW Monitor Advocate's review shall include a determination whether the State MSFW Monitor Advocate (i) does not have adequate access to information, (ii) is being impeded in fulfilling his/her duties, or (iii) is making recommendations which are being consistently ignored by State agency officials. If the Regional MSFW Monitor Advocate believes that the effectiveness of any State MSFW Monitor Advocate has been substantially impeded by the State Administrator, other State office officials, or any Federal officials, he/she shall report and recommend appropriate actions to the Regional Administrator. Information copies of the recommendations shall be provided the National MSFW Monitor Advocate.

(8) The Regional MSFW Monitor Advocate shall be informed of all proposed changes in policy and practice within USES, including JS regulations, which may affect the delivery of services to MSFWs. He/she shall advise the Regional Administrator on all such proposed changes which, in his/her opinion, may adversely affect MSFWs or which may substantially improve the delivery of services to MSFWs. The Regional MSFW Monitor Advocate may also recommend changes in JS policy or regulations, as well as changes in the funding of State agencies and/or adjustments of reallocation of the discretionary portions of funding formulae as they pertain to MSFWs.

(9) The Regional MSFW Monitor Advocate shall participate in the review and assessment activities required in this section and § 658.700 *et seq.* He/she, an Assistant, or another Regional MSFW Monitor Advocate, shall participate in national office and regional office on-site statewide reviews of JS services to MSFWs in States in the region. The Regional MSFW Monitor Advocate shall engage in the following activities in the course of participating in an on-site State agency review:

(i) He/she shall accompany selected outreach workers on their field visits;

(ii) He/she shall participate in a random field check of migrant camps or work sites where MSFWs have been placed on inter or intrastate clearance orders;

(iii) He/she shall contact local CETA 303 groups or other farmworker organizations as part of the on-site review, and shall conduct interviews with representatives of the organizations; and

(iv) He/she shall meet with the State MSFW Monitor Advocate and discuss the full range of the JS services to MSFWs, including the monitoring and complaint system.

(10) During the calendar quarter preceding the time of peak MSFW activity in each State, the Regional MSFW Monitor Advocate shall meet with the State MSFW Monitor Advocate and shall review in detail the State agency's capability for providing full services to MSFWs as required by JS regulations, during the upcoming harvest season. The Regional MSFW Monitor Advocate shall offer technical assistance and recommend to the State agency and/or the Regional Administrator any changes in State policy or practice that he/she finds necessary.

(11) The Regional MSFW Monitor Advocate each year during the peak harvest season shall visit each state in the region not scheduled for an on-site review during that fiscal year and shall:

(i) Meet with the State MSFW Monitor Advocate and other central office staff to discuss MSFW service delivery, and (ii) contact representatives of MSFW organizations to obtain information concerning JS service delivery and coordination with other agencies and interested employer organizations.

(12) The Regional MSFW Monitor Advocate shall initiate and maintain regular and personal contacts, including informal contacts in addition to those specifically required by these regulations, with State MSFW Monitor Advocates in the region. In addition, the Regional MSFW Monitor Advocate shall have personal and regular contact with the National MSFW Monitor Advocate. The Regional MSFW Monitor Advocate shall also establish routine and regular contacts with CETA 303 groups, other farmworker organizations and agricultural employers and/or employer organizations in his/her region. He/she shall attend conferences or meetings of these groups wherever possible and shall report to the Regional Administrator and the Regional Farm Labor Coordinated Enforcement Committee on these contacts when appropriate. He/she shall also make recommendations as to how DOL might better coordinate JS and CETA 303 services to MSFWs.

(13) The Regional MSFW Monitor Advocate shall attend MSFW-related public meeting(s) conducted in the region, pursuant to 29 CFR 42.20. Following such meetings or hearings, the Regional MSFW Monitor Advocate shall take such steps or make such recommendations to the Regional Administrator, as he/she deems necessary to remedy problem(s) or condition(s) identified or described therein.

(14) The Regional MSFW Monitor Advocate shall attempt to achieve regional solutions to any problems, deficiencies or improper practices concerning services to MSFWs which are regional in scope. Further, he/she shall recommend policies, offer technical assistance or take any other necessary steps as he/she deems desirable or appropriate on a regional, rather than state-by-state basis, to promote region-wide improvement in JS services to MSFWs. He/she shall facilitate region-wide coordination and communication regarding provision of JS services to MSFWs among State MSFW Monitor Advocates, State Administrators and federal ETA officials to the greatest extent possible. In the event that any State or other Regional MSFW Monitor Advocate, enforcement agency, or MSFW group refers a matter to the Regional MSFW Monitor Advocate which

requires emergency action, he/she shall assist them in obtaining action by appropriate agencies and staff, inform the originating party of the action taken, and, upon request, provide written confirmation.

(15) The Regional MSFW Monitor Advocate shall initiate and maintain such contacts as he/she deems necessary with Regional MSFW Monitor Advocates in other regions to seek to resolve problems concerning MSFWs who work, live or travel through the region. He/she shall recommend to the Regional Administrator and/or the National office inter-regional cooperation on any particular matter, problem, or policy with respect to which inter-regional action is desirable.

(16) The Regional MSFW Monitor Advocate shall establish regular contacts with the ESA and OSHA farmworker specialists in the region and, to the extent necessary, shall establish contacts with the staff of other DOL agencies represented on the Regional Farm Labor Coordinated Enforcement Committee. The Regional MSFW Monitor Advocate shall coordinate his/her efforts with specialists in the region to ensure that the policy specified in 29 CFR 42.20(c)(3) is followed.

(17) The Regional MSFW Monitor Advocate shall participate in the regional reviews of State agency Program Budget Plans, and shall comment to the Regional Administrator as to the adequacy of the affirmative action plans, the outreach plans, and other specific plans included therein.

§ 658.604 Assessment and evaluation of program performance data.

(a) State agencies shall compile program performance data required by ETA, including statistical information on program operations.

(b) The ETA shall use the program performance data in assessing and evaluating whether the State agencies have complied with JS regulations and their State agency program budget plans.

(c) In assessing and evaluating program performance data, the ETA shall act in accordance with the following general principles:

(1) The fact that the program performance data from a State agency, whether overall or relative to a particular program activity, indicate poor program performance does not by itself constitute a violation of JS regulations or of the State agency's responsibilities under its State agency program budget plan;

(2) Program performance data, however, may so strongly indicate that a State agency's performance is poor that the data may raise a presumption (*prima facie* case) that a State agency is violating JS regulations or the State agency program budget plan. A State agency's failure to meet the operational objectives set forth in the PBP shall raise a presumption that the agency is violating JS regulations and/or its PBP. In such cases the ETA shall afford the State agency an opportunity to rebut the presumption of a violation pursuant to the procedures at subpart H of this part.

(3) The ETA shall take into account that certain program performance data may measure items over which State agencies have direct or substantial control while other data may measure items over which the State agency has indirect or minimal control.

(i) Generally, for example, a State agency has direct and substantial control over the delivery of job services such as referrals to jobs, job development contacts, applicant counseling, referrals to supportive services and the conduct of field checks.

(ii) State agencies, however, have only indirect control over the outcome of services. State agencies, for example, cannot guarantee that an employer will hire a referred applicant, nor can they guarantee that the terms and conditions of employment will be as stated on a job order.

(iii) Outside forces, moreover, such as a sudden heavy increase in unemployment rates, a strike by State agency employees, or a severe drought or flood may skew the results measured by program performance data;

(4) The ETA shall consider a State agency's failure to keep accurate and complete program performance data required by JS regulations as a violation of the JS regulations.

§ 656.605 Communication of findings to State agencies.

(a) The Regional Administrator shall inform State agencies in writing of the results of review and assessment activities and, as appropriate, shall discuss with the State Administrator the impact or action required by ETA as a result of review and assessment activities.

(b) The ETA national office shall transmit the results of any review and assessment activities conducted by it to the Regional Administrator who shall send the information to the State agency.

(c) Whenever the review and assessment indicates a State agency violation of JS regulations or its State agency program budget plan, the Regional Administrator shall follow the procedures set forth at subpart H of this part.

(d) Regional Administrators shall follow-up any corrective action plan imposed on a State agency under subpart H of this part by further review and assessment of the State agency pursuant to this subpart.

Subpart H—Federal Application of Remedial Action to State Agencies

AUTHORITY: Wagner-Peyser Act of 1933, as amended, 29 U.S.C. 49 *et seq.;* 5 U.S.C. 301 *et seq.*

§ 658.700 Scope and purpose of subpart.

This subpart sets forth the procedures which ETA shall follow upon either discovering independently or receiving from other(s) information indicating that State agencies may not be adhering to JS regulations.

§ 658.701 Statements of policy.

(a) It is the policy of the Employment and Training Administration (ETA) to take all necessary action, including the imposition of the full range of sanctions set forth in this subpart, to ensure that State agencies comply with all requirements established by JS regulations.

(b) It is the policy of ETA to initiate decertification procedures against State agencies in instances of serious or continual violations of JS regulations if less stringent remedial actions taken in accordance with this subpart fail to resolve noncompliance.

(c) It is the policy of the ETA to act on information concerning alleged violations by State agencies of the JS regulations received from any person or organization.

§ 658.702 Initial action by the Regional Administrator.

(a) The ETA Regional Administrator shall be responsible for ensuring that all State agencies in his/her region are in compliance with JS regulations.

(b) Wherever a Regional Administrator discovers or is apprised of possible State agency violations of JS regulations by the review and assessment activities under subpart G of this part, or through required reports or written complaints from individuals, organizations or employers which are elevated to ETA after the exhaustion of State agency administrative remedies, the Regional Administrator shall conduct an investigation. Within 10 days after receipt of the report or other information, the Regional Administrator shall make a determination whether there is probable cause to believe that a State agency has violated JS regulations.

(c) The Regional Administrator shall accept complaints regarding possible State agency violations of JS regulations from employee organizations, employers or other groups, without exhaustion of the complaint process described at subpart E, if the Regional Administrator determines that the nature and scope of the complaint are such that the time required to exhaust the administrative procedures at the State level would adversely affect a significant number of applicants. In such cases, the Regional Administrator shall investigate the matter within 10 working days, may provide the State agency 10 working days for comment, and shall make a determination within an additional 10 working days whether there is probable cause to believe that the State agency has violated JS regulations.

(d) If the Regional Administrator determines that there is no probable cause to believe that a State agency

has violated JS regulations, he/she shall retain all reports and supporting information in ETA files. In all cases where the Regional Administrator has insufficient information to make a probable cause determination, he/she shall so notify the Administrator in writing and the time for the investigation shall be extended 20 additional working days.

(e) If the Regional Administrator determines that there is probable cause to believe that a State agency has violated JS regulations, he/she shall issue a Notice of Initial Findings of Noncompliance by registered mail to the offending State agency. The Notice will specify the nature of the violation, cite the regulations involved, and indicate corrective action which may be imposed in accordance with paragraphs (g) and (h) of this section. If the noncompliance involves services to MSFWs or the JS complaint system, a copy of said notice shall be sent to the National MSFW Monitor Advocate.

(f)(1) The State agency shall have 20 working days to comment on the findings, or a longer period, up to 20 additional days, if the Regional Administrator determines that such a longer period is appropriate. The State agency's comments shall include agreement or disagreement with the findings and suggested corrective actions, where appropriate.

(2) After the period elapses, the Regional Administrator shall prepare within 20 working days, written final findings which specify whether or not the State agency has violated JS regulations. If in the final findings the Regional Administrator determines that the State agency has not violated JS regulations, the Regional Administrator shall notify the State Administrator of this finding and retain supporting documents in his/her files. If the final finding involves services to MSFWs or the JS complaint system, the Regional Administrator shall also notify the National Monitor Advocate. If the Regional Administrator determines that a State agency has violated JS regulations, the Regional Administrator shall prepare a Final Notice of Noncompliance which shall specify the violation(s) and cite the regulations involved. The Final Notice of Noncompliance shall be sent to the State agency by registered mail. If the noncompliance involves services to MSFWs or the JS complaint system, a copy of the Final Notice shall be sent to the National MSFW Monitor Advocate.

(g) If the violation involves the misspending of grant funds, the Regional Administrator may order in the Final Notice of Noncompliance a disallowance of the expenditure and may either demand repayment or withhold future funds in the amount in question. If the Regional Administrator disallows costs, the Regional Administrator shall give the reasons for the disallowance, inform the State agency that the disallowance is effective immediately and that no more funds may be spent in the unallowed manner, and offer the State agency the opportunity to request a hearing pursuant to §658.707. The offer, or the acceptance of an offer of a hearing, however, shall not stay the effectiveness of the disallowance. The Regional Administrator shall keep complete records of the disallowance.

(h) If the violation does not involve misspending of grant funds or the Regional Administrator determines that the circumstances warrant other action:

(1) The Final Notice of Noncompliance shall direct the State agency to implement a specific corrective action plan to correct all violations. If the State agency's comment demonstrates with supporting evidence (except where inappropriate) that all violations have already been corrected, the Regional Administrator need not impose a corrective action plan and instead may cite the violations and accept their resolution, subject to follow-up review, if necessary. If the Regional Administrator determines that the violation(s) cited had been found previously and that the corrective action(s) taken had not corrected the violation(s) contrary to the findings of previous follow-up reviews, the Regional Administrator shall apply remedial actions to the State agency pursuant to §658.704.

(2) The Final Notice of Noncompliance shall specify the time by which each corrective action must be taken. This period shall not exceed 40 working

days unless the Regional Administrator determines that exceptional circumstances necessitate corrective actions requiring a longer time period. In such cases, and if the violations involve services to MSFWs or the JS complaint system, the Regional Administrator shall notify the Administrator in writing of the exceptional circumstances which necessitate a longer time period, and shall specify that time period. The specified time period shall commence with the date of signature on the registered mail receipt.

(3) When the time period provided for in paragraph (h)(2) of this section elapses, ETA staff shall review the State agency's efforts as documented by the State agency to determine if the corrective action(s) has been taken and if the State agency has achieved compliance with JS regulations. If necessary, ETA staff shall conduct a follow-up visit as part of this review.

(4) If, as a result of this review, the Regional Administrator determines that the State agency has corrected the violation(s), the Regional Administrator shall record the basis for this determination, notify the State agency, send a copy to the Administrator, and retain a copy in ETA files.

(5) If, as a result of this review, the Regional Administrator determines that the State has taken corrective action but is unable to determine if the violation has been corrected due to seasonality or other factors, the Regional Administrator shall notify in writing the State agency and the Administrator of his/her findings. The Regional Administrator shall conduct further follow-up at an appropriate time to make a final determination if the violation has been corrected. If the Regional Administrator's further follow-up reveals that violations have not been corrected, the Regional Administrator shall apply remedial actions to the State agency pursuant to § 658.704.

(6) If, as a result of the review the Regional Administrator determines that the State agency has not corrected the violations and has not made good faith efforts and adequate progress toward the correction of the violations, the Regional Administrator shall apply remedial actions to the State agency pursuant to § 658.704.

(7) If, as a result of the review, the Regional Administrator determines that the State agency has made good faith efforts and adequate progress toward the correction of the violation and it appears that the violation will be fully corrected within a reasonable time period, the State agency shall be advised by registered mail (with a copy sent to the Administrator) of this conclusion, of remaining differences, of further needed corrective action, and that all deficiencies must be corrected within a specified time period. This period shall not exceed 40 working days unless the Regional Administrator determines that exceptional circumstances necessitate corrective action requiring a longer time period. In such cases, the Regional Administrator shall notify the Administrator in writing of the exceptional circumstances which necessitate a longer time period, and shall specify that time period. The specified time period shall commence with the date of signature on the registered mail receipt.

(8) (i) If the State agency has been given an additional time period pursuant to paragraph (b)(7) of this section, ETA staff shall review the State agency's efforts as documented by the State agency at the end of the time period. If necessary, ETA shall conduct a follow-up visit as part of this review.

(ii) If the State agency has corrected the violation(s), the Regional Administrator shall document that finding, notify in writing the State agency and the Administrator, and retain supporting documents in ETA files. If the State agency has not corrected the violation(s), the Regional Administrator shall apply remedial actions pursuant to § 658.704.

§ 658.703 Emergency corrective action.

In critical situations as determined by the Regional Administrator, where it is necessary to protect the integrity of the funds, or insure the proper operation of the program, the Regional Administrator may impose immediate corrective action. Where immediate corrective action is imposed, the Regional Administrator shall notify the

State agency of the reason for imposing the corrective action prior to providing the State agency an opportunity to comment.

§ 658.704 Remedial actions.

(a) If a State agency fails to correct violations as determined pursuant to § 658.702, the Regional Administrator shall apply one or more of the following remedial actions to the State agency:

(1) Imposition of special reporting requirements for a specified period of time;

(2) Restrictions of obligational authority within one or more expense classifications;

(3) Implementation of specific operating systems or procedures for a specified time;

(4) Requirement of special training for State agency personnel;

(5) With the approval of the Assistant Secretary and after affording the State Administrator the opportunity to request a conference with the Assistant Secretary, the elevation of specific decision-making functions from the State Administrator to the Regional Administrator;

(6) With the approval of the Assistant Secretary and after affording the State Administrator the opportunity to request a conference with the Assistant Secretary, the imposition of Federal staff in key State agency positions;

(7) With the approval of the Assistant Secretary and after affording the State Administrator the opportunity to request a conference with the Assistant Secretary, funding of the State agency on a short-term basis or partial withholding of funds for a specific function or for a specific geographical area;

(8) Holding of public hearings in the State on the State agency's deficiencies;

(9) Disallowance of funds pursuant to § 658.702(g); or

(10) If the matter involves a serious or continual violation, the initiation of decertification procedures against the State agency, as set forth in paragraph (e) of this section.

(b) The Regional Administrator shall send, by registered mail, a Notice of Remedial Action to the State agency. The Notice of Remedial Action shall set forth the reasons for the remedial action. When such a notice is the result of violations of regulations governing services to MSFWs (20 CFR 653.100 *et seq.*) or the JS complaint system (20 CFR 658.400 *et seq.*), a copy of said notice shall be sent to the USES Administrator, who shall publish the notice promptly in the FEDERAL REGISTER.

(c) If the remedial action is other than decertification, the notice shall state that the remedial action shall take effect immediately. The notice shall also state that the State agency may request a hearing pursuant to § 658.707 by filing a request in writing with the Regional Administrator pursuant to § 658.707 within 20 working days of the State agency's receipt of the notice. The offer of hearing, or the acceptance thereof, however, shall not stay the implementation of remedial action.

(d) Within 60 working days after the initial application of remedial action, the Regional Administrator shall conduct a review of the State agency's compliance with JS regulations unless the Regional Administrator determines that a longer time period is necessary. In such cases, the Regional Administrator shall notify the USES Administrator in writing of the circumstances which necessitate a longer time period, and specify that time period. If necessary, ETA staff shall conduct a follow-up visit as part of this review. If the State agency is in compliance with the JS regulations, the Regional Administrator shall fully document these facts and shall terminate the remedial actions. The Regional Administrator shall notify the State agency of his/her findings. When the case involves violations of regulations governing services to MSFWs or the JS complaint system, a copy of said notice shall be sent to the USES Administrator, who shall promptly publish the notice in the FEDERAL REGISTER. The Regional Administrator shall conduct, within a reasonable time after terminating the remedial actions, a review of the State agency's compliance to determine whether any remedial actions should be reapplied.

(e) If, upon conducting the on-site review referred to in paragraph (c) of this section, the Regional Administrator

finds that the State agency remains in noncompliance, the Regional Administrator shall continue the remedial action and/or impose different additional remedial actions. The Regional Administrator shall fully document all such decisions and, when the case involves violations of regulations governing services to MSFWs or the JS complaint system, shall send copies to the USES Administrator, who shall promptly publish the notice in the FEDERAL REGISTER.

(f) (1) If the State agency has not brought itself into compliance with JS regulations within 120 working days of the initial application of remedial action, the Regional Administrator shall initiate decertification unless the Regional Administrator determines that circumstances necessitate continuing remedial action for a longer period of time. In such cases, the Regional Administrator shall notify the USES Administrator in writing of the circumstances which necessitate the longer time period, and specify the time period.

(2) The Regional Administrator shall notify the State agency by registered mail of the decertification proceedings, and shall state the reasons therefor. Whenever such a notice is sent to a State agency, the Regional Administrator shall prepare five indexed copies containing, in chronological order, all the documents pertinent to the case along with a request for decertification stating the grounds therefor. One copy shall be retained. Two shall be sent to the ETA national office, one shall be sent to the Solicitor of Labor, Attention: Associate Solicitor for Employment and Training, and, if the case involves violations of regulations governing services to MSFWs or the complaint system, one copy shall be sent to the National MSFW Monitor Advocate. The notice sent by the Regional Administrator shall be published promptly in the FEDERAL REGISTER.

§ 658.705 Decision to decertify.

(a) Within 30 working days of receiving a request for decertification, the Assistant Secretary for ETA shall review the case and shall decide whether to proceed with decertification.

(b) The Assistant Secretary shall grant the request for decertification unless he/she makes a finding that (1) the violations of JS regulations are neither serious nor continual; (2) the State agency is in compliance; or (3) the Assistant Secretary has reason to believe that the State agency will achieve compliance within 80 working days unless exceptional circumstances necessitate a longer time period, pursuant to the remedial action already applied or to be applied. (In the event the Assistant Secretary does not have sufficient information to act upon the request, he/she may postpone the determination for up to an additional 20 working days in order to obtain any available additional information.) In making a determination of whether violations are ''serious'' or ''continual,'' as required by this subsection, the Assistant Secretary shall consider:

(i) Statewide or multiple deficiencies as shown by performance data and/or on-site reviews;

(ii) Recurrent violations, even if they do not persist over consecutive reporting periods, and

(iii) The good faith efforts of the State to achieve full compliance with JS regulations as shown by the record.

(c) If the Assistant Secretary denies a request for decertification, he/she shall write a complete report documenting his/her findings and, if appropriate, instructing that an alternate remedial action or actions be applied. Copies of the report shall be sent to the Regional Administrator. Notice of the Assistant Secretary's decision shall be published promptly in the FEDERAL REGISTER, and the report of the Assistant Secretary shall be made available for public inspection and copying.

(d) If the Assistant Secretary decides that decertification is appropriate, he/she shall submit the case to the Secretary providing written explanation for his/her recommendation of decertification.

(e) Within 30 working days after receiving the report of the Assistant Secretary, the Secretary shall determine whether to decertify the State agency. The Secretary shall grant the request for decertification unless he/she makes one of the three findings set forth in § 658.705(b). If the Secretary decides not

to decertify, he/she shall then instruct that remedial action be continued or that alternate actions be applied. The Secretary shall write a report explaining his/her reasons for not decertifying the State agency and copies will be sent to the State agency. Notice of the Secretary's decision shall be published promptly in the FEDERAL REGISTER, and the report of the Secretary shall be made available for public inspection and copy.

(f) Where either the Assistant Secretary or the Secretary denies a request for decertification and order further remedial action, the Regional Administrator shall continue to monitor the State agency's compliance. If the agency achieves compliance within the time period established pursuant to §658.705(b), the Regional Administrator shall terminate the remedial actions. If the State agency fails to achieve full compliance within that time period after the Secretary's decision not to decertify, the Regional Administrator shall submit a report of his/her findings to the Assistant Secretary who shall reconsider the request for decertification pursuant to the requirements of §658.705(b).

§658.706 Notice of decertification.

If the Secretary decides to decertify a State agency, he/she shall send a Notice of Decertification to the State agency stating the reasons for this action and providing a 10 working day period during which the State agency may request an administrative hearing in writing to the Secretary. The notice shall be published promptly in the FEDERAL REGISTER.

§658.707 Requests for hearings.

(a) Any State agency which received a Notice of Decertification under §658.706 or a notice of disallowance under §658.702 may request a hearing on the issue by filing a written request for hearing with the Secretary within 10 working days of receipt of the notice. This request shall state the reasons the State agency believes the basis of the decision to be wrong, and it must be signed by the State Administrator.

(b) When the Secretary receives a request for a hearing from a State agency, he/she shall send copies of a file containing all materials and correspondence relevant to the case to the Assistant Secretary, the Regional Administrator, the Solicitor of Labor, and the Chief Administrative Law Judge of the DOL. When the case involves violations of regulations governing services to MSFWs or the ES complaint system, a copy shall be sent to the National MSFW Monitor Advocate.

(c) The Secretary shall publish notice of hearing in the FEDERAL REGISTER. This notice shall invite all interested parties to attend and to present evidence at the hearing. All interested parties who make written request to participate shall thereafter receive copies of all documents filed in said proceedings.

§658.708 Hearings.

(a) Upon receipt of a hearing file by the Chief Administrative Law Judge, the case shall be docketed and notice sent by registered mail, return receipt requested, to the Solicitor of Labor, Attention: Associate Solicitor for Employment and Training, the Administrator, the Regional Administrator and the State Administrator. The notice shall set a time, place, and date for a hearing on the matter and shall advise the parties that:

(1) They may be represented at the hearing;

(2) They may present oral and documentary evidence at the hearing;

(3) They may cross-examine opposing witnesses at the hearing; and

(4) They may request rescheduling of the hearing if the time, place, or date set are inconvenient.

(b) The Solicitor of Labor or the Solicitor's designee shall represent the Department at the hearing.

§658.709 Conduct of hearings.

(a) Hearings shall be conducted in accordance with sections 5–8 of the Administrative Procedure Act, 5 U.S.C. 553 *et seq.*

(b) Technical rules of evidence shall not apply, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination, shall be applied if necessary by

the Administrative Law Judge conducting the hearing. The Administrative Law Judge may exclude irrelevant, immaterial or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties. Opportunity shall be given to refute facts and arguments advanced on either side of the issue. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record.

(c) The general provisions governing discovery as provided in the Rules of Civil Procedure for the United States District Court, title V, 28 U.S.C., rules 26 through 37, may be made applicable to the extent that the Administrative Law Judge concludes that their use would promote the proper advancement of the hearing.

(d) When a public officer is a respondent in a hearing in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the proceeding does not abate and the officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantive rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

§ 658.710 Decision of the Administrative Law Judge.

(a) The Administrative Law Judge shall have jurisdiction to decide all issues of fact and related issues of law and to grant or deny appropriate motions, but shall not have jurisdiction to decide upon the validity of Federal statutes or regulations.

(b) The decision of the Administrative Law Judge shall be based on the hearing record, shall be in writing and shall state the factual and legal basis of the decision. Notice of the decision shall be published in the FEDERAL REGISTER and the Administrative Law Judge's decision shall be available for public inspection and copying.

(c) Except when the case involves the decertification of a State agency, the decision of the Administrative Law Judge shall be the final decision of the Secretary.

(d) If the case involves the decertification of an appeal to the State agency, the decision of the Administrative Law Judge shall contain a notice stating that, within 30 calendar days of the decision, the State agency or the Administrator may appeal to the Administrative Review Board, United States Department of Labor, by sending by registered mail, return receipt requested, a written appeal to the Administrative Review Board, in care of the Administrative Law Judge who made the decision.

[45 FR 39468, June 10, 1980, as amended at 61 FR 19983, May 3, 1996]

§ 658.711 Decision of the Administrative Review Board.

(a) Upon the receipt of an appeal to the Administrative Review Board, United States Department of Labor, the Administrative Law Judge shall certify the record in the case to the Administrative Review Board, which shall make a decision to decertify or not on the basis of the hearing record.

(b) The decision of the Administrative Review Board shall be final, shall be in writing, and shall set forth the factual and legal basis for the decision. Notice of the Administrative Review Board's decision shall be published in the FEDERAL REGISTER, and copies shall be made available for public inspection and copying.

[61 FR 19983, May 3, 1996]

PART 660—INTRODUCTION TO THE REGULATIONS FOR WORKFORCE INVESTMENT SYSTEMS UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

Sec.

660.100 What is the purpose of title I of the Workforce Investment Act of 1998?
660.200 What do the regulations for workforce investment systems under title I of the Workforce Investment Act cover?
660.300 What definitions apply to the regulations for workforce investment systems under title 1 of WIA?

AUTHORITY: Sec. 506(c), Pub. L. 105–220; 20 USC 9276(c).

SOURCE: 64 FR 18693, Apr. 15, 1999, unless otherwise noted.

§ 660.100 What is the purpose of title I of the Workforce Investment Act of 1998?

The purpose of title I of the Workforce Investment Act of 1998 (hereafter referred to as WIA) is to provide workforce investment activities that increase the employment, retention and earnings of participants, and increase occupational skill attainment by participants, which will improve the quality of the workforce, reduce welfare dependency, and enhance the productivity and competitiveness of the Nation's economy. These goals are achieved through the workforce investment system. (WIA sec. 106.)

§ 660.200 What do the regulations for workforce investment systems under title I of the Workforce Investment Act cover?

The regulations found in 20 CFR parts 660—671 set forth the regulatory requirements that are applicable to programs operated with funds provided under title I of WIA. This part 660 describes the purpose of that Act, explains the format of these regulations and sets forth definitions for terms that apply to each part. Part 661 contains regulations relating to Statewide and local governance of the workforce investment system. Part 662 describes the One-Stop system and the roles of One-Stop partners. Part 663 sets forth requirements applicable to WIA title I programs serving adults and dislocated workers. Part 664 sets forth requirements applicable to WIA title I programs serving youth. Part 665 contains regulations relating to Statewide activities. Part 666 describes the WIA title I performance accountability system. Part 667 sets forth the administrative requirements applicable to programs funded under WIA title I. Parts 668 and 669 contain the particular requirements applicable to programs serving Indians and Native Americans and Migrant and Seasonal Farmworkers, respectively. Parts 670 and 671 describe the particular requirements applicable to the Job Corps and other national programs, respectively.

§ 660.300 What definitions apply to the regulations for workforce investment systems under title I of WIA?

In addition to the definitions set forth at WIA sec. 101, the following definitions apply to the regulations set forth in 20 CFR parts 660—671:

Department or DOL means the U.S. Department of Labor, including its agencies and organizational units.

Designated region means a combination of local areas that are partly or completely in a single labor market area, economic development region, or other appropriate contiguous subarea of a State, that is designated by the State under WIA section 116(c), or a similar interstate region that is designated by two or more States under WIA section 116(c)(4).

Employment and training activity means a workforce investment activity that is carried out for an adult or dislocated worker.

EEO data means data on race and ethnicity, age, sex, and disability required by regulations implementing sec. 188 of WIA governing nondiscrimination.

ETA means the Employment and Training Administration of the U.S. Department of Labor.

Grant means an award of WIA financial assistance by the U.S. Department of Labor to an eligible WIA recipient.

Grantee means the direct recipient of grant funds from the Department of Labor. A grantee may also be referred to as a recipient.

Literacy means an individual's ability to read, write, and speak in English, and to compute, and solve problems, at levels of proficiency necessary to function on the job, in the family of the individual, and in society.

Local Board means a local workforce investment board established under WIA sec. 117, to set policy for the local workforce investment system.

Outlying area means the United States Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.

Participant means an individual who has registered under 20 CFR 663.105 or 20 CFR 664.215 and has been determined

to be eligible to participate in and who is receiving services (except for follow up services) under a program authorized by WIA title I. Participation commences on the first day, following determination of eligibility, on which the individual begins receiving core, intensive, training or other services provided under WIA title I.

Recipient means an entity to which a WIA grant is awarded directly from the Department of Labor to carry out a program under title I of WIA. The State is the recipient of funds awarded under WIA secs. 127(b)(1)(C)(i)(II), 132(b)(1)(B) and 132(b)(2)(B).

Register means the process for collecting information to determine an individual's eligibility for services under WIA title I. Individuals may be registered in a variety ways, as described in 20 CFR 663.105 and 20 CFR 664.215.

Secretary means the Secretary of the U.S. Department of Labor.

Self certification means an individual's signed attestation that the information he/she submits to demonstrate eligibility for a program under title I of WIA is true and accurate.

State Board means a State workforce investment board established under WIA sec. 111.

State means each of the several States of the United States, the District of Columbia and the Commonwealth of Puerto Rico. The term ''State'' does not include outlying areas.

Subrecipient means an entity to which a subgrant is awarded and which is accountable to the recipient (or higher tier subrecipient) for the use of the funds provided.

Vendor means an entity responsible for providing generally required goods or services to be used in the WIA program. These goods or services may be for the recipient's or subrecipient's own use or for the use of participants in the program.

Wagner-Peyser Act means the Act of June 6, 1933, as amended, codified at 29 U.S.C. 49 *et seq.*

Workforce investment activities mean the array of activities permitted under title I of WIA, which include employment and training activities for adults and dislocated workers, as described in WIA section 134, and youth activities, as described in WIA section 129.

Youth activity means a workforce investment activity that is carried out for youth.

PART 661—STATEWIDE AND LOCAL GOVERNANCE OF THE WORKFORCE INVESTMENT SYSTEM UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

Subpart A—General Governance Provisions

Sec.

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661.410 What provisions of WIA and the Wagner-Peyser Act may be waived, and what provisions may not be waived?
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AUTHORITY: Sec. 506(c), Pub. L. 105–220; 20 U.S.C. 9276(c).

SOURCE: 64 FR 18694, Apr. 15, 1999, unless otherwise noted.

Subpart A—General Governance Provisions

§ 661.100 What is the workforce investment system?

Under title I of WIA, the workforce investment system provides the framework for delivery of workforce investment activities at the State and local levels to individuals who need those services, including job seekers, dislocated workers, youth, incumbent workers, new entrants to the workforce, veterans, persons with disabilities, and employers. Each State's Governor is required, in accordance with the requirements of this Part, to establish a State Board; to designate local workforce investment areas; and to oversee the creation of Local Boards and One-Stop service delivery systems in the State.

§ 661.110 What is the role of the Department of Labor as the Federal governmental partner in the governance of the workforce investment system?

(a) Successful governance of the workforce investment system will be achieved through cooperation and coordination of Federal, State and local governments.

(b) The Department of Labor sees as one of its primary roles providing leadership and guidance to support a system that meets the objectives of title I of WIA, and in which State and local partners have flexibility to design systems and deliver services in a manner designed to best achieve the goals of WIA based on their particular needs. These regulations provide the framework in which State and local officials can exercise such flexibility within the confines of the statutory requirements. Wherever possible, system features such as design options and categories of services are not narrowly defined, and are subject to State and local interpretation.

(c) The Secretary, in consultation with other Federal Agencies, as appropriate, may publish guidance on interpretations of statutory and regulatory

provisions. State and local policies, interpretations, guidelines and definitions that are consistent with interpretations contained in such guidance will be considered to be consistent with the Act for purposes of § 661.120 of this subpart.

§ 661.120 What are the roles of the local and State governmental partner in the governance of the workforce investment system?

(a) Local Boards should establish policies, interpretations, guidelines and definitions to implement provisions of title I of WIA to the extent that such policies, interpretations, guidelines and definitions are not inconsistent with the Act or the regulations or with State policies.

(b) State Boards should establish policies, interpretations, guidelines and definitions to implement provisions of title I of WIA to the extent that such policies, interpretations, guidelines and definitions are not inconsistent with the Act and regulations.

Subpart B—State Governance Provisions

§ 661.200 What is the State Workforce Investment Board?

(a) The State Board is a board established by the Governor in accordance with the requirements of WIA section 111 and this section.

(b) The membership of the State Board must meet the requirements of WIA section 111(b). The State Board must contain two or more members representing the categories described in WIA sections 111(b)(1)(C)(iii)–(v), and special consideration must be given to chief executive officers of community colleges and community based organizations in the selection of members representing the entities identified in WIA section 111(b)(1)(C)(v).

(c) The Governor may appoint any other representatives or agency officials, such as agency officials responsible for economic development and juvenile justice programs in the State.

(d) Members who represent organizations, agencies or other entities must be individuals with optimum policy making authority within the entities they represent.

(e) A majority of members of the State Board must be representatives of business. Members who represent business must be individuals who are owners, chief executive officers, chief operating officers, or other individuals with optimum policy making or hiring authority, including members of Local Boards.

(f) The Governor must appoint the business representatives from among individuals who are nominated by State business organizations and business trade associations. The Governor must appoint the labor representatives from among individuals who are nominated by State labor federations.

(g) The Governor must select a chairperson of the State Board from the business representatives on the board.

(h) The Governor may establish terms of appointment or other conditions governing appointment or membership on the State Board.

(i) For the programs and activities carried out by one-stop partners, as described in WIA section 121(b) and 20 CFR 662.210, the State Board must include:

(1) The lead State agency officials with responsibility for such program, or

(2) In any case in which no lead State agency official has responsibility for such a program service, a representative in the State with expertise relating to such program, service or activity.

(j) The State Board must conduct its business in an open manner as required by WIA section 111(g), by making available to the public, on a regular basis through open meetings, information about the activities of the State Board, including information about the State Plan prior to submission of the plan, information about membership, and on request, minutes of formal meetings of the State Board. (WIA section 111)

§ 661.205 What is the role of the State Board?

The State Board must assist the Governor in the:

(a) Development of the State Plan;

(b) Development and continuous improvement of a Statewide system of activities that are funded under subtitle B of title I of WIA, or carried out through the One-Stop delivery system, including—

(1) Development of linkages in order to assure coordination and nonduplication among the programs and activities carried out by One-Stop partners, including, as necessary, addressing any impasse situations in the development of the local memorandum of understanding; and

(2) Review of local plans;

(c) Commenting at least once annually on the measures taken under section 113(b)(14) of the Carl D. Perkins Vocational and Technical Education Act;

(d) Designation of local workforce investment areas,

(e) Development of allocation formulas for the distribution of funds for adult employment and training activities and youth activities to local areas, as permitted under WIA sections 128(b)(3)(B) and 133(b)(3)(B);

(f) Development and continuous improvement of comprehensive State performance measures, including State adjusted levels of performance, to assess the effectiveness of the workforce investment activities in the State, as required under WIA section 136(b);

(g) Preparation of the annual report to the Secretary described in WIA section 136(d);

(h) Development of the Statewide employment statistics system described in section 15(e) of the Wagner-Peyser Act; and

(i) Development of an application for an incentive grant under WIA section 503. (WIA section 111(d).)

§ 661.210 Under what circumstances may the Governor select an alternative entity in place of the State Workforce Investment Board?

(a) The State may use any State entity that meets the requirements of WIA section 111(e) to perform the functions of the State Board.

(b) If the State uses an alternative entity, the State workforce investment plan must demonstrate that the alternative entity meets all three of the requirements of WIA section 111(e). Section 111(e) requires that such entity:

(1) Was in existence on December 31, 1997;

(2)(i) Was established under section 122 (relating to State Job Training Coordinating Councils) or title VII (relating to State Human Resource Investment Councils) of the Job Training Partnership Act (29 U.S.C. 1501 *et seq.*), as in effect on December 31, 1997, or

(ii) Is substantially similar to the State Board described in WIA section 111(a), (b), and (c) and § 661.200; and

(3) Includes, at a minimum, two or more representatives of business in the State and two or more representatives of labor organizations in the State.

(c) If the alternative entity does not provide for representative membership of each of the categories of required State Board membership under WIA section 111(b), the State Plan must explain the manner in which the State will ensure an ongoing role for any such group in the workforce investment system.

(d) If the membership structure of the alternative entity is significantly changed after December 31, 1997, the entity will no longer be eligible to perform the functions of the State Board. In such case, the Governor must establish a new State Board which meets all of the criteria of WIA section 111(b). A significant change in the membership structure does not mean the filling of a vacancy on the alternative entity, but does include any change in the organization of the alternative entity or in the categories of entities represented on the alternative entity which requires a change to the alternative entity's charter or a similar document that defines the formal organization of the alternative entity.

(e) In 20 CFR parts 660 through 671, all references to the State Board also apply to an alternative entity used by a State.

§ 661.220 What are the requirements for the submission of the State Workforce Investment Plan?

(a) The Governor of each State must submit a State Workforce Investment Plan (State Plan) in order to be eligible to receive funding under title I of WIA and the Wagner-Peyser Act. The State Plan must outline the State's

five year strategy for the workforce investment system.

(b) The State Plan must be submitted in accordance with planning guidelines issued by the Secretary of Labor. The planning guidelines set forth the information necessary to document the State's vision, goals, strategies, policies and measures for the workforce investment system (that were arrived at through the collaboration of the Governor, chief elected officials, business and other parties), as well as the information required to demonstrate compliance with WIA, and the information detailed by WIA and these regulations and the Wagner-Peyser Act and the Wagner-Peyser regulations at 20 CFR part 652.

(c) The State Plan must contain a description of the State's performance accountability system, and the State performance measures in accordance with the requirements of WIA section 136 and 20 CFR part 666.

(d) The State must provide an opportunity for public comment on and input into the development of the State Plan prior to its submission. The opportunity for public comment must include an opportunity for comment by representatives of business, representatives of labor organizations, and chief elected official(s) and must be consistent with the requirement, at WIA section 111(g), that the State Board makes information regarding the State Plan and other State Board activities available to the public through regular open meetings. The State Plan must describe the State's process and timeline for ensuring a meaningful opportunity for public comment.

(e) The Secretary reviews completed plans and must approve all plans within ninety days of their submission, unless the Secretary determines in writing that:

(1) The plan is inconsistent with the provisions of title I of WIA or these regulations. For example, a finding of inconsistency would be made if the Secretary and the Governor have not reached agreement on the adjusted levels of performance under WIA section 136(b)(3)(A), or there is not an effective strategy in place to ensure development of a fully operational One-Stop delivery system in the State; or

(2) The portion of the plan describing the detailed Wagner-Peyser plan does not satisfy the criteria for approval of such plans as provided in section 8(d) of the Wagner-Peyser Act or the Wagner-Peyser regulations at 20 CFR part 652.

§ 661.230 What are the requirements for modification of the State workforce investment plan?

(a) The State may submit a modification of its workforce investment plan at any time during the five-year life of the plan.

(b) Modifications are required when:

(1) Changes in Federal or State law or policy substantially change the assumptions upon which the plan is based.

(2) There are changes in the Statewide vision, strategies, policies, performance indicators, the methodology used to determine local allocation of funds, reorganizations which change the working relationship with system employees, changes in organizational responsibilities, changes to the membership structure of the State Board or alternative entity and similar substantial changes to the State's workforce investment system.

(3) The State has failed to meet performance goals, and must adjust service strategies.

(c) Modifications are required in accordance with the Wagner-Peyser provisions at 20 CFR 652.210.

(d) Modifications to the State Plan are subject to the same public review and comment requirements that apply to the development of the original State Plan.

(e) State Plan modifications will be approved by the Secretary based on the approval standard applicable to the original State Plan under § 661.220(e).

§ 661.240 How do the unified planning requirements apply to the five-year strategic WIA and Wagner-Peyser plan and to other Department of Labor plans?

(a) A State may submit to the Secretary a unified plan for any of the programs or activities described in WIA section 501(b)(2). This includes the following DOL programs and activities:

(1) The five-year strategic WIA and Wagner-Peyser plan;

(2) Trade adjustment assistance activities and NAFTA—TAA;

(3) Veterans' programs under 38 U.S.C. Chapter 41;

(4) Programs authorized under State unemployment compensation laws;

(5) Welfare-to-Work (WtW) programs; and

(6) Senior Community Service Employment Programs under title V of the Older Americans Act.

(b) For purposes of paragraph (a) of this section, a State may submit, as part of the unified plan, any plan, application form or any other similar document, that is required as a condition for the approval of Federal funding under the applicable program. These plans include such things as the WIA plan, or the WtW plan. They do not include jointly executed funding instruments, such as grant agreements, or Governor/Secretary Agreements or items such as corrective actions plans.

(c) A State which submits a unified plan under paragraph (a) of this section will not be required to submit additional planning materials as a condition for approval to receive Federal funds.

(d) Each portion of a unified plan submitted under paragraph (a) of this section is subject to the particular requirements of Federal law authorizing the program. All grantees are still subject to such things as reporting and record-keeping requirements, corrective action plan requirements and other generally applicable requirements.

(e) A unified plan must contain the information required by WIA section 501(c) and will be approved in accordance with the requirements of WIA section 501(d).

§ 661.250 What are the requirements for designation of local workforce investment areas?

(a) The Governor must designate local workforce investment areas in order for the State to receive funding under title I of WIA.

(b) The Governor must take into consideration the factors described in WIA section 116(a)(1)(B) in making designations of local areas. Such designation must be made in consultation with the State Board, and after consultation with chief elected officials. The Governor must also consider comments received through the public comment process described in the State workforce investment plan under § 661.220(d).

(c) The Governor may approve a request for designation as a workforce investment area from any unit of general local government, including a combination of such units, if the State Board determines that the area meets the requirements of WIA section 116(a)(1)(B) and recommends designation. (WIA section 116.)

§ 661.260 What are the requirements for automatic designation of workforce investment areas relating to units of local government with a population of 500,000 or more?

The requirements for automatic designation relating to units of local government with a population of 500,000 or more and to rural concentrated employment programs are contained in WIA section 116(a)(2).

§ 661.270 What are the requirements for temporary and subsequent designation of workforce investment areas relating to areas that had been designated as service delivery areas under JTPA?

The requirements for temporary and subsequent designation relating to areas that had been designated as service delivery areas under JTPA are contained in WIA section 116(a)(3).

§ 661.280 What right does an entity have to appeal the Governor's decision rejecting a request for designation as a workforce investment area?

(a) A unit of local government (or combination of units) or a rural concentrated employment program grant recipient (as described at WIA section 116(a)(2)(B), which has requested but has been denied its request for designation as a workforce investment area under §§ 661.260–661.270, may appeal the decision to the State Board, in accordance with appeal procedures established in the State Plan.

(b) If a decision on the appeal is not rendered in a timely manner or if the appeal to the State Board does not result in designation, the entity may request review by the Secretary of Labor,

under the procedures set forth at 20 CFR 667.640(a).

(c) The Secretary may require that the area be designated as a workforce investment area, if the Secretary determines that:

(1) The entity was not accorded procedural rights under the State appeals process; or

(2) The area meets the automatic designation requirements at WIA section 116(a)(2) or the temporary and subsequent designation requirements at WIA section 116(a)(3), as appropriate.

§ 661.290 Under what circumstances may States require Local Boards to take part in regional planning activities?

(a) The State may require Local Boards within a designated region (as defined at 20 CFR 660.300) to:

(1) Participate in a regional planning process that results in regional performance measures for workforce investment activities under title I of WIA. Regions that meet or exceed the regional performance measures may receive regional incentive grants;

(2) Share, where feasible, employment and other types of information that will assist in improving the performance of all local areas in the designated region on local performance measures; and

(3) Coordinate the provision of WIA title I services, including supportive services such as transportation, across the boundaries of local areas within the designated region.

(b) Two or more States may designate a labor market area, economic development region, or other appropriate contiguous subarea of the States as an interstate region. In such cases, the States may jointly exercise the State's functions described in this section.

(c) Designation of intrastate regions and interstate regions and their corresponding performance measures must be described in the respective State Plan(s). For interstate regions, the roles of the respective governors, State Boards and Local Boards must be described in the respective State Plans.

(d) Unless agreed to by all affected chief elected officials and the Governor, these regional planning activities may not substitute for or replace the requirements applicable to each local area under other provisions of the WIA. (WIA section 116(a).)

Subpart C—Local Governance Provisions

§ 661.300 What is the Local Workforce Investment Board?

(a) The Local Workforce Investment Board (Local Board) is appointed by the chief elected official in each local area in accordance with State criteria established under WIA section 117(b), and is certified by the Governor every two years, in accordance with WIA section 117(c)(2).

(b) In partnership with the chief elected official(s), the Local Board sets policy for the portion of the Statewide workforce investment system within the local area.

(c) The Local Board and the chief elected official(s) may enter into an agreement that describes the respective roles and responsibilities of the parties.

(d) The Local Board, in partnership with the chief elected official, develops the local workforce investment plan and performs the functions described in WIA section 117(d). (WIA section 117 (d).)

(e) In the case in which a local area includes more than one unit of general local government in accordance with WIA section 117 (c)(1)(B), the chief elected officials of such units may execute an agreement to describe their responsibilities for carrying out the roles and responsibilities. If, after a reasonable effort, the chief elected officials are unable to reach agreement, the Governor may appoint the members of the local board from individuals nominated or recommended as specified in WIA section 117(b).

(f) In the case in which the State Plan indicates that the State will be treated as a local area under WIA title I, the Governor may designate the State Board to carry out any of the roles of the Local Board.

§ 661.305 What is the role of the Local Workforce Investment Board?

(a) WIA section 117(d) specifies that the Local Board is responsible for:

(1) Developing the five-year local workforce investment plan (Local Plan) and conducting oversight of the One-Stop system, youth activities and employment and training activities under title I of WIA, in partnership with the chief elected official;

(2) Selecting One-Stop operators with the agreement of the chief elected official;

(3) Selecting eligible youth service providers based on the recommendations of the youth council, and identifying eligible providers of adult and dislocated worker intensive services and training services, and maintaining a list of eligible providers with performance and cost information, as required in 20 CFR part 663, subpart E;

(4) Developing a budget for the purpose of carrying out the duties of the Local Board, subject to the approval of the chief elected official;

(5) Negotiating and reaching agreement on local performance measures with the chief elected official and the Governor;

(6) Assisting the Governor in developing the Statewide employment statistics system under the Wagner-Peyser Act;

(7) Coordinating workforce investment activities with economic development strategies and developing employer linkages; and

(8) Promoting private sector involvement in the Statewide workforce investment system through effective connecting, brokering, and coaching activities through intermediaries such as the One-Stop operator in the local area or through other organizations, to assist employers in meeting hiring needs.

(b) The Local Board, in cooperation with the chief elected official, appoints a youth council as a subgroup of the Local Board and coordinates workforce and youth plans and activities with the youth council, in accordance with WIA sec. 117(h) and § 661.335.

(c) Local Boards which are part of a State designated region for regional planning must carry out the regional planning responsibilities required by the State in accordance with WIA section 116(c) and § 661.290.

(d) The Local Board must conduct business in an open manner as required by WIA section 117(e), by making available to the public, on a regular basis through open meetings, information about the activities of the Local Board, including information about the local plan before submission of the plan, and about membership, the designation and certification of One-Stop operators, and the award of grants or contracts to eligible providers of youth activities, and on request, minutes of formal meetings of the Local Board. (WIA sec. 117.)

§ 661.310 Under what limited conditions may a Local Board directly be a provider of core services, intensive services, or training services, or act as a One-Stop Operator?

(a) A Local Board may not directly provide core services, or intensive services, or be designated or certified as a One-Stop operator, unless agreed to by the chief elected official and the Governor.

(b) A Local Board is prohibited from providing training services, unless the Governor grants a waiver in accordance with the provisions in WIA section 117(f)(1). The waiver shall apply for not more than one year and may be renewed for not more than one additional year.

(c) The restrictions on the provision of core, intensive, and training services by the Local Board, and designation or certification as One-Stop operator, also apply to staff of the Local Board. (WIA sec. 117(f)(1) and (f)(2).)

§ 661.315 Who are the required members of the Local Workforce Investment Boards?

(a) The membership of Local Board must be selected in accordance with criteria established under WIA section 117(b)(1) and must meet the requirements of WIA section 117(b)(2). The Local Board must contain two or more members representing the categories described in WIA section 117(b)(2)(A)(ii)–(v), and special consideration must be given to the entities identified in WIA section 117(b)(2)(A)(ii), (iv) and (v) in the selection of members representing those categories. The Local Board must contain at least one member representing each One-Stop partner.

(b) The membership of Local Boards may include individuals or representatives of other appropriate entities, including entities representing individuals with multiple barriers to employment and other special populations, as determined by the chief elected official.

(c) Members who represent organizations, agencies or other entities must be individuals with optimum policy making authority within the entities they represent.

(d) A majority of the members of the Local Board must be representatives of business in the local area. Members representing business must be individuals who are owners, chief executive officers, chief operating officers, or other individuals with optimum policy-making or hiring authority. Business representatives serving on Local Boards may also serve on the State Board.

(e) Chief elected officials must appoint the business representatives from among individuals who are nominated by local business organizations and business trade associations. Chief elected officials must appoint the labor representatives from among individuals who are nominated by local labor federations (or, for a local area in which no employees are represented by such organizations, other representatives of employees). (WIA sec. 117(b).)

§ 661.320 Who must chair a Local Board?

The Local Board must elect a chairperson from among the business representatives on the board. (WIA sec. 117(b)(5).)

§ 661.325 What criteria will be used to establish membership of the Local Board?

The Local Board is appointed by the chief elected official(s) in the local area in accordance with State criteria established under WIA section 117(b), and is certified by the Governor every two years, in accordance with WIA section 117(c)(2). The criteria for certification must be described in the State Plan. (WIA sec. 117(c).)

§ 661.330 Under what circumstances may the State use an alternative entity as the local workforce investment board?

(a) The State may use any local entity that meets the requirements of WIA section 117(i) to perform the functions of the Local Board. WIA section 117(i) requires that such entity:

(1) Was established to serve the local area (or the service delivery area that most closely corresponds to the local area);

(2) Was in existence on December 31, 1997;

(3)(i) Is a Private Industry Council established under to section 102 of the Job Training Partnership Act, as in effect on December 31, 1997; or

(ii) Is substantially similar to the Local Board described in WIA section 117 (a), (b), and (c) and (h)(1) and (2); and

(4) Includes, at a minimum, two or more representatives of business in the local area and two or more representatives of labor organizations nominated by local labor federations or employees in the local area.

(b)(1) If the Governor certifies an alternative entity to perform the functions of the Local Board; the State workforce investment plan must demonstrate that the alternative entity meets the requirements of WIA section 117(i), set forth in paragraph (a) of this section.

(2) If the alternative entity does not provide for representative membership of each of the categories of required Local Board membership under WIA section 117(b), the local workforce investment plan must explain the manner in which the Local Board will ensure an ongoing role for any such group in the local workforce investment system.

(c) If the membership structure of an alternative entity is significantly changed after December 31, 1997, the entity will no longer be eligible to perform the functions of the Local Board. In such case, the chief elected official(s) must establish a new Local Board which meets all of the criteria of WIA section 117(a), (b), and (c) and (h)(1) and (2). A significant change in the membership structure does not

mean the filling of a vacancy on the alternative entity, but does include any change in the organization of the alternative entity or in the categories of entities represented on the alternative entity that requires a change to the alternative entity's charter or a similar document that defines the formal organization of the alternative entity.

(d) In these regulations, all references to the Local Board must be deemed to also apply to an alternative entity used by a local area. (WIA sec. 117(i).)

§ 661.335 What is a youth council, and what is its relationship to the Local Board?

(a) A youth council must be established as a subgroup within each Local Board.

(b) The membership of each youth council must include:

(1) Members of the Local Board, such as educators, employers, and representatives of human service agencies, who have special interest or expertise in youth policy;

(2) Members who represent service agencies, such as juvenile justice and local law enforcement agencies;

(3) Members who represent local public housing authorities;

(4) Parents of eligible youth seeking assistance under subtitle B of title I of WIA;

(5) Individuals, including former participants, and members who represent organizations, that have experience relating to youth activities; and

(6) Members who represent the Job Corps, if a Job Corps Center is located in the local area represented by the council.

(c) Youth councils may include other individuals, who the chair of the Local Board, in cooperation with the chief elected official, determines to be appropriate.

(d) Members of the youth council who are not members of the Local Board must be voting members of the youth council and nonvoting members of the Local Board.

§ 661.340 What are the responsibilities of the youth council?

The youth council is responsible for:

(a) Coordinating youth activities in a local area;

(b) Developing portions of the local plan related to eligible youth, as determined by the chairperson of the Local Board;

(c) Recommending eligible youth service providers in accordance with WIA section 123, subject to the approval of the Local Board;

(d) Conducting oversight with respect to eligible providers of youth activities in the local area, subject to the approval of the Local Board; and

(e) Carrying out other duties, as authorized by the chairperson of the Local Board, such as establishing linkages with educational agencies and other youth entities.

§ 661.345 What are the requirements for the submission of the local workforce investment plan?

(a) WIA section 118 requires that each Local Board, in partnership with the appropriate chief elected officials, develops and submits a comprehensive five-year plan to the Governor which identifies and describes certain policies, procedures and local activities that are carried out in the local area, and that is consistent with the State Plan.

(b) The Local Board must provide an opportunity for public comment on and input into the development of the local workforce investment plan prior to its submission, and the opportunity for public comment on the local plan must:

(1) Make copies of the proposed local plan available to the public (through such means as public hearings and local news media);

(2) Include an opportunity for comment by members of the Local Board and members of the public, including representatives of business and labor organizations;

(3) Provide at least a thirty (30) day period for comment, beginning on the date on which the proposed plan is made available, prior to its submission to the Governor; and

(4) Be consistent with the requirement, in WIA section 117(e), that the Local Board make information about the plan available to the public on a regular basis through open meetings.

(c) The Local Board must submit any comments that express disagreement with the plan to the Governor along with the plan.

§ 661.350 What are the contents of the local workforce investment plan?

(a) The local workforce investment plan must meet the requirements of WIA section 118(b). The plan must include:

(1) An identification of the workforce investment needs of businesses, jobseekers, and workers in the local area;

(2) An identification of current and projected employment opportunities and job skills necessary to obtain such opportunities;

(3) A description of the One-Stop delivery system to be established or designated in the local area, including:

(i) How the Local Board will ensure continuous improvement of eligible providers of services and ensure that such providers meet the employment needs of local employers and participants; and

(ii) A copy of the local memorandum(s) of understanding between the Local Board and each of the One-Stop partners concerning the operation of the local One-Stop delivery system;

(4) A description of the local levels of performance negotiated with the Governor and the chief elected official(s) to be used by the Local Board for measuring the performance of the local fiscal agent (where appropriate), eligible providers, and the local One-Stop delivery system;

(5) A description and assessment of the type and availability of adult and dislocated worker employment and training activities in the local area, including a description of the local ITA system and the procedures for ensuring that exceptions to the use of ITA's, if any, are justified under WIA section 134(d)(4)(G)(ii) and 20 CFR 663.430;

(6) A description of how the Local Board will coordinate local activities with Statewide rapid response activities;

(7) A description and assessment of the type and availability of youth activities in the local area, including an identification of successful providers of such activities;

(8) A description of the process used by the Local Board to provide opportunity for public comment, including comment by representatives of business and labor organizations, and input into the development of the local plan, prior to the submission of the plan;

(9) An identification of the fiscal agent, or entity responsible for the disbursal of grant funds;

(10) A description of the competitive process to be used to award grants and contracts for activities carried out under this subtitle I of WIA, including the process to be used to procure training services that are made as exceptions to the Individual Training Account process (WIA sec. 134(d)(4)(G)),

(11) A description of the criteria to be used by the Governor and the Local Board, under 20 CFR 663.600, to determine whether funds allocated to a local area for adult employment and training activities under WIA sections 133(b)(2)(A) or (3) are limited, and the process by which any priority will be applied by the One-Stop operator;

(12) In cases where an alternate entity functions as the Local Board, the information required at § 661.330(b), and

(13) Such other information as the Governor may require.

(b) The Governor must review completed plans and must approve all such plans within ninety days of their submission, unless the Governor determines in writing that:

(1) There are deficiencies identified in local workforce investment activities carried out under this subtitle that have not been sufficiently addressed; or

(2) The plan does not comply with title I of WIA and these regulations, including the required consultations and public comment provisions.

(c) In cases where the State is a single local area:

(1) The Secretary performs the roles assigned to the Governor as they relate to local planning activities.

(2) The Secretary issues planning guidance for such States.

(3) The requirements found in WIA and in these regulations for consultation with chief elected officials apply to the development of State and local plans and to the development and operation of the One-Stop delivery system.

§ 661.355 When must a local plan be modified?

The Governor must establish procedures governing the modification of local plans. Situations in which modifications may be required by the Governor include significant changes in local economic conditions, changes in the financing available to support WIA title I and partner-provided WIA services, changes to the Local Board structure, or a need to revise strategies to meet performance goals.

Subpart D—Waivers and Work-Flex

§ 661.400 What is the purpose of the General Statutory and Regulatory Waiver Authority provided at section 189(i)(4) of the Workforce Investment Act?

(a) The purpose of the general statutory and regulatory waiver authority is to provide flexibility to States and local areas and enhance their ability to improve the statewide workforce investment system.

(b) A waiver may be requested to address impediments to the implementation of a strategic plan, including the continuous improvement strategy, consistent with the key reform principles of WIA. These key reform principles include:

(1) Streamlining services and information to participants through a One-Stop delivery system;

(2) Empowering individuals to obtain needed services and information to enhance their employment opportunities;

(3) Ensuring universal access to core employment-related services;

(4) Increasing accountability of States, localities and training providers for performance outcomes;

(5) Establishing a stronger role for Local Boards and the private sector;

(6) Providing increased State and local flexibility to implement innovative and comprehensive workforce investment systems; and

(7) Improving youth programs through services which emphasize academic and occupational learning.

§ 661.410 What provisions of WIA and the Wagner-Peyser Act may be waived, and what provisions may not be waived?

(a) The Secretary may waive any of the statutory or regulatory requirements of subtitles B and E of title I of WIA, except for requirements relating to:

(1) Wage and labor standards;

(2) Non-displacement protections;

(3) Worker rights;

(4) Participation and protection of workers and participants;

(5) Grievance procedures and judicial review;

(6) Nondiscrimination;

(7) Allocation of funds to local areas;

(8) Eligibility of providers or participants;

(9) The establishment and functions of local areas and local boards; and

(10) Procedures for review and approval of State and Local plans; and

(b) The Secretary may waive any of the statutory or regulatory requirements of sections 8 through 10 of the Wagner-Peyser Act (29 U.S.C. 49g—49i) except for requirements relating to:

(1) The provision of services to unemployment insurance claimants and veterans; and

(2) Universal access to the basic labor exchange services without cost to job seekers.

(c) The Secretary does not intend to waive any of the statutory or regulatory provisions essential to the key reform principles embodied in the Workforce Investment Act, described in §661.400, except in extremely unusual circumstances where the provision can be demonstrated as impeding reform. (WIA sec. 189(i).)

§ 661.420 Under what conditions may a Governor request, and the Secretary approve, a general waiver of statutory or regulatory requirements under section 189(i)(4)?

(a) A Governor may request a general waiver in consultation with appropriate chief elected officials:

(1) By submitting a waiver plan which may accompany the State's WIA 5-year strategic Plan; or

(2) After a State's WIA Plan is approved, by directly submitting a waiver plan.

(b) A Governor's waiver request may seek waivers for the entire State or for one or more local areas.

(c) A Governor requesting a general waiver must submit to the Secretary a plan to improve the Statewide workforce investment system that:

(1) Identifies the statutory or regulatory requirements for which a waiver is requested and the goals that the State or local area, as appropriate, intends to achieve as a result of the waiver and how those goals relate to the Strategic Plan goals;

(2) Describes the actions that the State or local area, as appropriate, has undertaken to remove State or local statutory or regulatory barriers;

(3) Describes the goals of the waiver and the expected programmatic outcomes if the request is granted;

(4) Describes the individuals affected by the waiver; and

(5) Describes the processes used to:

(i) Monitor the progress in implementing the waiver;

(ii) Provide notice to any Local Board affected by the waiver; and

(iii) Provide any Local Board affected by the waiver an opportunity to comment on the request.

(d) The Secretary issues a decision on a waiver request within 90 days after the receipt of the original waiver request.

(e) The Secretary will approve a waiver request if and only to the extent that:

(1) The Secretary determines that the requirements for which a waiver is requested impede the ability of either the State or local area to implement the State's plan to improve the Statewide workforce investment system;

(2) The Secretary determines that the waiver plan meets all of the requirements of WIA section 189(i)(4) and §§ 661.400–661.420 of this subpart; and

(3) The State has executed a memorandum of understanding with the Secretary requiring the State to meet, or ensure that the local area meets, agreed-upon outcomes and to implement other appropriate measures to ensure accountability.

(g) The Secretary will issue guidelines under which the States may request general waivers of WIA and Wagner-Peyser requirements. (WIA sec. 189(i).)

§ 661.430 Under what conditions may the Governor submit a Workforce Flexibility Plan?

(a) A State may submit to the Secretary, and the Secretary may approve, a workforce flexibility (work-flex) plan under which the State is authorized to waive, in accordance with the plan:

(1) Any of the statutory or regulatory requirements under title I of WIA applicable to local areas, if the local area requests the waiver in a waiver application, except for:

(i) Requirements relating to the basic purposes of title I of WIA;

(ii) Wage and labor standards;

(iii) Grievance procedures and judicial review;

(iv) Nondiscrimination;

(v) Eligibility of participants;

(vi) Allocation of funds to local areas;

(vii) Establishment and functions of local areas and local boards;

(viii) Review and approval of local plans;

(ix) Worker rights, participation, and protection; and

(x) Any of the statutory provisions essential to the key reform principles embodied in the Workforce Investment Act, described in § 661.400.

(2) Any of the statutory or regulatory requirements applicable to the State under sec. 8 through 10 of the Wagner-Peyser Act (29 U.S.C. 49g–49i), except for requirements relating to:

(i) The provision of services to unemployment insurance claimants and veterans; and

(ii) Universal access to basic labor exchange services without cost to job seekers; and

(3) Any of the statutory or regulatory requirements under the Older Americans Act of 1965 (OAA) (42 U.S.C. 3001 *et seq.*), applicable to State agencies on aging with respect to activities carried out using funds allotted under OAA section 506(a)(3) (42 U.S.C. 3056d(a)(3)), except for requirements relating to:

(i) The basic purposes of OAA;

(ii) Wage and labor standards;

(iii) Eligibility of participants in the activities; and

(iv) Standards for agreements.

(b) A State's workforce flexibility plan may accompany the State's five-year Strategic Plan or may be submitted separately. If it is submitted separately, the workforce flexibility plan must identify related provisions in the State's five-year Strategic Plan.

(c) A workforce flexibility plan submitted under paragraph (a) of this section must include descriptions of:

(1) The process by which local areas in the State may submit and obtain State approval of applications for waivers;

(2) The statutory and regulatory requirements of title I of WIA that are likely to be waived by the State under the workforce flexibility plan;

(3) The statutory and regulatory requirements of sections 8 through 10 of the Wagner-Peyser Act that are proposed for waiver, if any;

(4) The statutory and regulatory requirements of the Older Americans Act of 1965 that are proposed for waiver, if any;

(5) The outcomes to be achieved by the waivers described in paragraphs (c)(1) to (4) of this section # including, where appropriate, revisions to adjusted levels of performance included in the State or local plan under title I of WIA; and

(6) The measures to be taken to ensure appropriate accountability for Federal funds in connection with the waivers.

(d) The Secretary may approve a workforce flexibility plan for a period of up to five years.

(e) Before submitting a workforce flexibility plan to the Secretary for approval, the State must provide adequate notice and a reasonable opportunity for comment on the proposed waiver requests under the workforce flexibility plan to all interested parties and to the general public.

(f) The Secretary will issue guidelines under which States may request designation as a work-flex State.

§ 661.440 What limitations apply to the State's Workforce Flexibility Plan authority under WIA?

(a)(1) Under work-flex waiver authority a State must not waive the WIA, Wagner-Peyser or Older Americans Act requirements which are excepted from the work-flex waiver authority and described in § 661.430(a).

(2) Requests to waive statutory and regulatory requirements of title I of WIA applicable at the State level may not be granted under work-flex waiver authority granted to a State. Such requests may only be granted by the Secretary under the general waiver authority described at §§ 661.410–661.420 of this subpart.

(b) As required in § 661.430(c)(5), States must address the outcomes to result from work-flex waivers as part of its workforce flexibility plan. Once approved, a State's work-flex designation is conditioned on the State demonstrating it has met the agreed-upon outcomes contained in its workforce flexibility plan.

PART 662—DESCRIPTION OF THE ONE-STOP SYSTEM UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

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Sec.

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AUTHORITY: Section 506(c), Pub. L. 105–220; 20 U.S.C. 9276(c).

SOURCE: 64 FR 18701, Apr. 15, 1999, unless otherwise noted.

Subpart A—General Description of One-Stop Delivery System

§ 662.100 What is the One-Stop delivery system?

(a) In general, the One-Stop delivery system is a system under which entities responsible for administering separate workforce investment, educational, and other human resource programs and funding streams (referred to as One-Stop partners) collaborate to create a seamless system of service delivery that will enhance access to the programs' services and improve long-term employment outcomes for individuals receiving assistance.

(b) Title I of WIA assigns responsibilities at the local, State and Federal level to ensure the creation and maintenance of a One-Stop delivery system that enhances the range and quality of workforce development services that are accessible to individuals seeking assistance.

(c) The system must include at least one comprehensive physical center in each local area that must provide the core services specified in WIA section 134(d)(2), and must provide access to other programs and activities carried out by the One-Stop partners.

(d) While each local area must have at least one comprehensive center (and may have additional comprehensive centers), WIA section 134(c) allows for arrangements to supplement the center. These arrangements may include:

(1) A network of affiliated sites that can provide one or more partners' programs, services and activities at each site;

(2) A network of One-Stop partners through which each partner provides services that are linked, physically or technologically, to an affiliated site that assures individuals are provided information on the availability of core services in the local area; and

(3) Specialized centers that address specific needs, such as those of dislocated workers.

(e) The design of the local area's One-Stop delivery system, including the number of comprehensive centers and the supplementary arrangements, must be described in the local plan and be consistent with the memorandum of understanding executed with the One-Stop partners.

Subpart B—One-Stop Partners and the Responsibilities of Partners

§ 662.200 Who are the required One-Stop partners?

(a) WIA section 121(b)(1) identifies the entities that are required partners in the local One-Stop systems.

(b) The required partners are the entities that carry out:

(1) Programs authorized under title I of WIA, serving:

(i) Adults;

(ii) Dislocated workers;

(iii) Youth;

(iv) Job Corps;

(v) Native American programs;

(vi) Migrant and seasonal farmworker programs; and

(vii) Veterans' workforce programs; (WIA sec. 121(b)(1)(B)(i).)

(2) Programs authorized under the Wagner-Peyser Act (29 U.S.C. 49 *et seq.*); (WIA sec. 121(b)(1)(B)(ii).)

(3) Adult education and literacy activities authorized under title II of WIA; (WIA sec. 121(b)(1)(B)(iii).)

(4) Vocational rehabilitation programs authorized under parts A and B of title I of the Rehabilitation Act (29 U.S.C. 720 *et seq.*); (WIA sec. 121(b)(1)(B)(iv).)

(5) Welfare-to-work programs authorized under sec. 403(a)(5) of the Social Security Act (42 U.S.C. 603(a)(5) *et seq.*); (WIA sec. 121(b)(1)(B)(v).)

(6) Senior community service employment activities authorized under title V of the Older Americans Act of 1965 (42 U.S.C. 3056 *et seq.*); (WIA sec. 121(b)(1)(B)(vi).)

(7) Postsecondary vocational education activities under the Carl D. Perkins Vocational and Applied Technology Education Act (20 U.S.C. 2301 *et seq.*); (WIA sec. 121(b)(1)(B)(vii).)

(8) Trade Adjustment Assistance and NAFTA Transitional Adjustment Assistance activities authorized under chapter 2 of title II of the Trade Act of 1974 (19 U.S.C. 2271 *et seq.*); (WIA sec. 121(b)(1)(B)(viii).)

(9) Activities authorized under chapter 41 of title 38, U.S.C. (local veterans' employment representatives and disabled veterans outreach programs); (WIA sec. 121(b)(1)(B)(ix).)

(10) Employment and training activities carried out under the Community Services Block Grant (42 U.S.C. 9901 *et seq.*); (WIA sec. 121(b)(1)(B)(x).)

(11) Employment and training activities carried out by the Department of Housing and Urban Development; (WIA sec. 121(b)(1)(B)(xi).) and

(12) Programs authorized under State unemployment compensation laws (in accordance with applicable Federal law); (WIA sec. 121(b)(1)(B)(xii).)

§ 662.210 What other entities may serve as One-Stop partners?

(a) WIA provides that other entities that carry out a human resource program, including Federal, State, or local programs and programs in the private sector may serve as additional partners in the One-Stop system if the Local Board and chief elected official(s) approve the entity's participation.

(b) Additional partners may include:

(1) TANF programs authorized under part A of title IV of the Social Security Act (42 U.S.C. 601 *et seq.*);

(2) Employment and training programs authorized under section 6(d)(4) of the Food Stamp Act of 1977 (7 U.S.C. 2015(d)(4));

(3) Work programs authorized under section 6(o) of the Food Stamp Act of 1977 (7 U.S.C. 2015(o));

(4) Programs authorized under the National and Community Service Act of 1990 (42 U.S.C. 12501 *et seq.*); and

(5) other appropriate programs, including programs related to transportation and housing. (WIA section 121(b)(2).)

§ 662.220 What entity serves as the One-Stop partner for a particular program in the local area?

(a) The ''entity'' that carries out the program and activities listed in §§ 662.200 and 662.210 of this subpart, and, therefore, serves as the One-Stop partner is the grant recipient, administrative entity or organization responsible for administering the funds of the specified program in the local area. The term ''entity'' does not include the service providers that contract with or are subrecipients of the local administrative entity. For programs that do not include local administrative entities, the responsible State Agency should be the partner. Specific entities for specific programs are identified in paragraph (b) of this section.

(b)(1) For title II of WIA, the entity that carries out the program for the purposes of paragraph (a) of this section is the State eligible entity. The State eligible entity may designate an eligible provider as the ''entity'' for this purpose;

(2) For title I, Part A, of the Rehabilitation Act, the entity that carries out the program for the purposes of paragraph (a) of this section is the designated State agency or designated unit specified under section 101(a)(2) that is primarily concerned with vocational rehabilitation, or vocational and other rehabilitation, of individuals with disabilities; and

(3) Under WIA, the national programs, including Job Corps, the WIA Indian and Native American program, the Migrant and Seasonal Farmworkers program, and the Veterans' Workforce Investment program, are required One-Stop partners. Local Boards must include them in the One-Stop delivery system where they are present in their local area. In local areas where the national programs are not present,

States and Local Boards should take steps to ensure that customer groups served by these programs have access to services through the One-Stop delivery system.

§ 662.230 What are the responsibilities of the required One-Stop partners?

All required partners must:

(a) Make available to participants through the One-Stop delivery system the core services that are applicable to the partner's programs; (WIA section 121(b)(1)(A).)

(b) Use a portion of funds made available to the partner's program, to the extent not inconsistent with the Federal law authorizing the partner's program, to:

(1) Create and maintain the One-Stop delivery system; and

(2) Provide core services; (WIA sec. 134(d)(1)(B).)

(c) Enter into a memorandum of understanding (MOU) with the Local Board relating to the operation of the One-Stop system that meets the requirements of § 662.300, including a description of services, how the cost of the identified services and operating costs of the system will be funded, and methods for referrals (WIA sec. 121(c));

(d) Participate in the operation of the One-Stop system consistent with the terms of the MOU and requirements of authorizing laws; (WIA sec. 121(b)(1)(B).) and

(e) Serve as a representative on the local workforce investment board. (WIA sec. 117(b)(2)(A)(vi).)

§ 662.240 What are a program's applicable core services?

(a) The core services applicable to any One-Stop partner program are those services described in paragraph (b) of this section, that are authorized and provided under the partner's program.

(b) The core services identified in section 134(d)(2) of the WIA are:

(1) Determinations of whether the individuals are eligible to receive assistance under subtitle B of title I of WIA;

(2) Outreach, intake (which may include worker profiling), and orientation to the information and other services available through the One-Stop delivery system;

(3) Initial assessment of skill levels, aptitudes, abilities, and supportive service needs;

(4) Job search and placement assistance, and where appropriate, career counseling;

(5) Provision of employment statistics information, including the provision of accurate information relating to local, regional, and national labor market areas, including—

(i) Job vacancy listings in such labor market areas;

(ii) Information on job skills necessary to obtain the listed jobs; and

(iii) Information relating to local occupations in demand and the earnings and skill requirements for such occupations;

(6) Provision of program performance information and program cost information on:

(i) Eligible providers of training services described in WIA section 122;

(ii) Eligible providers of youth activities described in WIA section 123;

(iii) Providers of adult education described in title II;

(iv) Providers of postsecondary vocational education activities and vocational education activities available to school dropouts under the Carl D. Perkins Vocational and Applied Technology Education Act (20 U.S.C. 2301 *et seq.*); and

(v) Providers of vocational rehabilitation program activities described in title I of the Rehabilitation Act of 1973 (29 U.S.C. 720 *et seq.*);

(7) Provision of information on how the local area is performing on the local performance measures and any additional performance information with respect to the One-Stop delivery system in the local area;

(8) Provision of accurate information relating to the availability of supportive services, including, at a minimum, child care and transportation, available in the local area, and referral to such services, as appropriate;

(9) Provision of information regarding filing claims for unemployment compensation;

(10) Assistance in establishing eligibility for—

(i) Welfare-to-work activities authorized under section 403(a)(5) of the Social Security Act (42 U.S.C. 603(a)(5)) available in the local area; and

(ii) Programs of financial aid assistance for training and education programs that are not funded under this Act and are available in the local area; and

(11) Followup services, including counseling regarding the workplace, for participants in workforce investment activities authorized under subtitle (B) of title I of WIA who are placed in unsubsidized employment, for not less than 12 months after the first day of the employment, as appropriate.

§ 662.250 Where and to what extent must required One-Stop partners make core services available?

(a) At a minimum, the core services that are applicable to the program of the partner under § 662.220, and that are in addition to the basic labor exchange services traditionally provided in the local area under the Wagner-Peyser program, must be made available at the comprehensive One-Stop center. These services must be made available to individuals attributable to the partner's program who seek assistance at the center. The adult and dislocated worker program partners are required to make all of the core services listed in § 662.240 available at the center in accordance with 20 CFR 663.100(b)(1).

(b) The applicable core services may be made available by the provision of appropriate technology at the comprehensive One-Stop center, by co-locating personnel at the center, cross-training of staff, or through a cost reimbursement or other agreement between service providers at the comprehensive One-Stop center and the partner, as described in the MOU.

(c) The responsibility of the partner for the provision of core services must be proportionate to the use of the services at the comprehensive One-Stop center by the individuals attributable to the partner's program. The specific method of determining each partner's proportionate responsibility must be described in the MOU.

(d) For purposes of this part, individuals attributable to the partner's program may include individuals who are referred through the comprehensive One-Stop center and enrolled in the partner's program after the receipt of core services, who have been enrolled in the partner's program prior to receipt of the applicable core services at the center, who meet the eligibility criteria for the partner's program and who receive an applicable core service, or who meet an alternative definition described in the MOU.

(e) Under the MOU, the provision of applicable core services at the Center by the One-Stop partner may be supplemented by the provision of such services through the networks of affiliated sites and networks of One-Stop partners described in WIA section 134(c)(2).

§ 662.260 What services, in addition to the applicable core services, are to be provided by One-Stop partners through the One-Stop delivery system?

In addition to the provision of core services, One-Stop partners must provide access to the other activities and programs carried out under the partner's authorizing laws. The access to these services must be described in the local MOU. 20 CFR part 663 describes the specific requirements relating to the provision of core, intensive, and training services through the One-Stop system that apply to the adult and the dislocated worker programs authorized under title I of WIA. Additional requirements apply to the provision of all labor exchange services under the Wagner-Peyser Act. (WIA sec. 134(c)(1)(D).)

§ 662.270 How are the costs of providing services through the One-Stop delivery system and the operating costs of the system to be funded?

The MOU must describe the particular funding arrangements for services and operating costs of the One-Stop delivery system. Each partner must contribute a fair share of the operating costs of the One-Stop delivery system proportionate to the use of the system by individuals attributable to the partner's program. There are a number of methods, consistent with the requirements of the relevant OMB

circulars, that may be used for allocating costs among the partners. Some of these methodologies include allocations based on direct charges, cost pooling, indirect cost rates and activity-based cost allocation plans. Additional guidance relating to cost allocation methods may be issued by the Department in consultation with the other appropriate Federal agencies.

§ 662.280 Does title I require One-Stop partners to use their funds for individuals who are not eligible for the partner's program or for services that are not authorized under the partner's program?

No. The requirements of the partner's program continue to apply. The Act intends to create a seamless service delivery system for individuals seeking workforce development services by linking the One-Stop partners in the One-Stop delivery system. While the overall effect is to provide universal access to core services, the resources of each partner may only be used to provide services that are authorized and provided under the partner's program to individuals who are eligible under such program. (WIA sec. 121(b)(1).)

Subpart C—Memorandum of Understanding of the One-Stop Delivery System

§ 662.300 What is the Memorandum of Understanding?

(a) The Memorandum of Understanding (MOU) is an agreement developed and executed between the Local Board, with the agreement of the chief elected official, and the One-Stop partners relating to the operation of the One-Stop delivery system in the local area.

(b) The MOU must contain the provisions required by WIA section 121(c)(2). These provisions cover services to be provided through the One-Stop delivery system; the funding of the services and operating costs of the system; and methods for referring individuals between the One-Stop operators and partners. The MOU's provisions also must determine the duration and procedures for amending the MOU, and may contain any other provisions that are consistent with WIA title I and these regulations agreed to by the parties. (WIA sec. 121(c).)

§ 662.310 Is there a single MOU for the local area or are there to be separate MOU's between the Local Board and each partner?

(a) A single ''umbrella'' MOU may be developed that addresses the issues relating to the local One-Stop delivery system for the Local Board and all partners, or the Local Board and the partners may decide to enter into separate agreements between the Local Board and one or more partners. Under either approach, the requirements described in §662.310 apply. Since funds are generally appropriated annually, financial agreements may be negotiated with each partner annually to clarify funding of services and operating costs of the system under the MOU.

(b) WIA emphasizes full and effective partnerships between Local Boards and One-Stop partners. Local Boards and partners must enter into good-faith negotiations. Local Boards and partners may request assistance from a State agency responsible for administering the partner program, the Governor, State Board, or other appropriate parties. The State agencies, the State Board, and the Governor may also consult with the appropriate Federal agencies to address impasse situations after exhausting other alternatives. The Local Board and partners must document the negotiations and efforts that have taken place. Any failure to execute an MOU between a Local Board and a required partner must be reported by the Local Board and the required partner to the Governor or State Board, and the State agency responsible for administering the partner's program, and by the Governor or the State Board and the responsible State agency to the Secretary of Labor and to the head of any other Federal agency with responsibility for oversight of a partner's program. (WIA sec. 121(c).)

(c) If an impasse has not been resolved through the alternatives available under this section any partner that fails to execute an MOU may not be permitted to serve on the Local Board. In addition, any local area in

which a Local Board has failed to execute an MOU with all of the required partners is not eligible for State incentive grants awarded on the basis of local coordination of activities under 20 CFR 665.200(d)(2).

Subpart D—One-Stop Operators

§ 662.400 Who is the One-Stop operator?

(a) The One-Stop operator is the entity that performs the role described in paragraph (c) of this section. The types of entities that may be selected to be the One-Stop operator include:

(1) A postsecondary educational institution;

(2) An Employment Service agency established under the Wagner-Peyser Act on behalf of the local office of the agency;

(3) A private, nonprofit organization (including a community-based organization);

(4) A private for-profit entity;

(5) A government agency; and

(6) Another interested organization or entity.

(b) One-Stop operators may be a single entity or a consortium of entities and may operate one or more One-Stop centers. In addition, there may be more than one One-Stop operator in a local area.

(c) The agreement between the Local Board and the One-Stop operator shall specify the operator's role. That role may range between simply coordinating service providers within the center to being the primary provider of services within the center. (WIA sec. 121(d).)

§ 662.410 How is the One-Stop operator selected?

(a) The Local Board, with the agreement of the chief elected official, must designate and certify One-Stop operators in each local area.

(b) The One-Stop operator is designated or certified:

(1) Through a competitive process, or

(2) Under an agreement between the Local Board and a consortium of entities that includes at least three or more of the required One-Stop partners identified at §662.200. (WIA sec. 121(d).)

§ 662.420 Under what limited conditions may the Local Board be designated or certified as the One-Stop operator?

(a) The Local Board may be designated or certified as the One-Stop operator only with the agreement of the chief elected official and the Governor.

(b) The designation or certification must be made publicly, in accordance with the requirements of the ''sunshine provision'' in WIA section 117(e), and must be reviewed whenever the biennial certification of the Local Board is made under 20 CFR 663.300(a). (WIA sec. 117(f)(2).)

§ 662.430 Under what conditions may existing One-Stop delivery systems be certified to act as the One-Stop operator?

Under WIA section 121(e), the Local Board, the chief elected official and the Governor may agree to certify an entity as a One-Stop operator under the following circumstances:

(a) A One-Stop delivery system, consistent with the scope and meaning of the term in WIA section 134(c), existed in the local area prior to August 7, 1998;

(b) The certification is consistent with the requirements of:

(1) WIA section 121(b) and;

(2) the Memorandum(s) of Understanding; and

(c) The certification must be made publicly, in accordance with the ''sunshine provision'' at WIA section 117(e). (WIA section 121(e).)

PART 663—ADULT AND DISLOCATED WORKER ACTIVITIES UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

Subpart A— Delivery of Adult and Dislocated Worker Services Through the One-Stop Delivery System

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AUTHORITY: Section 506(c), Pub. L. 105–220; 20 U.S.C. 9276(c).

SOURCE: 64 FR 18704, Apr. 15, 1999, unless otherwise noted.

Subpart A—Delivery of Adult and Dislocated Worker Services Through the One-Stop Delivery System

§ 663.100 What is the role of the adult and dislocated worker program in the One-Stop delivery system?

(a) The One-Stop system is the basic delivery system for adult and dislocated worker services. Through this system, adults and dislocated workers can access a continuum of services. The services are organized into three levels: core, intensive, and training.

(b) The chief elected official or his/her designee(s), as the local grant recipient(s) for the adult and dislocated worker programs, is a required One-Stop partner and is subject to the provisions relating to such partners described in 20 CFR part 662. Consistent with those provisions:

(1) Core services for adults and dislocated workers must be made available in at least one comprehensive One-Stop center in each local workforce investment area. Services may also be available elsewhere, either at affiliated sites or at specialized centers. For example, specialized centers may be established to serve workers being dislocated from a particular employer or industry, or to serve residents of public housing.

(2) The One-Stop centers also make intensive services available to adults and dislocated workers, as needed, either by the One-Stop operator directly or through contracts with service providers that are approved by the Local Board.

(3) Through the One-Stop system, adults and dislocated workers needing training are provided Individual Training Accounts (ITA's) and access to lists of eligible providers of training. These lists contain quality consumer information, including cost and performance information for each of the providers, so that participants can make informed choices on where to use their ITA's. (ITA's are more fully discussed in subpart D of this part.)

§ 663.105 When must adults and dislocated workers be registered?

(a) Registration is the process for collecting information for supporting a determination of eligibility. This information may be collected through methods that include electronic data transfer, personal interview, or an individual's application.

(b) Adults and dislocated workers who receive services funded under title I other than self-service or informational activities must be registered and determined eligible.

(c) EEO data must be collected on individuals during the registration process.

§ 663.110 What are the eligibility criteria for adults in the adult and dislocated worker program?

To be an eligible adult in the adult and dislocated worker program, an individual must be 18 years of age or older. To be eligible for the dislocated worker program, an eligible adult must meet the criteria of § 663.115 of this subpart.

§ 663.115 What are the eligibility criteria for dislocated workers in the adult and dislocated worker program?

(a) To be an eligible dislocated worker in the adult and dislocated worker program, an individual must meet the definition of ''dislocated worker'' at WIA section 101(9).

(b) Governors and Local Boards may establish policies and procedures for One-Stop operators to use in determining an individual's eligibility as a dislocated worker, consistent with the definition at WIA section 101(9). These policies and procedures may address such conditions as:

(1) What constitutes a ''general announcement'' of plant closing under WIA section 101(9)(B)(ii) or (iii); and (2) What constitutes ''unemployed as a result of general economic conditions in the community in which the individual resides or because of natural disasters' for determining the eligibility of self-employed individuals, including family members and farm or ranch hands, under WIA section 101(9)(C).

§ 663.120 Are displaced homemakers eligible for dislocated worker activities under WIA?

(a) Yes. There are two significant differences from the eligibility requirements under the Job Training Partnership Act.

(b) Under the dislocated worker program in JTPA, displaced homemakers are defined as ''additional dislocated workers'' and are only eligible to receive services if the Governor determines that providing such services would not adversely affect the delivery of services to the other eligible dislocated workers. Under WIA section 101(9), displaced homemakers who meet the definition at WIA section 101(10) are eligible dislocated workers without any additional determination.

(c) The definition of displaced homemaker under JTPA included individuals who had been dependent upon public assistance under Aid for Families with Dependent Children (AFDC) as well as those who had been dependent on the income of another family member. The definition in WIA section 101(10) includes only those individuals who were dependent on a family member's income. Those individuals who have been dependent on public assistance may be served in the adult program.

§ 663.145 What services are WIA title I adult and dislocated workers formula funds used to provide?

(a) WIA title I formula funds allocated to local areas for adults and dislocated workers must be used to provide core, intensive and training services through the One-Stop delivery system. Local Boards determine the most appropriate mix of these services, but all three types must be available for both adults and dislocated workers.

(b) WIA title I funds may also be used to provide the other services described in WIA section 134(e):

(1) Discretionary One-Stop delivery activities, including:

(i) Customized screening and referral of qualified participants in training services to employment; and

(ii) Customized employment-related services to employers on a fee-for-service basis that are in addition to labor exchange services available to employers under the Wagner-Peyser Act.

(2) Supportive services, including needs-related payments, as described in subpart H of this part.

§ 663.150 What core services must be provided to adults and dislocated workers?

(a) At a minimum, all of the core services described in WIA section 134(d)(2) and 20 CFR 662.220 must be provided in each local area through the One-Stop delivery system.

(b) Followup services must be made available, for a minimum of 12 months following the first day of employment, to registered participants who are placed in unsubsidized employment.

§ 663.155 How are core services delivered?

Core services must be provided through the One-Stop delivery system. Core services may be provided directly by the One-Stop operator or through contracts with service providers that are approved by the Local Board. The Local Board may only be a provider of core services when approved by the chief elected official and the Governor in accordance with the requirements of WIA section 117(f)(2) and 20 CFR 661.310.

§ 663.160 Are there particular core services an individual must receive before receiving intensive services under WIA section 134(d)(3)?

(a) Yes. At a minimum, an individual must receive at least one core service, such as an initial assessment or job search and placement assistance, before receiving intensive services. The initial assessment determines the individual's skill levels, aptitudes, and supportive services needs. The job search and placement assistance helps the individual determine whether he or she is unable to obtain employment, and thus

requires more intensive services to obtain employment. The decision on which core services to provide, and the timing of their delivery, may be made on a case-by-case basis at the local level depending upon the needs of the participant.

(b) A determination of the need for intensive services under § 663.220, as established by the initial assessment or the individual's inability to obtain employment through the core services provided, must be contained in the participant's case file.

§ 663.165 How long must an individual be in core services in order to be eligible for intensive services?

There is no Federally-required minimum time period for participation in core services before receiving intensive services. [WIA section 134(d)(3).]

Subpart B—Intensive Services

§ 663.200 What are intensive services for adults and dislocated workers?

(a) Intensive services are listed in WIA section 134(d)(3)(C). The list in the Act is not all-inclusive and other intensive services, such as out-of-area job search assistance, literacy activities related to basic workforce readiness, relocation assistance, internships, and work experience may be provided, based on an assessment or individual employment plan.

(b) For the purposes of paragraph (a) of this section, work experience is a planned, structured learning experience that takes place in a workplace for a limited period of time. Work experience may be paid or unpaid, as appropriate. A work experience workplace may be in the private for profit sector, the non-profit sector, or the public sector.

§ 663.210 How are intensive services delivered?

(a) Intensive services must be provided through the One-Stop delivery system. Intensive services may be provided directly by the One-Stop operator or through contracts with service providers that are approved by the Local Board. (WIA secs. 117(d)(2)(D) and 134(d)(3)(B).)

(b) The Local Board may only be a provider of intensive services when approved by the chief elected official and the Governor in accordance with WIA section 117(f)(2) and 20 CFR 661.310.

§ 663.220 Who may receive intensive services?

There are two categories of adults and dislocated workers who may receive intensive services:

(a) Adults and dislocated workers who are unemployed, have received at least one core service and are unable to obtain employment through core services, and are determined by a One-Stop operator to be in need of more intensive services to obtain employment; and

(b) Adults and dislocated workers who are employed, have received at least one core service, and are determined by a One-Stop operator to be in need of intensive services to obtain or retain employment that leads to self-sufficiency, as described in § 663.230.

§ 663.230 What criteria must be used to determine whether an employed worker needs intensive services to obtain or retain employment leading to "self-sufficiency"?

State Boards or Local Boards must set the criteria for determining whether employment leads to self-sufficiency. At a minimum, such criteria must provide that self-sufficiency means employment that pays at least the lower living standard income level, as defined in WIA section 101(24). Self-sufficiency for a dislocated worker may be defined in relation to a percentage of the layoff wage.

§ 663.240 Are there particular intensive services an individual must receive prior to receiving training services under WIA section 134(d)(4)(A)(i)?

(a) Yes. At a minimum, an individual must receive at least one intensive service, such as development of an individual employment plan with a case manager or individual counseling and career planning, before the individual may receive training services.

(b) The case file must contain a determination of need for training services under § 663.310, as identified in the

individual employment plan, comprehensive assessment, or through any other intensive service received.

§ 663.245 What is the individual employment plan?

The individual employment plan is an ongoing strategy jointly developed by the participant and the case manager that identifies the participant's employment goals, the appropriate achievement objectives, and the appropriate combination of services for the participant to achieve the employment goals.

§ 663.250 How long must an individual participant be in intensive services to be eligible for training services?

There is no Federally-required minimum time period for participation in intensive services before receiving training services. (WIA section 134(d)(4)(A)(i).)

Subpart C—Training Services

§ 663.300 What are training services for adults and dislocated workers?

Training services are listed in WIA section 134(d)(4)(D). The list in the Act is not all-inclusive and additional training services may be provided.

§ 663.310 Who may receive training services?

Training services may be made available to employed and unemployed adults and dislocated workers who:

(a) Have met the eligibility requirements for intensive services, have received at least one intensive service under § 663.240, and have been determined to be unable to obtain or retain employment through such services;

(b) After an interview, evaluation, or assessment, and case management, have been determined by a One-Stop operator or One-Stop partner, to be in need of training services and to have the skills and qualifications to successfully complete the selected training program;

(c) Select a program of training services that is directly linked to the employment opportunities either in the local area or in another area to which the individual is willing to relocate;

(d) Are unable to obtain grant assistance from other sources to pay the costs of such training, including Federal Pell Grants established under title IV of the Higher Education Act of 1965, or require WIA assistance in addition to other sources of grant assistance, including Federal Pell Grants (provisions relating to fund coordination are found at § 663.320 and WIA section 134(d)(4)(B)); and

(e) For individuals whose services are provided through the adult funding stream, are determined eligible in accordance with the State and local priority system, if any, in effect for adults under WIA section 134(d)(4)(E) and § 663.600. [WIA section 134(d)(4)(A).]

§ 663.320 What are the requirements for coordination of WIA training funds and other grant assistance?

(a) WIA funding for training is limited to participants who:

(1) Are unable to obtain grant assistance from other sources to pay the costs of their training; or

(2) Require assistance beyond that available under grant assistance from other sources to pay the costs of such training. Program operators and training providers must coordinate funds available to pay for training as described in paragraphs (b) and (c) of this section.

(b) Program operators must coordinate training funds available and make funding arrangements with One-Stop partners and other entities to apply the provisions of paragraph (a) of this section. Training providers must consider the availability of Pell Grants and other sources of grants to pay for training costs, so that WIA funds supplement other sources of training grants.

(c) A WIA participant may enroll in WIA-funded training while his/her application for a Pell Grant is pending as long as the One-Stop operator has made arrangements with the training provider and the WIA participant regarding allocation of the Pell Grant, if it is subsequently awarded. In that case, the training provider must reimburse the One-Stop operator the WIA funds used to underwrite the training for the amount the Pell Grant covers. Reimbursement is not required from

the portion of Pell Grant assistance disbursed to the WIA participant for education-related expenses. (WIA section 134(d)(4)(B).)

Subpart D—Individual Training Accounts

§ 663.400 How are training services provided?

Except under the three conditions described in WIA section 134(d)(4)(G)(ii) and § 663.430(a), the Individual Training Account (ITA) is established for eligible individuals to finance training services. Local Boards may only provide training services under § 663.430 if they receive a waiver from the Governor and meet the requirements of 20 CFR 661.310 and WIA section 117(f)(1). (WIA section 134(d)(4)(G).)

§ 663.410 What is an Individual Training Account?

The ITA is established on behalf of a participant. WIA title I adult and dislocated workers purchase training services from eligible providers they select in consultation with the case manager. Payments from ITA's may be made in a variety of ways, including the electronic transfer of funds through financial institutions, vouchers, or other appropriate methods. Payments may also be made incrementally; through payment of a portion of the costs at different points in the training course. (WIA section 134(d)(4)(G).)

§ 663.420 Can the duration and amount of ITA's be limited?

(a) Yes. The State or Local Board may impose limits on ITA's, such as limitations on the dollar amount and/or duration.

(b) Limits to ITA's may be established in different ways:

(1) There may be a limit for an individual participant that is based on the needs identified in the individual employment plan; or

(2) There may be a policy decision by the State Board or Local Board to establish a range of amounts and/or a maximum amount applicable to all ITA's.

(c) Limitations established by State or Local Board policies must be described in the State or Local Plan, respectively, but should not be implemented in a manner that undermines the Act's requirement that training services are provided in a manner that maximizes customer choice in the selection of an eligible training provider.

§ 663.430 Under what circumstances may mechanisms other than ITA's be used to provide training services?

(a) Contracts for services may be used instead of ITA's only when one of the following three exceptions applies:

(1) When the services provided are on-the-job training (OJT) or customized training;

(2) When the Local Board determines that there are an insufficient number of eligible providers in the local area to accomplish the purpose of a system of ITA's. The Local Plan must describe the process to be used in selecting the providers under a contract for services. This process must include a public comment period for interested providers of at least 30 days;

(3) When the Local Board determines that there is a training services program of demonstrated effectiveness offered in the area by a community-based organization (CBO) or another private organization to serve special participant populations that face multiple barriers to employment, as described in paragraph (b) in this section. The Local Board must develop criteria to be used in determining demonstrated effectiveness, particularly as it applies to the special participant population to be served. The criteria may include:

(i) Financial stability of the organization;

(ii) Demonstrated performance in measures appropriate to the program including program completion rate; attainment of the skills, certificates or degrees the program is designed to provide; placement after training in unsubsidized employment; and retention in employment; and

(iii) How the specific program relates to the workforce investment needs identified in the local plan.

(b) Under paragraph (a)(3) of this section, special participant populations

that face multiple barriers to employment are populations of low-income individuals that are included in one or more of the following categories:

(1) Individuals with substantial language or cultural barriers;

(2) Offenders;

(3) Homeless individuals; and

(4) Other hard-to-serve populations as defined by the Governor.

§ 663.440 What are the requirements for consumer choice?

(a) Training services, whether under ITA's or under contract, must be provided in a manner that maximizes informed consumer choice in selecting an eligible provider.

(b) Each Local Board, through the One-Stop center, must make available to customers the State list of eligible providers required in WIA section 122(e). The list includes a description of the programs through which the providers may offer the training services, the information identifying eligible providers of on-the-job training and customized training required under WIA section 122(h) (where applicable), and the performance and cost information about eligible providers of training services described in WIA sections 122(e) and (h).

(c) An individual who has been determined eligible for training services under § 663.310 may select a provider described in paragraph (b) of this section after consultation with a case manager. Unless the program has exhausted funds for the program year, the operator must refer the individual to the selected provider, and establish an ITA for the individual to pay for training. For purposes of this paragraph, a referral may be carried out by providing a voucher or certificate to the individual to obtain the training.

(d) The cost of referral of an individual with an ITA to a training provider is paid by the applicable adult or dislocated worker program under title I of WIA.

Subpart E—Eligible Training Providers

§ 663.500 What is the purpose of this subpart?

The workforce investment system established under WIA emphasizes informed customer choice, system performance, and continuous improvement. The eligible provider process is part of the strategy for achieving these goals. Local Boards, in partnership with the State, identify training providers whose performance qualifies them to receive WIA funds to train adults and dislocated workers. After receiving core and intensive services and in consultation with case managers, eligible participants who need training use the list of these eligible providers to make an informed choice. The ability of providers to successfully perform, the procedures State and Local Boards use to establish eligibility, and the degree to which information, including performance information, on those providers is made available to customers eligible for training services, are key factors affecting the successful implementation of the Statewide workforce investment system. This subpart describes the process for determining eligible training providers.

§ 663.505 What are Eligible Providers of Training Services?

(a) Eligible providers of training services are described in WIA section 122. They are those entities eligible to receive WIA title I–B funds to provide training services to eligible adult and dislocated worker customers.

(b) In order to provide training services under WIA title I–B, a provider must meet the requirements of this subpart and WIA section 122.

(1) These requirements apply to the use of WIA title I adult and dislocated worker funds to provide training:

(i) To individuals using ITA's to access training through the eligible provider list; and

(ii) To individuals for training provided through the exceptions to ITA's described at § 663.430(a)(2) and (a)(3).

(2) These requirements apply to all organizations providing training to adult and dislocated workers, including:

(i) Postsecondary educational institutions providing a program described in section 122(a)(2)(A)(ii);

(ii) Entities that carry out programs under the National Apprenticeship Act (29 U.S.C. 50 *et seq.*);

(iii) Other public or private providers of a program of training services described in WIA section 122(a)(2)(C);

(iv) Local Boards, if they meet the conditions of WIA section 117(f)(1), and

(v) Community-based organizations and other private organizations providing training under § 663.430.

(c) Provider eligibility procedures must be established by the Governor, as required by this subpart. Different procedures are described in WIA for determinations of ''initial'' and ''subsequent'' eligibility. Because the processes are different, they are discussed separately.

§ 663.508 What is a "program of training services"?

A program of training services is:

(a) One or more courses or classes that, upon successful completion, leads to:

(1) A certificate, an associate degree, or baccalaureate degree, or

(2) A competency or skill recognized by employers, or

(b) A training regimen that provides individuals with additional skills or competencies generally recognized by employers.

§ 663.510 Who is responsible for managing the eligible provider process?

(a) The State and the Local Boards each have responsibilities for managing the eligible provider process.

(b) The Governor must establish eligibility criteria for certain providers to become initially eligible and must set minimum levels of performance for all providers to remain subsequently eligible.

(c) The Governor must designate a State agency (called ''designated State agency'') to assist in carrying out WIA section 122. The designated State agency is responsible for:

(1) Developing and maintaining the State list of eligible providers, which is comprised of lists submitted by Local Boards;

(2) Verifying the accuracy of the information on the State list, in consultation with the Local Boards, removing providers who do not meet program performance levels, and taking appropriate enforcement actions, against providers in the case of the intentional provision of inaccurate information, as described in WIA section 122(f)(1), and in the case of a substantial violation of the requirements of WIA, as described in WIA section 122(f)(2);

(3) Disseminating the State list, accompanied by performance and cost information relating to each provider, to One-Stop operators throughout the State.

(d) The Local Board must:

(1) Accept applications for initial eligibility from certain postsecondary institutions and entities providing apprenticeship training;

(2) Carry out procedures prescribed by the Governor to assist in determining the initial eligibility of other providers;

(3) Carry out procedures prescribed by the Governor to assist in determining the subsequent eligibility of all providers;

(4) Compile a local list of eligible providers, collect the performance and cost information and any other required information relating to providers;

(5) Submit the local list and information to the designated State agency;

(6) Ensure the dissemination and appropriate use of the State list through the local One-Stop system;

(7) Consult with the designated State agency in cases where termination of an eligible provider is contemplated because inaccurate information has been provided; and

(8) Work with the designated State agency in cases where the termination of an eligible provider is contemplated because of violations of the Act.

(e) The Local Board may:

(1) Make recommendations to the Governor on the procedures to be used

in determining initial eligibility of certain providers;

(2) Increase the levels of performance required by the State for local providers to maintain subsequent eligibility;

(3) Require additional verifiable program-specific information from local providers to maintain subsequent eligibility.

§ 663.515 What is the process for initial determination of provider eligibility?

(a) For postsecondary educational institutions that are eligible to receive assistance under title IV of the Higher Education Act, and that provide a program that leads to an associate or baccalaureate degree or certificate, and for entities carrying out apprenticeship programs registered under the National Apprenticeship Act to be initially eligible to receive adult or dislocated worker training funds under title I of WIA, the institution or entity must submit an application to the Local Board(s) for the local area(s) in which the provider desires to provide training services that describes each program of training services, as defined in § 663.508, that leads to such a degree or certificate or is registered under the National Apprenticeship Act.

(b) Local Boards determine the procedures to use in making an application under paragraph (a) of this section. The Local Board procedures must specify the timing, manner, and contents of the required application.

(c) For other providers,

(1) The Governor must develop a procedure for use by Local Boards for determining the eligibility of other providers, after

(i) Soliciting and taking into consideration recommendations from Local Boards and providers of training services within the State; and

(ii) Providing an opportunity for interested members of the public, including representatives of business and labor organizations, to submit comments on the procedure.

(2) The procedure must be described in the State Plan.

(3)(i) The procedure must require that the provider must submit an application to the Local Board at such time and in such manner as may be required, which contains a description of the program of training services;

(ii) If the provider provides a program of training services on the date of application, the procedure must require that the application include an appropriate portion of the performance information and program cost information described in § 663.540 of this subpart, and that the program meet appropriate levels of performance;

(iii) If the provider does not provide a program of training services on that date, the procedure must require that the provider meet appropriate requirements specified in the procedure. (WIA section 122(b)(2)(D).)

(4) Programs of training services provided by postsecondary educational institutions that do not lead to an associate or baccalaureate degree or certificate and apprenticeship programs that are not registered under the National Apprenticeship Act must be determined initially eligible under the provisions of this paragraph (c).

(d) The Local Board must include providers that meet the requirements of paragraphs (a) and (c) of this section on a local list and submit the list to the designated State agency. The State agency has 30 days to verify the information relating to the providers under paragraph (c) of this section. After the agency verifies that the provider meets the criteria for initial eligibility, or 30 days have elapsed, whichever occurs first, the provider is initially eligible as a provider of training services. The providers submitted under paragraph (a) of this section are initially eligible without State agency review. (WIA section 122(e).)

§ 663.530 Is there a time limit on the period of initial eligibility for training providers?

Yes. Under WIA section 122(c)(5), the Governor must require training providers to submit performance information and meet performance levels annually in order to remain eligible providers. States may require that these performance requirements be met one year from the date that initial eligibility was determined, or may require all eligible providers to submit performance information by the same date

each year. If the latter approach is adopted, the Governor may exempt eligible providers whose determination of initial eligibility occurs within six months of the date of submissions. The effect of this requirement is that no training provider may have a period of initial eligibility that exceeds eighteen months.

§ 663.535 What is the process for determination of the subsequent eligibility of a provider?

(a) The Governor must develop a procedure for the Local Board to use in determining the subsequent eligibility of all eligible training providers determined initially eligible under § 663.515 (a) and (c), after:

(1) Soliciting and taking into consideration recommendations from Local Boards and providers of training services within the State, and

(2) Providing an opportunity for interested members of the public, including representatives of business and labor organizations, to submit comments on such procedure.

(b) The procedure must be described in the State Plan.

(c) The procedure must require that:

(1) Providers annually submit performance and cost information as described at WIA sections 122(d)(1) and (2), for each program of training services for which the provider has been determined to be eligible, in a time and manner determined by the Local Board;

(2) Providers annually meet minimum performance levels described at WIA section 122(c)(6).

(d) The provider's performance information must meet the minimum acceptable levels established under paragraph (c)(2) of this section to remain eligible;

(e) Local Boards may require higher levels of performance for local providers than the levels specified in the procedures established by the Governor. (WIA sections 122(c)(5) and (c)(6).)

(f) The State procedure must require Local Boards to take into consideration:

(1) The specific economic, geographic and demographic factors in the local areas in which providers seeking eligibility are located, and

(2) The characteristics of the populations served by providers seeking eligibility, including the demonstrated difficulties in serving these populations, where applicable.

(g) The Local Board retains those providers on the local list that meet the required performance levels and other elements of the State procedures and submits the list, accompanied by the performance and cost information, and any additional required information, to the designated State agency. If the designated State agency determines within 30 days from the receipt of the information that the provider does not meet the performance levels established under paragraph (c)(2) of this section, the provider may be removed from the list. A provider retained on the local list and not removed by the designated State agency is considered an eligible provider of training services.

§ 663.540 What kind of performance and cost information is required for determinations of subsequent eligibility?

(a) Eligible providers of training services must submit, at least annually, under procedures established by the Governor under § 663.535(c):

(1) Verifiable program-specific performance information, including:

(i) The information described in WIA section 122(d)(1)(A)(i) for all individuals participating in the programs of training services, including individuals who are not receiving assistance under WIA section 134 and individuals who are receiving such assistance; and

(ii) The information described in WIA section 122(d)(1)(A)(ii) relating only to individuals receiving assistance under the WIA adult and dislocated worker program who are participating in the applicable program of training services; and

(2) Information on program costs (such as tuition and fees) for WIA participants in the program.

(b) Governors may require any additional verifiable performance information (such as the information described at WIA section 122(d)(2)) that the Governor determines to be appropriate to

obtain subsequent eligibility, including information regarding all participating individuals as well as individuals receiving assistance under the WIA adult and dislocated worker program.

(c) If the additional information required under paragraph (b) of this section imposes extraordinary costs on providers, or if providers experience extraordinary costs in the collection of information,

(1) The Governor or Local Board must provide access to cost-effective methods for the collection of the information; or

(2) The Governor must provide additional resources to assist providers in the collection of the information from funds for Statewide workforce investment activities reserved under WIA sections 128(a) and 133(a)(1).

(d) The Local Board and the designated State agency may accept program-specific performance information consistent with the requirements for eligibility under title IV of the Higher Education Act of 1965 from a provider for purposes of enabling the provider to fulfill the applicable requirements of this section, if the information is substantially similar to the information otherwise required under this section.

§ 663.550 How is eligible provider information developed and maintained?

(a) The designated State agency must maintain a list of all eligible training providers in the State (the ''State list'').

(b) The State list is a compilation of the eligible providers identified or retained by local areas and that have not been removed under § 663.535(c) and 663.565.

(c) The State list must be accompanied by the performance and cost information contained in the local lists as required by § 663.535(e). (WIA section 122(e)(4)(A).)

§ 663.555 How is the State list disseminated?

(a) The designated State agency must disseminate the State list and accompanying performance and cost information to the One-Stop delivery systems within the State.

(b) The State list and information must be updated at least annually.

(c) The State list and accompanying information form the primary basis of the One-Stop consumer reports system that provides for informed customer choice. The list and information must be widely available, through the One-Stop delivery system, to customers seeking information on training outcomes, as well as participants in employment and training activities funded under WIA and other programs.

(1) The State list must be made available to individuals who have been determined eligible for training services under § 663.310.

(2) The State list must also be made available to customers whose training is supported by other One-Stop partners.

§ 663.565 May an eligible training provider lose its eligibility?

(a) Yes. A training provider must deliver results and provide accurate information in order to retain its status as an eligible training provider.

(b) If the provider does not meet the established performance levels, it will be removed from the eligible provider list.

(1) A Local Board must determine, during the subsequent eligibility determination process, whether a provider meets performance levels. If the provider fails to meet such levels, the provider must be removed from the local list.

(2) The designated State agency upon receipt of the performance information accompanying the local list, may remove a provider from the State list if the agency determines the provider failed to meet the levels of performance prescribed under § 663.535(c).

(3) Providers determined to have intentionally supplied inaccurate information or to have subsequently violated any provision of title I of WIA or these regulations may be removed from the list in accordance with the enforcement provisions of WIA section 122(f). A provider whose eligibility is terminated under these conditions is liable to repay all adult and dislocated worker training funds it received during the period of noncompliance.

(4) The Governor must establish appeal procedures for providers of training to appeal a denial of eligibility under this part according to the requirements of 20 CFR 667.640(b).

§ 663.570 What is the consumer reports system?

The consumer reports system, referred to in WIA as performance information, is the vehicle for informing the customers of the One-Stop delivery system about the performance of training providers in the local area. It is built upon the State list of eligible providers developed through the procedures described in WIA section 122 and this subpart. The consumer reports system must contain the information necessary for an adult or dislocated worker customer to fully understand the options available to him or her in choosing a program of training services. Such program-specific factors may include overall performance, performance for significant customer groups (including wage replacement rates for dislocated workers), performance of specific provider sites, current information on employment and wage trends and projections, and duration of training programs.

§ 663.575 In what ways can a Local Board supplement the information available from the State list?

(a) Local Boards may supplement the information available from the State list by providing customers with additional information to assist in supporting informed customer choice and the achievement of local performance measures (as described in WIA section 136).

(b) This additional information may include:

(1) Information on programs of training services that are linked to occupations in demand in the local area;

(2) Performance and cost information, including program-specific performance and cost information, for the local outlet(s) of multi-site eligible providers; and

(3) Other appropriate information related to the objectives of WIA, which may include the information described in § 663.570.

§ 663.585 May individuals choose training providers located outside of the local area?

Yes. Individuals may choose any of the eligible providers on the State list. A State may also establish a reciprocal agreement with another State(s) to permit eligible providers of training services in each State to accept individual training accounts provided in the other State. (WIA sections 122(e)(4) and (e)(5).)

§ 663.590 May a community-based organization (CBO) be included on an eligible provider list?

Yes. CBO's may apply and be determined eligible providers of training services, under WIA section 122 and this subpart. As eligible providers, CBO's provide training through ITA's and may also receive contracts for training special participant populations when the requirements of § 663.430 are met.

§ 663.595 What requirements apply to providers of OJT and customized training?

For OJT and customized training providers, One-Stop operators in a local area must collect such performance information as the Governor may require, determine whether the providers meet such performance criteria as the Governor may require, and disseminate a list of providers that have met such criteria, along with the relevant performance information about them, through the One-Stop delivery system. Providers determined to meet the criteria are considered to be identified as eligible providers of training services. These providers are not subject to the other requirements of WIA section 122 or this subpart.

Subpart F—Priority and Special Populations

§ 663.600 What priority must be given to low-income adults and public assistance recipients served with adult funds under title I?

(a) WIA states, in section 134(d)(4)(E), that in the event that funds allocated to a local area for adult employment

and training activities are limited, priority for intensive and training services funded with title I adult funds must be given to recipients of public assistance and other low-income individuals in the local area.

(b) Since funding is generally limited, States and local areas must establish criteria by which local areas can determine the availability of funds and the process by which any priority will be applied under WIA section 134(d)(2)(E). Such criteria may include the availability of other funds for providing employment and training-related services in the local area, the needs of the specific groups within the local area, and other appropriate factors.

(c) States and local areas must give priority for adult intensive and training services to recipients of public assistance and other low-income individuals, unless the local area has determined that funds are not limited under the criteria established under paragraph (b) of this section.

(d) The process for determining whether to apply the priority established under paragraph (b) of this section does not necessarily mean that only the recipients of public assistance and other low income individuals may receive WIA adult funded intensive and training services when funds are determined to be limited in a local area. The Local Board and the Governor may establish a process that gives priority for services to the recipients of public assistance and other low income individuals and that also serves other individuals meeting eligibility requirements.

§ 663.610 Does the statutory priority for use of adult funds also apply to dislocated worker funds?

No. The statutory priority applies to adult funds for intensive and training services only. Funds allocated for dislocated workers are not subject to this requirement.

§ 663.620 How do the Welfare-to-Work program and the TANF program relate to the One-Stop delivery system?

(a) The local Welfare-to-Work (WtW) program operator is a required partner in the One-Stop delivery system. 20 CFR part 662 describes the roles of such partners in the One-Stop delivery system and applies to the Welfare-to-Work program operator. WtW programs serve individuals who may also be served by the WIA programs and, through appropriate linkages and referrals, these customers will have access to a broader range of services through the cooperation of the WtW program in the One-Stop system. WtW participants, who are determined to be WIA eligible, and who need occupational skills training may be referred through the One-Stop system to receive WIA training. WIA participants who are also determined WtW eligible, may be referred to the WtW operator for job placement and other WtW assistance.

(b) The local TANF agency is specifically suggested under WIA as an additional partner in the One-Stop system. TANF recipients will have access to more information about employment opportunities and services when the TANF agency participates in the One-Stop delivery system. The Governor and Local Board should encourage the TANF agency to become a One-Stop partner to improve the quality of services to the WtW and TANF-eligible populations. In addition, becoming a One-Stop partner will ensure that the TANF agency is represented on the Local Board and participates in developing workforce investment strategies that help cash assistance recipients secure lasting employment.

§ 663.630 How does a displaced homemaker qualify for services under title I?

Displaced homemakers may be eligible to receive assistance under title I in a variety of ways, including:

(a) Core services provided by the One-Stop partners through the One-Stop delivery system;

(b) Intensive or training services for which an individual qualifies as a dislocated worker/displaced homemaker if the requirements of this part are met;

(c) Intensive or training services for which an individual is eligible if the requirements of this part are met;

(d) Statewide employment and training projects conducted with reserve funds for innovative programs for displaced homemakers, as described in 20 CFR 665.210(f) .

§ 663.640 May a disabled individual whose family does not meet income eligibility criteria under the Act be eligible for priority as a low income adult?

Yes. Even if the family of a disabled individual does not meet the income eligibility criteria, the disabled individual is to be considered a low-income individual if the individual's own income:

(a) Meets the income criteria established in WIA section 101(25)(B); or

(b) Meets the income eligibility criteria for cash payments under any Federal, State or local public assistance program. (WIA section 101(25)(F).)

Subpart G—On-the-Job Training (OJT) and Customized Training

§ 663.700 What are the requirements for on-the-job training (OJT)?

(a) On-the-job training (OJT) is defined at WIA section 101(31). OJT is provided by an employer in the public, private non-profit, or private sector. A contract may be developed between the employer and the local program that provides occupational training for the WIA participant in exchange for the reimbursement of up to 50 percent of the wage rate to compensate for the employer's extraordinary costs. (WIA section 101(31)(B).)

(b) The local program must not contract with an employer who has previously exhibited a pattern of failing to provide OJT participants with continued long-term employment with wages, benefits, and working conditions that are equal to those provided to regular employees who have worked a similar length of time and are doing the same type of work. (WIA section 195(4).)

(c) An OJT contract must be limited to the period of time required for a participant to become proficient in the occupation for which the training is being provided. In determining the appropriate length of the contract, consideration should be given to the skill requirements of the occupation, the academic and occupational skill level of the participant, prior work experience, and the participant's individual employment plan. (WIA section 101(31)(C).)

§ 663.705 What are the requirements for OJT contracts for employed workers?

OJT contracts may be written for eligible employed workers when:

(a) The employee is not earning a self-sufficient wage as determined by Local Board policy;

(b) The requirements in § 663.700 are met; and

(c) The OJT relates to the introduction of new technologies, introduction to new production or service procedures, upgrading to new jobs that require additional skills, workplace literacy, or other appropriate purposes identified by the Local Board.

§ 663.710 What conditions govern OJT payments to employers?

(a) On-the-job training payments to employers are deemed to be compensation for the extraordinary costs associated with training participants and the costs associated with the lower productivity of the participants.

(b) Employers may be reimbursed up to 50 percent of the wage rate of an OJT participant for the extraordinary costs of providing the training and additional supervision related to the OJT. (WIA section 101(31)(B).)

(c) Employers are not required to document such extraordinary costs.

§ 663.715 What is customized training?

Customized training is training:

(a) that is designed to meet the special requirements of an employer (including a group of employers);

(b) that is conducted with a commitment by the employer to employ, or in the case of incumbent workers, continue to employ, an individual on successful completion of the training; and

(c) for which the employer pays for not less than 50 percent of the cost of the training. (WIA section 101(8).)

§ 663.720 What are the requirements for customized training for employed workers?

Customized training of an eligible employed individual may be provided for an employer or a group of employers when:

(a) The employee is not earning a self-sufficient wage as determined by Local Board policy;

(b) The requirements in § 663.715 are met; and

(c) The customized training relates to the purposes described in § 663.705(c) or other appropriate purposes identified by the Local Board.

Subpart H—Supportive Services

§ 663.800 What are supportive services for adults and dislocated workers?

Supportive services for adults and dislocated workers are defined at WIA sections 101(46) and 134(e)(2) and (3). They include services such as transportation, child care, dependent care, housing, and needs-related payments, that are necessary to enable an individual to participate in activities authorized under WIA title I. Local Boards, in consultation with the One-Stop partners and other community service providers, must develop a policy on supportive services that ensures resource and service coordination in the local area, such policy should address procedures for referral to such services, including how such services will be funded when they are not otherwise available from other sources. The provision of accurate information about the availability of supportive services in the local area, as well as referral to such activities, is one of the core services that must be available to adults and dislocated workers through the One-Stop delivery system. (WIA section 134(d)(2)(H).)

§ 663.805 When may supportive services be provided to participants?

(a) Supportive services may only be provided to individuals who are:

(1) Participating in core, intensive or training services; and

(2) Unable to obtain supportive services through other programs providing such services. (WIA section 134(e)(2)(A) and (B).)

(b) Supportive services may only be provided when they are necessary to enable individuals to participate in title I activities. (WIA section 101(46).)

§ 663.810 Are there limits on the amounts or duration of funds for supportive services?

(a) Local Boards may establish limits on the provision of supportive services or provide the One-Stop operator with the authority to establish such limits, including a maximum amount of funding and maximum length of time for supportive services to be available to participants.

(b) Procedures may also be established to allow One-Stop operators to grant exceptions to the limits established under paragraph (a) of this section.

§ 663.815 What are needs-related payments?

Needs-related payments provide financial assistance to participants for the purpose of enabling individuals to participate in training and are one of the supportive services authorized by WIA section 134(e)(3).

§ 663.820 What are the eligibility requirements for adults to receive needs-related payments?

Adults must:

(a) Be unemployed,

(b) Not qualify for, or have ceased qualifying for, unemployment compensation; and

(c) Be enrolled in a program of training services under WIA section 134(d)(4).

§ 663.825 What are the eligibility requirements for dislocated workers to receive needs-related payments?

To receive needs related payments, a dislocated worker must:

(a) Be unemployed, and:

(1) Have ceased to qualify for unemployment compensation or trade readjustment assistance under TAA or NAFTA–TAA; and

(2) Be enrolled in a program of training services under WIA section 134(d)(4) by the end of the 13th week after the most recent layoff that resulted in a determination of the worker's eligibility as a dislocated worker, or, if later, by the end of the 8th week after the worker is informed that a short-term layoff will exceed 6 months; or

(b) Be unemployed and did not qualify for unemployment compensation or trade readjustment assistance under TAA or NAFTA–TAA.

§ 663.830 May needs-related payments be paid while a participant is waiting to start training classes?

Yes. Payments may be provided if the participant has been accepted in a training program that will begin within 30 calender days. The Governor may authorize local areas to extend the 30 day period to address appropriate circumstances.

§ 663.840 How is the level of needs-related payments determined?

(a) The payment level for adults must be established by the Local Board.

(b) For dislocated workers, payments must not exceed the greater of either of the following levels:

(1) For participants who were eligible for unemployment compensation as a result of the qualifying dislocation, the payment may not exceed the applicable weekly level of the unemployment compensation benefit; or

(2) For participants who did not qualify for unemployment compensation as a result of the qualifying layoff, the weekly payment may not exceed the poverty level for an equivalent period. The weekly payment level must be adjusted to reflect changes in total family income as determined by Local Board policies. (WIA section 134(e)(3)(C).)

PART 664—YOUTH ACTIVITIES UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

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Sec.

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AUTHORITY: Sec. 506(c), Pub. L. 105–220; 20 U.S.C. 9276(c)

SOURCE: 64 FR 18713, Apr. 15, 1999, unless otherwise noted.

Subpart A—Youth Councils

§ 664.100 What is the youth council?

(a) The duties and membership requirements of the youth council are described in WIA section 117(h) and 20 CFR 661.335 and 661.340.

(b) The purpose of the youth council is to provide expertise in youth policy and to assist the Local Board in:

(1) Developing and recommending local youth employment and training policy and practice;

(2) Broadening the youth employment and training focus in the community to incorporate a youth development perspective;

(3) Establishing linkages with other organizations serving youth in the local area; and

(4) Taking into account a range issues that can have an impact on the success of youth in the labor market. (WIA sec. 117(h).)

§ 664.110 Who is responsible for oversight of youth programs in the local area?

(a) The Local Board, working with the youth council, is responsible for conducting oversight of local youth programs operated under the Act, to ensure both fiscal and programmatic accountability.

(b) Local program oversight is conducted in consultation with the local area's chief elected official.

(c) The Local Board may delegate its responsibility for oversight of eligible youth providers, as well as other oversight responsibilities, to the youth council, recognizing the advantage of delegating such responsibilities to the youth council whose members have expertise in youth issues. (WIA sec. 117(h)(4).)

Subpart B—Eligibility for Youth Services

§ 664.200 Who is eligible for youth services?

An eligible youth is defined, under WIA section 101(13), as an individual who:

(a) Is age 14 through 21;

(b) Is a low income individual, as defined in the WIA section 101(25); and

(c) Is within one or more of the following categories:

(1) Deficient in basic literacy skills;

(2) School dropout;

(3) Homeless, runaway, or foster child;

(4) Pregnant or parenting;

(5) Offender; or

(6) Is an individual (including a youth with a disability) who requires additional assistance to complete an educational program, or to secure and hold employment. (WIA sec. 101(13).)

§ 664.205 How is the "deficient in basic literacy skills" criterion in § 664.200(c)(1) defined and documented?

(a) Definitions and eligibility documentation requirements regarding the ''deficient in basic literacy skills'' criterion in § 664.200(c)(1) may be established at the State or local level. These definitions may establish such criteria as are needed to address State or local concerns, but must include a determination that an individual:

(1) Computes or solves problems, reads, writes, or speaks English at or below grade level 8.9; or

(2) Is unable to compute or solve problems, read, write, or speak English at a level necessary to function on the job, in the individual's family or in society.

(b) In cases where the State Board establishes State policy on this criterion, the policy must be included in the State plan. (WIA secs. 101(13)(C)(i), 101(19).)

§ 664.210 How is the " . . . requires additional assistance to complete an educational program, or to secure and hold employment" criterion in § 664.200(c)(6) defined and documented?

Definitions and eligibility documentation requirements regarding the ''requires additional assistance to complete an educational program, or to secure and hold employment'' criterion of § 664.200(c)(6) may be established at the State or local level. In cases where the State Board establishes State policy on this criterion, the policy must be included in the State Plan. (WIA sec. 101(13)(C)(iv).)

§ 664.215 Must youth participants be registered to participate in the youth program?

(a) Yes. All youth participants must be registered.

(b) Registration is the process of collecting information to support a determination of eligibility.

(c) EEO data must be collected on individuals during the registration process.

§ 664.220 Is there an exception to permit youth who are not low-income individuals to receive youth services?

Yes. Up to five percent of youth participants served by youth programs in a local area may be individuals who do not meet the income criterion for eligible youth, provided that they are within one or more of the following categories:

(a) School dropout;

(b) Basic skills deficient, as defined in WIA section 101(4);

(c) Are one or more grade levels below the grade level appropriate to the individual's age;

(d) Pregnant or parenting;

(e) Possess one or more disabilities, including learning disabilities;

(f) Homeless or runaway;

(g) Offender; or

(h) Face serious barriers to employment as identified by the Local Board. (WIA sec. 129(c)(5).)

§ 664.230 Are the eligibility barriers for eligible youth the same as the eligibility barriers for the five percent of youth participants who do not have to meet income eligibility requirements?

No. The barriers listed in § 664.200 and § 664.220 are not the same. Both lists of eligibility barriers include school dropout, homeless or runaway, pregnant or parenting, and offender, but each list contains barriers not included on the other list.

§ 664.240 May a local program use eligibility for free lunches under the National School Lunch Program as a substitute for the income eligibility criteria under the title I of WIA?

No. The criteria for income eligibility under the National School Lunch Program are not the same as the Act's income eligibility criteria. Therefore, the school lunch list may not be used as a substitute for income eligibility to determine who is eligible for services under the Act.

§ 664.250 May a disabled youth whose family does not meet income eligibility criteria under the Act be eligible for youth services?

Yes. Even if the family of a disabled youth does not meet the income eligibility criteria, the disabled youth is to be considered a low-income individual if the youth's own income:

(a) Meets the income criteria established in WIA section 101(25)(B); or

(b) Meets the income eligibility criteria for cash payments under any Federal, State or local public assistance program. (WIA sec. 101(25)(F).)

Subpart C—Out-of-School Youth

§ 664.300 Who is "out-of-school youth"?

An out-of-school youth is an individual who:

(a) Is an eligible youth who is a school dropout; or

(b) Is an eligible youth who has either graduated from high school or

holds a GED, but is basic skills deficient, unemployed, or underemployed. (WIA sec. 101(33).)

§ 664.310 Is youth attending an alternative school a "dropout"?

No. A school dropout is defined as an individual who is no longer attending any school and who has not received a secondary school diploma or its recognized equivalent. A youth attending an alternative school is not a dropout. (WIA sec. 101(39).)

§ 664.320 Does the requirement that at least 30 percent of youth funds be used to provide activities to out-of-school youth apply to all youth funds?

(a) Yes. The 30 percent requirement applies to the total amount of all funds allocated to a local area under section 128(b)(2)(A) or (b)(3) of WIA.

(b) Although it is not necessary to ensure that 30 percent of such funds spent on summer employment opportunities (or any other particular element of the youth program) are spent on out-of-school youth, the funds spent on these activities are included in the total to which the 30 percent requirement applies.

(c) There is a limited exception, at WIA section 129(c)(4)(B), under which certain small States may apply to the Secretary to reduce the minimum amount that must be spent on out-of-school youth. (WIA sec. 129(c)(4).)

Subpart D—Youth Program Design, Elements, and Parameters

§ 664.400 How must local youth programs be designed?

(a) The design framework of local youth programs must:

(1) Provide an objective assessment of each youth participant, that meets the requirements of WIA section 129(c)(1)(A), and includes a review of the academic and occupational skill levels, as well as the service needs, of each youth;

(2) Develop an individual service strategy for each youth participant that meets the requirements of WIA section 129(c)(1)(B), including identifying a career goal and consideration of the assessment results for each youth; and

(3) Provide preparation for postsecondary educational opportunities, provide linkages between academic and occupational learning, provide preparation for employment, and provide effective connections to intermediary organizations that provide strong links to the job market and employers.

(b) The local plan must describe the design framework for youth program design in the local area, and of how the ten program elements required in § 664.410 of this part are provided within that framework.

(c) Local Boards must ensure appropriate links to entities that will foster the participation of eligible local area youth. Such links may include connections to:

(1) Local area justice and law enforcement officials;

(2) Local public housing authorities;

(3) Local education agencies;

(4) Job Corps representatives; and

(5) Representatives of other area youth initiatives, including those that serve homeless youth and other public and private youth initiatives.

(d) Local Boards must ensure that the referral requirements in WIA section 129(c)(3) for youth who meet the income eligibility criteria are met, including:

(1) Providing these youth with information regarding the full array of applicable or appropriate services available through the Local Board, providers found eligible by the board, or One-Stop partners; and

(2) Referring these youth to appropriate training and educational programs that have the capacity to serve them either on a sequential or concurrent basis.

(e) In order to meet the basic skills and training needs of eligible applicants who do not meet the enrollment requirements of a particular program or who cannot be served by the program, each eligible youth provider must ensure that these youth are referred:

(1) For further assessment, as necessary, and

(2) To appropriate programs, in accordance with paragraph (d)(2) of this section.

(f) Local Boards must ensure that parents, youth participants, and other members of the community with experience relating to youth programs are involved in both the design and implementation of its youth programs.

(g) The objective assessment required under paragraph (a)(1) of this section or the individual service strategy required under paragraph (a)(2) of this section is not required if the program provider determines that it is appropriate to use a recent objective assessment or individual service strategy that was developed under another education or training program. (WIA section 129(c)(1).)

§ 664.410 Must local programs include each of the ten program elements listed in WIA section 129(c)(2) as options available to youth participants?

(a) Yes. Local programs must make the following services available to youth participants:

(1) Tutoring, study skills training, and instruction leading to secondary school completion, including dropout prevention strategies;

(2) Alternative secondary school offerings;

(3) Summer employment opportunities directly linked to academic and occupational learning;

(4) Paid and unpaid work experiences, including internships and job shadowing, as provided in §§ 664.460 and 664.470 of this part;

(5) Occupational skill training;

(6) Leadership development opportunities, which may include such activities as positive social behavior and soft skills, decision making, team work, and other activities, as provided in §§ 664.420 and 664.430 of this part;

(7) Supportive services, which may include the services listed in § 664.440;

(8) Adult mentoring for a duration of at least twelve (12) months, that may occur both during and after program participation;

(9) Followup services, as provided in § 664.450; and

(10) Comprehensive guidance and counseling, including drug and alcohol abuse counseling, as well as referrals to counseling, as appropriate to the needs of the individual youth.

(b) Local programs have the discretion to determine what specific program services will be provided to a youth participant, based on each participant's objective assessment and individual service strategy. (WIA sec. 129(c)(2).)

§ 664.420 What are leadership development opportunities?

Leadership development opportunities for youth may include the following:

(a) Exposure to postsecondary educational opportunities;

(b) Community and service learning projects;

(c) Peer-centered activities, including peer mentoring and tutoring;

(d) Organizational and team work training, including team leadership training;

(e) Training in decision-making, including determining priorities;

(f) Citizenship training, including life skills training such as parenting, work behavior training, and budgeting of resources;

(g) Employability; and

(h) Positive social behaviors. (WIA sec. 129(c)(2)(F).)

§ 664.430 What are positive social behaviors?

Positive social behaviors, often referred to as soft skills, are incorporated by many local programs as part of their menu of services which focus on areas that may include, but are not limited to, the following:

(a) Positive attitudinal development;

(b) Self esteem building;

(c) Cultural diversity training; and

(d) Work simulation activities. (WIA sec. 129(c)(2)(F).)

§ 664.440 What are supportive services for youth?

Supportive services for youth, as defined in WIA section 101(46), may include the following:

(a) Linkages to community services;

(b) Assistance with transportation costs;

(c) Assistance with child care and dependent care costs;

(d) Assistance with housing costs;

(e) Referrals to medical services; and

(f) Assistance with uniforms or other appropriate work attire and work-related tool costs, including such items as eye glasses and protective eye gear. (WIA sec. 129(c)(2)(G).)

§ 664.450 What are followup services for youth?

(a) Followup services for youth may include:

(1) The leadership development and supportive service activities listed in §§ 664.420 and 664.440 of this part;

(2) Regular contact with a youth participant's employer, including assistance in addressing work-related problems that arise;

(3) Assistance in securing better paying jobs, career development and further education;

(4) Work-related peer support groups;

(5) Adult mentoring; and

(6) Tracking the progress of youth in employment after training.

(b) All youth participants must receive some form of followup services for a minimum duration of 12 months. Followup services may be provided beyond twelve (12) months at the State or Local Board's discretion. The types of services provided and the duration of services must be determined based on the needs of the individual. The scope of these followup services may be less intensive for youth who have only participated in summer youth employment opportunities. (WIA sec. 129(c)(2)(I).)

§ 664.460 What are work experiences for youth?

(a) Work experiences are planned, structured learning experiences that take place in a workplace for a limited period of time. As stated in § 664.470, work experiences may be paid or unpaid.

(b) Work experience workplaces may be in the private, for-profit sector; the non-profit sector; or the public sector.

(c) Work experiences are designed to enable youth to gain exposure to the working world and its requirements. Work experiences should help youth acquire the personal attributes, knowledge, and skills needed to obtain a job and advance in employment. The purpose is to provide the youth participant with the opportunities for career exploration and skill development and is not to benefit the employer, although the employer may, in fact, benefit from the activities performed by the youth. Work experiences may be subsidized or unsubsidized and may include the following elements:

(1) Instruction in employability skills or generic workplace skills such as those identified by the Secretary's Commission on Achieving Necessary Skills (SCANS);

(2) Exposure to various aspects of an industry;

(3) Progressively more complex tasks;

(4) Internships and job shadowing;

(5) The integration of basic academic skills into work activities;

(6) Supported work, work adjustment, and other transition activities;

(7) Entrepreneurship; and

(8) Other elements designed to achieve the goals of work experience.

(d) In most cases, on-the-job training is not an appropriate work experiences activity for youth participants under age 18. Local program operators may choose, however, to use this service strategy for eligible youth when it is appropriate based on the needs identified by the objective assessment of an individual youth participant. (WIA sec. 129(c)(2)(D).)

§ 664.470 Are paid work experiences allowable activities?

Funds under the Act may be used to pay wages and related benefits for work experiences in the public; private; for-profit; or non-profit sectors where the objective assessment and individual service strategy indicate that work experiences are appropriate. (WIA sec. 129(c)(2)(D).)

Subpart E—Concurrent Enrollment

§ 664.500 May youth participate in both youth and adult programs concurrently?

(a) Under the Act, eligible youth are 14 through 21 years of age. Adults are defined in the Act as individuals age 18 and older. Thus, individuals ages 18 through 21 may be eligible for both adult and youth programs.

(b) Eligible individuals who are 18 through 21 years old may participate in

adult and youth programs concurrently. Such individuals must be eligible under the youth or adult eligibility criteria applicable to the services received. Local program operators may determine, for individuals in this age group, the appropriate level and balance of youth and/or adult services.

(c) Local program operators must identify and track the funding streams which pay the costs of services provided to individuals who are participating in youth and adult programs concurrently, and ensure that services are not duplicated.

§ 664.510 Are Individual Training Accounts allowed for youth participants?

No. However, individuals age 18 and above, who are eligible for training services under the adult and dislocated worker program, may receive Individual Training Accounts through that program. Requirements for concurrent participation requirements are set forth in § 664.500 of this part. To the extent possible, in order to enhance youth participant choice, youth participants should be involved in the selection of educational and training activities.

Subpart F—Summer Employment Opportunities

§ 664.600 Are Local Boards required to offer summer employment opportunities in the local youth program?

(a) Yes. Local Boards are required to offer summer youth employment opportunities that link academic and occupational learning as part of the menu of services required in § 664.410(a).

(b) Summer youth employment must provide direct linkages to academic and occupational learning, and may provide other elements and strategies as appropriate to serve the needs and goals of the participants.

(c) Local Boards may determine how much of available youth funds will be used for summer and for year-round youth activities.

(d) The summer youth employment opportunities element is not intended to be a stand-alone program. Local programs should integrate a youth's participation in that element into a comprehensive strategy for addressing the youth's employment and training needs. Youths who participate in summer employment opportunities must be provided with a minimum of twelve months of followup services, as required in § 664.450. (WIA sec. 129(c)(2)(C).)

§ 664.610 How is the summer employment opportunities element administered?

Chief elected officials and Local Boards are responsible for ensuring that the local youth program provides summer employment opportunities to youth. The chief elected officials are the grant recipients for local youth funds, unless another entity is chosen to be grant recipient or fiscal agent under WIA section 117(d)(3)(B). If, in the administration of the summer employment opportunities element of the local youth program, providers other than the grant recipient/fiscal agent are used to provide summer youth employment opportunities, these providers must be selected by awarding a grant or contract on a competitive basis, based on the recommendation of the youth council and on criteria contained in the State Plan. (WIA sec. 129(c)(2)(C).)

§ 664.620 Do the core indicators described in 20 CFR 666.100(a)(3) apply to participation in summer employment activities?

Yes. The summer employment opportunities element is one of a number of activities authorized by the WIA youth program. The law provides specific core indicators of performance for youth, and requires that all participating youth be included in the determination of whether the local levels of performance are met. Program operators can help ensure positive outcomes for youth participants by providing them with continuity of services.

Subpart G—One-Stop Services to Youth

§ 664.700 What is the connection between the youth program and the One-Stop service delivery system?

(a) The chief elected official (or designee under WIA section 117(d)(3)(B)),

as the local grant recipient for the youth program is a required One-Stop partner and is subject to the requirements that apply to such partners, described in 20 CFR part 662.

(b) In addition to the provisions of 20 CFR part 662, connections between the youth program and the One-Stop system may include those that facilitate:

(1) The coordination and provision of youth activities;

(2) Linkages to the job market and employers;

(3) Access for eligible youth to the information and services required in §§ 664.400 and 664.410 of this part; and

(4) Other activities designed to achieve the purposes of the youth program and youth activities as described in WIA section 129(a). (WIA secs. 121(b)(1)(B)(i); 129.)

§ 664.710 Do Local Boards have the flexibility to offer services to area youth who are not eligible under the youth program through the One-Stop centers?

Yes. However, One-Stop services for non-eligible youth must be funded by programs that are authorized to provide services to such youth. For example, basic labor exchange services under the Wagner-Peyser Act may be provided to any youth.

Subpart H—Youth Opportunity Grants

§ 664.800 How are the recipients of Youth Opportunity Grants selected?

(a) Youth Opportunity Grants are awarded through a competitive selection process. The Secretary establishes appropriate application procedures, selection criteria, and an approval process for awarding Youth Opportunity Grants to accomplish the purpose of the Act and use available funds in an effective manner in the Solicitation for Grant Applications announcing the competition.

(b) The Secretary distributes grants equitably among urban and rural areas by taking into consideration such factors as the following:

(1) The poverty rate in urban and rural communities;

(2) The number of people in poverty in urban and rural communities; and

(3) The quality of proposals received. (WIA sec.169(a) and (e).)

§ 664.810 How does a Local Board or other entity become eligible to receive a Youth Opportunity Grant?

(a) A Local Board is eligible to receive a Youth Opportunity Grant if it serves a community that:

(1) Has been designated as an empowerment zone (EZ) or enterprise community (EC) under section 1391 of the Internal Revenue Code of 1986;

(2) Is located in a State that does not have an EZ or an EC and that has been designated by its Governor as a high poverty area; or

(3) Is one of two areas in a State that has been designated by the Governor as an area for which a local board may apply for a Youth Opportunity Grant, and that meets the poverty rate criteria in sections 1392 (a)(4), (b), and (d) of the Internal Revenue Code of 1986.

(b) An entity other than a Local Board is eligible to receive a grant if that entity:

(1) Is a WIA Indian and Native American grant recipient under WIA sec. 166; and

(2) Serves a community that:

(i) Meets the poverty rate criteria in sections 1392(a)(4), (b), and (d) of the Internal Revenue Code of 1986; and

(ii) Is located on an Indian reservation or serves Oklahoma Indians or Alaska Native villages or Native groups, as provided in WIA section 169 (d)(2)(B). (WIA sec. 169(c) and (d).)

§ 664.820 Who is eligible to receive services under Youth Opportunity Grants?

All individuals ages 14 through 21 who reside in the community identified in the grant are eligible to receive services under the grant. (WIA sec. 169(a).)

§ 664.830 How are performance measures for Youth Opportunity Grants determined?

(a) The Secretary negotiates performance measures, including appropriate performance levels for each indicator, with each selected grantee, based on information contained in the application.

(b) Performance indicators for the measures negotiated under Youth Opportunity Grants are the indicators of performance provided in WIA sections. 136 (b)(2)(A) and (B). (WIA sec. 169(f).)

PART 665—STATEWIDE WORKFORCE INVESTMENT ACTIVITIES UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

Subpart A—General Description

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665.100 What are the Statewide workforce investment activities under title I of WIA?
665.110 How are Statewide workforce investment activities funded?

Subpart B—Required and Allowable Statewide Workforce Investment Activities

§ 665.200 What are required Statewide workforce investment activities?
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665.220 Who is an ''incumbent worker'' for purposes of Statewide workforce investment activities?

Subpart C—Rapid Response Activities

665.300 What are rapid response activities and who is responsible for providing them?
665.310 What rapid response activities are required?
665.320 May other activities may be undertaken as part of rapid response?
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AUTHORITY: Section 506(c), Pub. L. 105–220; 20 USC 9276(c)

SOURCE: 64 FR 18717, Apr. 15, 1999, unless otherwise noted.

Subpart A—General Description

§ 665.100 What are the Statewide workforce investment activities under title I of WIA?

Statewide workforce investment activities include Statewide employment and training activities for adults and dislocated workers, as described in WIA section 134(a), and Statewide youth activities, as described in WIA section 129 (b). They include both required and allowable activities. In accordance with the requirements of this subpart, the State may develop policies and strategies for use of Statewide workforce investment funds. Descriptions of these policies and strategies must be included in the State Plan. (WIA secs. 129(b); 134(a).)

§ 665.110 How are Statewide workforce investment activities funded?

(a) Except for the Statewide rapid response activities described in paragraph (c) of this section, Statewide workforce investment activities are supported by funds reserved by the Governor under WIA section 128(a).

(b) Funds reserved by the Governor for Statewide workforce investment activities may be combined and used for any of the activities authorized in WIA secstions 129(b), 134(a)(2)(B) or 134(a)(3)(A) (which are described in §§ 665.200 and 665.210), regardless of whether the funds were allotted through the youth, adult, or dislocated worker funding streams.

(c) Funds for Statewide rapid response activities are reserved under WIA sec. 133(a)(2) and may be used to provide the activities authorized at sec. 134(a)(2)(A) (which are described in §§ 665.310 to 665.330 of this part). (WIA secs 129(b); 133(a)(2); 134(a)(2)(B); and 134(a)(3)(A).)

Subpart B—Required and Allowable Statewide Workforce Investment Activities

§ 665.200 What are required Statewide workforce investment activities?

Required Statewide workforce investment activities are:

(a) Required rapid response activities, as described in § 665.310 of this part;

(b) Disseminating:

(1) The State list of eligible providers of training services (including those providing non-traditional training services), for adults and dislocated workers;

(2) Information identifying eligible providers of on-the-job training and customized training;

(3) Performance and program cost information about these providers, as described in 20 CFR 663.540; and

(4) A list of eligible providers of youth activities as described in WIA section 123;

(c) Conducting evaluations, under WIA section 136(e), of workforce investment activities for adults, dislocated workers and youth, in order to establish and promote methods for continuously improving such activities to achieve high-level performance within, and high-level outcomes from, the Statewide workforce investment system. Such evaluations must be conducted in coordination with local boards in the State and, to the maximum extent practicable, in coordination with Federal evaluations carried out under WIA section 172.

(d) Providing incentive grants:

(1) To local areas for regional cooperation among local boards (including local boards for a designated region, as described in 20 CFR 661.290);

(2) For local coordination of activities carried out under WIA; and

(3) For exemplary performance by local areas on the performance measures.

(e) Providing technical assistance to local areas that fail to meet local performance measures.

(f) Assisting in the establishment and operation of One-Stop delivery systems, in accordance with the strategy described in the State workforce investment plan. [WIA sec. 112(b)(14).]

(g) Providing additional assistance to local areas that have high concentrations of eligible youth.

(h) Operating a fiscal and management accountability information system, based on guidelines established by the Secretary after consultation with the Governors, chief elected officials, and One-Stop partners, as required by WIA section 136(f). (WIA secs. 129(b)(2) and 134(a)(2).)

§ 665.210 What are allowable Statewide workforce investment activities?

Allowable Statewide workforce investment activities include:

(a) State administration of the adult, dislocated worker and youth workforce investment activities, consistent with the five percent administrative cost limitation at 20 CFR 667.210(a)(1).

(b) Providing capacity building and technical assistance to local areas, including Local Boards, One-Stop operators, One-Stop partners, and eligible providers, which may include:

(1) Staff development and training; and

(2) The development of exemplary program activities.

(c) Conducting research and demonstrations.

(d) Establishing and implementing innovative incumbent worker training programs, which may include an employer loan program to assist in skills upgrading, and programs targeted to empowerment zones and enterprise communities.

(e) Providing support to local areas for the identification of eligible training providers.

(f) Implementing innovative programs for displaced homemakers, and programs to increase the number of individuals trained for and placed in nontraditional employment.

(g) Carrying out adult and dislocated worker employment and training activities as the State determines are necessary to assist local areas in carrying out local employment and training activities.

(h) Carrying out youth activities Statewide.

(i) Preparation and submission to the Secretary of the annual performance progress report as described in 20 CFR 667.300(e). (WIA secs. 129(b)(3) and 134(a)(3).)

§ 665.220 Who is an "incumbent worker" for purposes of Statewide workforce investment activities?

States may establish policies and definitions to determine which workers are eligible for incumbent worker services under this subpart. An incumbent worker is an individual who is employed, but an incumbent worker does not necessarily have to meet the eligibility requirements for intensive and training services for employed adults and dislocated workers at 20 CRF 663.220(a)(2) and 663.310. (WIA sec. 134(a)(3)(A)(iv)(I).)

Subpart C—Rapid Response Activities

§ 665.300 What are rapid response activities and who is responsible for providing them?

(a) Rapid response activities are described in §§ 665.310 through 665.330 of this part. They encompass the activities necessary to plan and deliver services to enable dislocated workers to transition to new employment as quickly as possible, following either a permanent closure or mass layoff, or a natural or other disaster resulting in a mass job dislocation.

(b) The State is responsible for providing rapid response activities. Rapid response is a required activity carried out in local areas by the State, or an entity designated by the State, in conjunction with the Local Board and chief elected officials. The State must establish methods by which to provide additional assistance to local areas that experience disasters, mass layoffs, plant closings, or other dislocation events when such events substantially increase the number of unemployed individuals.

(c) States must establish a rapid response dislocated worker unit to carry out Statewide rapid response activities. (WIA secs. 101(38), 112(b)(17)(A)(ii) and 134(a)(2)(A).)

§ 665.310 What rapid response activities are required?

Rapid response activities must include:

(a) On-site contact with the employer, representatives of the affected workers, and the local community, which may include an assessment of the:

(1) Layoff plans and schedule of the employer;

(2) Potential for averting the layoff(s) in consultation with State or local economic development agencies, including private sector economic development entities;

(3) Background and probable assistance needs of the affected workers;

(4) Reemployment prospects for workers in the local community; and

(5) Available resources to meet the short and long-term assistance needs of the affected workers;

(b) The provision of information and access to unemployment compensation benefits, comprehensive One-Stop system services, and employment and training activities, including information on the Trade Adjustment Assistance program and the NAFTA–TAA program;

(c) The provision of guidance and/or financial assistance in establishing a labor-management committee voluntarily agreed to by labor and management, or a workforce transition committee comprised of representatives of the employer, the affected workers and the local community. The committee may devise and oversee an implementation strategy that responds to the reemployment needs of the workers. The assistance to this committee may include:

(1) The provision of training and technical assistance to members of the committee;

(2) Funding the operating costs of a committee to enable it to provide advice and assistance in carrying out rapid response activities and in the design and delivery of WIA-authorized services to affected workers. Typically, such support will last no longer than six months; and

(3) Providing a list of potential candidates to serve as a neutral chairperson of the committee.

(d) The provision of emergency assistance adapted to the particular closing, layoff or disaster.

(e) The provision of assistance to the local board and chief elected official(s) to develop a coordinated response to the dislocation event and, as needed, obtain access to State economic development assistance. Such coordinated response may include the development of an application for National Emergency Grant under 20 CFR part 671. (WIA secs. 101(38) and 134(a)(2)(A).)

§ 665.320 May other activities be undertaken as part of rapid response?

Yes. A State or designated entity may provide additional rapid response activities in addition to the activities required to be provided under § 665.310. In order to provide effective rapid response upon notification of a permanent closure or mass layoff, or a natural or other disaster resulting in a

mass job dislocation, the State or designated entity may:

(a) In conjunction, with other appropriate Federal, State and Local agencies and officials, employer associations, technical councils or other industry business councils, and labor organizations:

(1) Develop prospective strategies for addressing dislocation events, that ensure rapid access to the broad range of allowable assistance;

(2) Identify strategies for the aversion of layoffs; and

(3) Develop and maintain mechanisms for the regular exchange of information relating to potential dislocations, available adjustment assistance, and the effectiveness of rapid response strategies.

(b) In collaboration with the appropriate State agency(ies), collect and analyze information related to economic dislocations, including potential closings and layoffs, and all available resources in the State for dislocated workers in order to provide an adequate basis for effective program management, review and evaluation of rapid response and layoff aversion efforts in the State.

(c) Participate in capacity building activities, including providing information about innovative and successful strategies for serving dislocated workers, with local areas serving smaller layoffs.

(d) Assist in devising and overseeing strategies for:

(1) Layoff aversion, such as prefeasibility studies of avoiding a plant closure through an option for a company or group, including the workers, to purchase the plant or company and continue it in operation;

(2) Incumbent worker training, including employer loan programs for employee skill upgrading; and

(3) Linkages with economic development activities at the Federal, State and local levels, including Federal Department of Commerce programs and available State and local business retention and recruitment activities.

§ 665.330 Are the NAFTA/TAA requirements for rapid response also required activities?

The Governor must ensure that rapid response activities under WIA are made available to workers who, under the NAFTA Worker Security Act (Pub. L. 103–182), are members of a group of workers (including those in any agricultural firm or subdivision of an agricultural firm) for which the Governor has made a finding that:

(a) The sales or production, or both, of such firm or subdivision have decreased absolutely, and

(b)(1) Imports from Mexico or Canada of articles like or directly competitive with those produced by such firm or subdivision have increased; or

(2) There has been a shift in production by such workers' firm or subdivision to Mexico or Canada of articles which are produced by the firm or subdivision.

PART 666—PERFORMANCE ACCOUNTABILITY UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

Subpart A—State Measures of Performance

Sec.

666.100 What performance indicators must be included in a State's plan?
666.110 May a Governor require additional indicators of performance?
666.120 What are the procedures for negotiating annual levels of performance?
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Subpart B—Incentives and Sanctions for State Performance

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666.210 How may Incentive Grant funds be used?

666.220 What information must be included in State Board's application for an Incentive Grant?
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Subpart C—Local Measures of Performance

666.300 What performance indicators apply to local areas?
666.310 What levels of performance apply to the indicators of performance in local areas?

Subpart D—Incentives and Sanctions for Local Performance

666.400 Under what circumstances are local areas eligible for State Incentive Grants?
666.410 How may local incentive awards be used?
666.420 Under what circumstances may a sanction be applied to local areas for poor performance?

AUTHORITY: Sec. 506(c), Pub. L. 105–220; 20 U.S.C. 9276(c).

SOURCE: 64 FR 18719, Apr. 15, 1999, unless otherwise noted.

Subpart A—State Measures of Performance

§ 666.100 What performance indicators must be included in a State's plan?

(a) All States submitting a State Plan under WIA title I, subtitle B must propose expected levels of performance for each of the core indicators of performance for the adult, dislocated worker and youth programs, respectively and the two customer satisfaction indicators.

(1) For the Adult program, these indicators are:

(i) Entry into unsubsidized employment;

(ii) Retention in unsubsidized employment six months after entry into the employment;

(iii) Earnings received in unsubsidized employment six months after entry into the employment; and

(iv) Attainment of a recognized credential related to achievement of educational skills (such as a secondary school diploma or its recognized equivalent), or occupational skills, by participants who enter unsubsidized employment.

(2) For the Dislocated Worker program, these indicators are:

(i) Entry into unsubsidized employment;

(ii) Retention in unsubsidized employment six months after entry into the employment;

(iii) Earnings received in unsubsidized employment six months after entry into the employment; and

(iv) Attainment of a recognized credential related to achievement of educational skills (such as a secondary school diploma or its recognized equivalent), or occupational skills, by participants who enter unsubsidized employment.

(3) For the Youth program, these indicators are:

(i) For eligible youth aged 14 through 18:

(A) Attainment of basic skills, and, as appropriate, work readiness or occupational skills;

(B) Attainment of secondary school diplomas and their recognized equivalents; and

(C) Placement and retention in post-secondary education, advanced training, military service, employment, or qualified apprenticeships.

(ii) For eligible youth aged 19 through 21:

(A) Entry into unsubsidized employment;

(B) Retention in unsubsidized employment six months after entry into the employment;

(C) Earnings received in unsubsidized employment six months after entry into the employment; and

(D) Attainment of a recognized credential related to achievement of educational skills (such as a secondary school diploma or its recognized equivalent), or occupational skills, by participants who enter post-secondary education, advanced training, or unsubsidized employment.

(4) A single customer satisfaction measure for employers and a single customer satisfaction indicator for participants must be used for the WIA title I, subtitle B programs for adults, dislocated workers and youth. (WIA sec. 136(b)(2).)

(b) After consultation with the representatives identified in WIA secs. 136(i) and 502(b), the Departments of Labor and Education will issue definitions for the performance indicators established under title I and title II of WIA. (WIA secs. 136(b), (f) and (i).)

§ 666.110 May a Governor require additional indicators of performance?

Yes. Governors may develop additional indicators of performance for adults, youth and dislocated worker activities. These indicators must be included in the State Plan. (WIA sec. 136(b)(2)(C).)

§ 666.120 What are the procedures for negotiating annual levels of performance?

(a) The Department issues instructions on the specific information that must accompany the State Plan and that is used to review the State's expected levels of performance. The instructions may require that levels of performance for years two and three be expressed as a percentage improvement over the immediately preceding year's actual performance, consistent with the objective of continuous improvement.

(b) States must submit expected levels of performance for the required indicators for each of the first three program years covered by the Plan.

(c) The Secretary and the Governor must reach agreement on levels of performance for each core indicator and the customer satisfaction indicators. In negotiating these levels, the following must be taken into account:

(1) The expected levels of performance identified in the State Plan;

(2) The extent to which the levels of performance for each core indicator assist in achieving high customer satisfaction;

(3) The extent to which the levels of performance promote continuous improvement and ensure optimal return on the investment of Federal funds; and

(4) How the levels compare with those of other States, taking into account factors including differences in economic conditions, participant characteristics, and the proposed service mix and strategies.

(d) The levels of performance agreed to under paragraph (c) of this section will be the State's adjusted levels of performance for the first three years of the State Plan. These levels will used to determine whether sanctions will be applied or incentive grant funds will be awarded.

(e) Before the fourth year of the State Plan, the Secretary and the Governor must reach agreement on levels of performance for each core indicator and the customer satisfaction indicators for the fourth and fifth years covered by the plan. In negotiating these levels, the factors listed in paragraph (c) of this section must be taken into account.

(f) The levels of performance agreed to under paragraph (e) of this section will be the State adjusted levels of performance for the fourth and fifth years of the plan and must be incorporated into the State Plan.

(g) Levels of performance for the additional indicators developed by the Governor are considered to be State adjusted levels of performance, but are not part of the negotiations described in paragraphs (c) and (e) of this section. (WIA sec. 136(b)(3).)

(h) State adjusted levels of performance may be revised in accordance with § 666.130 of this subpart.

§ 666.130 Under what conditions may a State or DOL request revisions to the State adjusted levels of performance?

(a) The DOL guidelines describe when and under what circumstances a Governor may request revisions to negotiated levels. These circumstances include significant changes in economic conditions, in the characteristics of participants entering the program, or in the services to be provided from when the initial plan was submitted and approved. (WIA sec. 136(b)(3)(A)(vi).)

(b) The guidelines will establish the circumstances under which a State will be required to submit revisions under specified circumstances.

§ 666.140 Which individuals receiving services are included in the core indicators of performance?

(a) The core indicators of performance apply to all individuals who are

registered under 20 CFR 663.105 and 664.215 for the adult, dislocated worker and youth programs, except for those adults and dislocated workers who participate exclusively in self-service or informational activities. (WIA sec. 136(b)(2)(A).)

(b) For registered participants, a standardized record that includes appropriate performance information must be maintained in accordance with WIA section 185(a)(3).

§ 666.150 What responsibility do States have to use quarterly wage record information for performance accountability?

(a) States must, consistent with State law, use quarterly wage record information in measuring the progress on State and local performance measures.

(b) The State must include in the State Plan a description of the State's performance accountability system, and a description of the State's strategy for using quarterly wage record information to measure the progress on State and local performance measures. The description must identify the entities that may have access to quarterly wage record information for this purpose.

(c) ''Quarterly wage record information'' means information regarding wages paid to an individual, the social security account number (or numbers, if more than one) of the individual and the name, address, State, and (when known) the Federal employer identification number of the employer paying the wages to the individual. (WIA sec. 136(f)(2).)

Subpart B—Incentives and Sanctions for State Performance

§ 666.200 Under what circumstances is a State eligible for an Incentive Grant?

A State is eligible to apply for an Incentive Grant if its performance for the immediately preceding year exceeds:

(a) The State's adjusted levels of performance for the required core indicators for the adult, dislocated worker and youth programs under title I of WIA as well as the customer satisfaction indicators for WIA title I programs;

(b) The adjusted levels of performance included in plans submitted to the Department of Education for title II Adult Education and Literacy programs; and

(c) The adjusted levels of performance under title I of the Carl D. Perkins Vocational and Technical Education Act (20 U.S.C. 2301 *et seq.*). (WIA sec. 503.)

§ 666.205 What are the time frames under which States submit performance progress reports and apply for incentive grants?

(a) State performance progress reports must be filed by the due date established in reporting instructions issued by the Department.

(b) Based upon the reports filed under paragraph (a) of this section, the Secretary will determine the amount of funds available, under WIA title I, to each eligible State for incentive grants, in accordance with the criteria of § 666.230. The award amounts for each eligible State will be published by the Secretary, after consultation with the Secretary of Education, within ninety (90) days after the due date for performance progress reports established under paragraph (a) of this section.

(c) Within forty-five (45) days of the publication of award amounts under paragraph (b) of this section, States may apply for incentive grants in accordance with the requirements of § 666.220.

§ 666.210 How may Incentive Grant funds be used?

Incentive grant funds are awarded to States to carry out any one or more innovative programs under titles I or II of WIA or the Carl D. Perkins Vocational and Technical Education Act, regardless of which Act is the source of the incentive funds. (WIA section 503(a).)

§ 666.220 What information must be included in State Board's application for an Incentive Grant?

(a) The Secretary of Labor, after consultation with the Secretary of Education, will issue instructions annually which will include the amount of funds available to be awarded for each State

and provide instructions for submitting applications for an Incentive Grant.

(b) Each State desiring an incentive grant must submit to the Secretary an application, developed by the State Board, containing the following assurances:

(1) The State legislature was consulted regarding the development of the application.

(2) The application was approved by the Governor, the eligible agency (as defined in WIA section 203), and the State agency responsible for vocational and technical programs under the Carl D. Perkins Vocational and Technical Education Act.

(3) The State exceeded the State adjusted levels of performance for title I, the adjusted levels of performance under title II and the adjusted levels for vocational and technical programs under the Carl D. Perkins Vocational and Technical Education Act. (WIA section 503(b).)

§ 666.230 How does the Department determine the amounts for Incentive Grant awards?

(a) DOL determines the total amount to be allocated from funds available under WIA section 174(b) for Incentive Grants taking into consideration such factors as:

(1) The availability of funds under section 174(b) for technical assistance, demonstration and pilot projects, evaluations, and Incentive Grants and the needs for these activities;

(2) The number of States that are eligible for Incentive Grants and their relative program formula allocations under title I;

(3) The availability of funds under WIA section 136(g)(2) resulting from funds withheld for poor performance by States; and

(4) The range of awards established in WIA section 503(c).

(b) The award amount for eligible States will be published by the Secretary of Labor, after consultation with the Secretary of Education, within 90 days after the due date established under § 666.205(a) of the latest State performance progress report providing the annual information needed to determine State eligibility.

(c) In determining the amount available to an eligible State, the Secretary, with the Secretary of Education, may consider such factors as:

(1) The relative allocations of the eligible State compared to other States;

(2) The extent to which the adjusted levels of performance were exceeded;

(3) Performance improvement relative to previous years;

(4) Changes in economic conditions, participant characteristics and proposed service design since the adjusted levels of performance were negotiated;

(5) The eligible State's relative performance for each of the indicators compared to other States; and

(6) The performance on those indicators considered most important in terms of accomplishing national goals established by each of the respective Secretaries.

§ 666.240 Under what circumstances may a sanction be applied to a State that fails to achieve adjusted levels of performance for title I?

(a) If a State fails to meet the adjusted levels of performance agreed to under § 666.120 for core indicators of performance or customer satisfaction indicators for the adult, dislocated worker or youth program under title I of WIA, the Secretary must, upon request, provide technical assistance, as authorized under WIA sections 136(g) and 170.

(b) If a State fails to meet the adjusted levels of performance for core indicators of performance or customer satisfaction indicators for the same program in two successive years, the amount of the succeeding year's allocation for the applicable program may be reduced by up to five percent.

(c) The exact amount of any allocation reduction will be based upon the degree of failure to meet the adjusted levels of performance for core indicators. In making a determination of the amount, if any, of such a sanction, the Department may consider factors such as:

(1) The State's performance relative to other States;

(2) Improvement efforts underway;

(3) Incremental improvement on the performance measures;

(4) Technical assistance previously provided;

(5) Changes in economic conditions and program design;

(6) The characteristics of participants served compared to the participant characteristics described in the State Plan; and

(7) Performance on other core indicators of performance and customer satisfaction indicators for that program. (WIA section 136(g).)

(d) In accordance with 20 CFR 667.300(e), a State grant may be reduced for failure to submit an annual performance progress report.

(e) A State may request review of a sanction imposed by the Department in accordance with the provisions of 20 CFR 667.800.

Subpart C—Local Measures of Performance

§ 666.300 What performance indicators apply to local areas?

(a) Each local workforce investment area in a State is subject to the same core indicators of performance and the customer satisfaction indicators that apply to the State under § 666.100(a).

(b) In addition to the indicators described in paragraph (a) of this section, under § 666.110 of this part, the Governor may apply additional indicators of performance to local areas in the State. (WIA sec. 136(c)(1).)

§ 666.310 What levels of performance apply to the indicators of performance in local areas?

(a) The Local Board and the chief elected official must negotiate with the Governor and reach agreement on the local levels of performance for each indicator identified in § 666.300 of this subpart. The levels must be based on the State adjusted levels of performance established under § 666.120 and take into account the factors described in paragraph (b) of this section.

(b) In determining the appropriate local levels of performance, the Governor, Local Board and chief elected official must take into account specific economic, demographic and other characteristics of the populations to be served in the local area.

(c) The performance levels agreed to under paragraph (a) of this section must be incorporated in the local plan. (WIA secs. 118(b)(3) and 136(c).)

Subpart D—Incentives and Sanctions for Local Performance

§ 666.400 Under what circumstances are local areas eligible for State Incentive Grants?

(a) States must use a portion of the funds reserved for Statewide workforce investment activities under WIA sections 128(a) and 133(a)(1) to provide Incentive Grants to local areas for regional cooperation among local boards (including local boards for a designated region as described in WIA section 116(c)), for local coordination of activities carried out under this Act, and for exemplary performance on the local performance measures established under subpart C of this part.

(b) The amount of funds used for Incentive Grants under paragraph (a) of this section and the criteria used for determining exemplary local performance levels to qualify for the incentive grants are determined by the Governor. (WIA sec. 134(a)(2)(B)(iii).)

§ 666.410 How may local incentive awards be used?

The local incentive grant funds may be used for any activities allowed under WIA title I–B.

§ 666.420 Under what circumstances may a sanction be applied to local areas for poor performance?

(a) If a local area fails to meet the levels of performance agreed to under § 666.310 for the core indicators of performance or customer satisfaction indicators for a program in any program year, technical assistance must be provided. The technical assistance must be provided by the Governor with funds reserved for Statewide workforce investment activities under WIA sections 128(a) and 133(a)(1), or, upon the Governor's request, by the Secretary. The technical assistance may include the development of a performance improvement plan, a modified local plan, or other actions designed to assist the local area in improving performance.

(b) If a local area fails to meet the levels of performance agreed to under

§666.310 for the core indicators of performance or customer satisfaction indicators for a program for two consecutive program years, the Governor must take corrective actions. The corrective actions may include the development of a reorganization plan under which the Governor:

(1) Requires the appointment and certification of a new Local Board;

(2) Prohibits the use of particular service providers or One-Stop partners that have been identified as achieving poor levels of performance; or

(3) Requires other appropriate measures designed to improve the performance of the local area.

(c) A local area may appeal to the Governor to rescind or revise a reorganization plan imposed under paragraph (b) of this section not later than thirty (30) days after receiving notice of the plan. The Governor must make a final decision within 30 days after receipt of the appeal. The Governor's final decision may be appealed by the Local Board to the Secretary under 20 CFR 667.650(b) not later than thirty (30) days after the local areas receives the decision. The decision by the Governor to impose a reorganization plan becomes effective at the time it is issued, and remains effective unless the Secretary rescinds or revises the reorganization plan. Upon receipt of the appeal from the local area, the Secretary must make a final decision within thirty (30) days. (WIA sec. 136(h).)

PART 667—ADMINISTRATIVE PROVISIONS UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

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Sec.

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AUTHORITY: Sec. 506(c), Pub. L. 105–220; 20 U.S.C. 9276(c).

SOURCE: 64 FR 18722, Apr. 15, 1999, unless otherwise noted.

Subpart A—Funding

§ 667.100 When do Workforce Investment Act grant funds become available?

(a) *Program year.* Except as provided in paragraph (b) of this section, fiscal year appropriations for programs and activities carried out under title I of WIA are available for obligation on the basis of a program year. A program year begins on July 1 in the fiscal year for which the appropriation is made and ends on June 30 of the following year.

(b) *Youth fund availability.* Fiscal year appropriations for a program year's youth activities, authorized under chapter 4, subtitle B, title I of WIA, may be made available for obligation beginning on April 1 of the fiscal year for which the appropriation is made.

§ 667.105 What award document authorizes the expenditure of Workforce Investment Act funds under title I of the Act?

(a) *Agreement.* All WIA title I funds that are awarded by grant, contract or cooperative agreement are issued under an agreement between the Grant Officer/Contracting Officer and the recipient. The agreement describes the terms and conditions applicable to the award of WIA title I funds.

(b) *Grant funds awarded to States.* Under the Governor/Secretary Agreement described in § 667.110, each program year, the grant agreement described in paragraph (a) of this section will be executed and signed by the Governor or the Governor's designated representative and Secretary or the Grant Officer. The grant agreement and associated Notices of Obligation are the basis for Federal obligation of funds allotted to the States in accordance with WIA sections 127(b) and 132(b) for each program year.

(c) *Indian and Native American Programs.* Awards of grants, contracts or cooperative agreements for the WIA Indian and Native American program will be made to eligible entities on a competitive basis every two program years for a two-year period, in accordance with the provisions of 20 CFR part 668. An award for the succeeding two-year period may be made to the same recipient on a non-competitive basis if the recipient:

(1) Has performed satisfactorily; and

(2) Submits a satisfactory two-year program plan for the succeeding two-year grant, contract or agreement period.

(d) *Migrant and Seasonal Farmworker Programs.* (1) Awards of grants or contracts for the Migrant and Seasonal Farmworker program will be made to eligible entities on a competitive basis every two program years for a two-year period, in accordance with the provisions of 20 CFR part 669. An award for the succeeding two-year period may be made to the same recipient if the recipient:

(i) Has performed satisfactorily; and (ii) Submits a satisfactory two-year program plan for the succeeding two-year period.

(2) A grant or contract may be renewed under the authority of paragraph (d)(1) of this section no more than once during any four-year period for any single recipient.

(e) *Job Corps.* (1) Awards of contracts will be made on a competitive basis between the Contracting Officer and eligible entities to operate contract centers and provide operational support services.

(2) The Secretary may enter into interagency agreements with Federal agencies for funding, establishment, and operation of Civilian Conservation Centers for Job Corps programs.

(f) *Youth Opportunity Grants.* Awards of grants for Youth Opportunity programs will be made to eligible Local Boards and eligible entities for a one-year period. The grants may be renewed for each of the four succeeding years based on criteria that include successful performance.

(g) *Awards under WIA secs. 171 and 172.* (1) Awards of grants, contracts or cooperative agreements will be made to eligible entities for programs or activities authorized under WIA sections 171 or 172. These funds are for:

(i) Demonstration;

(ii) Pilot;

(iii) Multi-service;

(iv) Research;

(v) Multi-State projects; and

(vi) Evaluations

(2) Grants and contracts under paragraphs (g)(1)(i) and (ii) of this section will be awarded on a competitive basis, except that a noncompetitive award may be made in the case of a project that is funded jointly with other public or private entities that provide a portion of the funding.

(3) Contracts and grants under paragraphs (g)(1)(iii), (iv), and (v) of this section in amounts that exceed $100,000 will be awarded on a competitive basis, except that a noncompetitive award may be made in the case of a project that is funded jointly with other public or private sector entities that provide a substantial portion of the assistance under the grant or contract for the project.

(4) Grants or contracts for carrying out projects in paragraphs (g)(1)(iii), (iv), and (v) of this section may not be awarded to the same organization for more than three consecutive years, unless the project is competitively re-evaluated within that period.

(5) Entities with nationally recognized expertise in the methods, techniques and knowledge of workforce investment activities will be provided priority in awarding contracts or grants for the projects under paragraphs (g)(1)(iii), (iv), and (v) of this section.

(6) A peer review process will be used for projects under paragraphs (g)(1)(iii),

(iv), and (v) of this section for grants that exceed $500,000, and to designate exemplary and promising programs.

(h) *Termination.* Each grant terminates when the period of fund availability has expired. The grant must be closed in accordance with the closeout provisions at 29 CFR 95.71 or 97.50, as appropriate.

§ 667.107 What is the period of availability for expenditure of WIA funds?

(a) *Grant funds expended by States.* Funds allotted to States under WIA sections 127(b) and 132(b), for any program year are available for expenditure by the State receiving the funds only during that program year and the two succeeding program years.

(b) *Grant funds expended by local areas.* (1) Funds allocated by a State to a local area under WIA section 128(b) and 133(b), for any program year are available for expenditure only during that program year and the succeeding program year.

(2) Funds which are not expended by a local area in the two-year period described in paragraph (b)(1) of this section, must be returned to the State. Funds so returned are available for expenditure by State and local recipients and subrecipients only during the third program year of availability. These funds may:

(i) Be used for Statewide projects, or

(ii) Be distributed to other local areas which had fully expended their allocation of funds for the same program year within the two-year period.

(c) *Job Corps.* Funds obligated for any program year for any Job Corps activity carried out under title I, subtitle C, of WIA, may be expended during that program year and the two succeeding program years.

(d) *Funds awarded under WIA section 171 and 172.* (a) Funds obligated for any program year for a program or activity authorized under section 171 or 172 of WIA remain available until expended.

(e) *Other programs under title I of WIA.* For all other grants, contracts and cooperative agreements issued under title I of WIA the period of availability for expenditure is set in the terms and conditions of the award document.

§ 667.110 What is the Governor/Secretary Agreement?

(a) To establish a continuing relationship under the Act, the Governor and the Secretary will enter into a Governor/Secretary Agreement. The Agreement will consist of a statement assuring that the State will comply with:

(1) The Workforce Investment Act and all applicable rules and regulations, and

(2) The Wagner-Peyser Act and all applicable rules and regulations.

(b) The Governor/Secretary Agreement may be modified, revised or terminated at any time, upon the agreement of both parties.

§ 667.120 What planning information must a State submit in order to receive a formula grant?

Each State seeking financial assistance under WIA sections 127 (youth) or 132 (adults and dislocated workers) or under the Wagner-Peyser Act must submit a single State Plan. The requirements for the plan content and the plan review process are described in WIA section 112, Wagner-Peyser section 8, and 20 CFR § 652.6, 652.7, and 661.220.

§ 667. 130 How are WIA title I formula funds allocated to local workforce investment areas?

(a) *General.* The Governor must allocate WIA formula funds allotted for services to youth, adults and dislocated workers in accordance with WIA sections 128 and 133, and this section.

(1) State Boards must assist Governors in the development of any discretionary within-State allocation formulas. (WIA sec. 111(d)(5).)

(2) Within-State allocations must be made:

(i) In accordance with the allocation formulas contained in WIA section 128(b) and 133(b) and in the State workforce investment plan, and (ii) After consultation with chief elected officials in each of the workforce investment areas.

(b) *State Reserve.* (1) Of the WIA formula funds allotted for services to youth, adults and dislocated workers, the Governor must reserve funds from each of these sources for Statewide workforce investment activities. In

making these reservations, the Governor may reserve up to fifteen (15) percent from each of these sources. Funds reserved under this paragraph may be combined and spent on Statewide employment and training activities, for adults and dislocated workers, and Statewide youth activities, as described in 20 CFR 665.200 and 665.210, without regard to the funding source of the reserved funds.

(2) The Governor must reserve a portion of the dislocated worker funds for Statewide rapid response activities, as described in WIA section 134(a)(2)(A) and 20 CFR 665.310 through 665.330. In making this reservation, the Governor may reserve up to twenty-five (25) percent of the dislocated worker funds.

(c) *Youth allocation formula.* (1) Unless the Governor elects to distribute funds in accordance with the discretionary allocation formula described in paragraph (c)(2) of this section, the remainder of youth funds not reserved under paragraph (b)(1) of this section must be allocated:

(i) 33⅓ percent on the basis of the relative number of unemployed individuals in areas of substantial unemployment in each workforce investment area, compared to the total number of unemployed individuals in all areas of substantial unemployment in the State;

(ii) 33⅓ percent on the basis of the relative excess number of unemployed individuals in each workforce investment area, compared to the total excess number of unemployed individuals in the State; and

(iii) 33⅓ percent on the basis of the relative number of disadvantaged youth in each workforce investment area, compared to the total number of disadvantaged youth in the State. [WIA sec. 128(b)(2)(A)(i)]

(2) *Discretionary youth allocation formula.* In lieu of making the formula allocation described in paragraph (c)(1) of this section, the State may allocate youth funds under a discretionary formula. Under that formula, the State must allocate a minimum of 70 percent of youth funds not reserved under paragraph (b)(1) of this section on the basis of the formula in paragraph (c)(1) of this section, and may allocate up to 30 percent on the basis of a formula that:

(i) Incorporates additional factors (other than the factors described in pargraph (c)(1) of this section) relating to:

(A) Excess youth poverty in urban, rural and suburban local areas; and

(B) Excess unemployment above the State average in urban, rural and suburban local areas; and

(ii) Was developed by the State Board and approved by the Secretary of Labor as part of the State workforce investment plan. (WIA sec. 128(b)(3).)

(d) *Adult allocation formula.* (1) Unless the Governor elects to distribute funds in accordance with the discretionary allocation formula described in paragraph (d)(2) of this section, the remainder of adult funds not reserved under paragraph (b)(1) of this section must be allocated:

(i) 33⅓ percent on the basis of the relative number of unemployed individuals in areas of substantial unemployment in each workforce investment area, compared to the total number of unemployed individuals in areas of substantial unemployment in the State;

(ii) 33⅓ percent on the basis of the relative excess number of unemployed individuals in each workforce investment area, compared to the total excess number of unemployed individuals in the State; and

(iii) 33⅓ percent on the basis of the relative number of disadvantaged adults in each workforce investment area, compared to the total number of disadvantaged adults in the State. (WIA sec. 133(b)(2)(A)(i))

(2) *Discretionary adult allocation formula.* In lieu of making the formula allocation described in paragraph (d)(1)of this section, the State may allocate adult funds under an discretionary formula. Under that formula, the State must allocate a minimum of 70 percent of adult funds on the basis of such formula in paragraph (d)(1) of this section, and may allocate up to 30 percent on the basis of a formula that:

(i) Incorporates additional factors (other than the factors described in paragraph (d)(1) of this section) relating to:

(A) Excess poverty in urban, rural and suburban local areas; and

(B) Excess unemployment above the State average in urban, rural and suburban local areas; and

(ii) Was developed by the State Board and approved by the Secretary of Labor as part of the State workforce investment plan. (WIA sec. 133(b)(3).)

(e) *Dislocated worker allocation formula.* (1) The remainder of dislocated worker funds not reserved under paragraph (b)(1) or (b)(2) of this section must be allocated on the basis of a formula prescribed by the Governor that distributes funds in a manner that addresses the State's worker readjustment assistance needs. Funds so distributed must not be less than 60 percent of the State's formula allotment.

(2)(i) The Governor's dislocated worker formula must use the most appropriate information available to the Governor, including information on:

(A) Insured unemployment data,

(B) Unemployment concentrations,

(C) Plant closings and mass layoff data,

(D) Declining industries data,

(E) Farmer-rancher economic hardship data, and

(F) Long-term unemployment data.

(ii) The State Plan must describe the data used for the formula and the weights assigned, and explain the State's decision to use other information or to omit any of the information sources set forth in paragraph (e)(2)(i) of this section.

(3) The Governor may not amend the dislocated worker formula more than once for any program year.

(4)(i) Dislocated worker funds initially reserved by the Governor for Statewide rapid response activities in accordance with paragraph (b)(2) of this section may be:

(A) Distributed to local areas, and (B) Used to operate projects in local areas in accordance with the requirements of WIA section 134(a)(2)(A) and 20 CFR 665.310 through 665.330.

(ii) The State Plan must describe the procedures for any distribution to local areas, including the timing and process for determining whether a distribution will take place.

§ 667.140 Does a Local Board have the authority to transfer funds between programs?

(a) A Local Board may transfer up to 20 percent of a program year allocation for adult employment and training activities, and up to 20 percent of a program year allocation for dislocated worker employment and training activities between the two programs.

(b) Before making any such transfer, a Local Board must obtain the Governor's approval.

(c) Local Boards may not transfer funds to or from the youth program.

§ 667.150 What reallotment procedures does the Secretary use?

(a) The first reallotment of funds among States will occur during PY 2001 based on obligations in PY 2000.

(b) The Secretary determines, during the first quarter of the program year, whether a State has obligated its required level of at least 80 percent of the funds allotted under WIA sections 127 and 132 for programs serving youth, adults, and dislocated workers for the prior year as separately determined for each of the three funding streams. Unobligated balances are determined based on allotments adjusted for any allowable transfer between the adult and dislocated worker funding streams. The amount to be recaptured from each State for reallotment, if any, is based on State obligations of the funds allotted to each State under WIA sections 127 and 132 for programs serving youth, adults, or dislocated workers, less any amount reserved (up to 5 percent at the State level and up to 10 percent at the local level) for the costs of administration. This amount, if any, is separately determined for each funding stream.

(c) The Secretary reallots youth, adult and dislocated worker funds among eligible States in accordance with the provisions of WIA sections 127(c) and 132(c), respectively. To be eligible to receive a reallotment of youth, adult, or dislocated worker funds under the reallotment procedures, a State must have obligated at least 80 percent of the prior program year allotment, less any amount reserved for the costs of administration of youth, adult, or dislocated worker funds. A State's eligibility to receive a

reallotment is separately determined for each funding stream.

§ 667.160 What reallocation procedures must the Governors use?

(a) The Governor may reallocate youth, adult, and dislocated worker funds among local areas within the State in accordance with the provisions of sections 128(c) and 133(c) of the Act. If the Governor chooses to reallocate funds, the provisions in paragraphs (b) and (c) of this section apply.

(b) For the youth, adult and dislocated worker programs, the amount to be recaptured from each local area for purposes of reallocation, if any, must be based on the amount by which the prior year's unobligated balance of allocated funds exceeds 20 percent of that year's allocation for the program, less any amount reserved (up to 10 percent) for the costs of administration. Unobligated balances must be determined based on allocations adjusted for any allowable transfer between funding streams. This amount, if any, must be separately determined for each funding stream.

(c) To be eligible to receive youth, adult or dislocated worker funds under the reallocation procedures, a local area must have obligated at least 80 percent of the prior program year's allocation, less any amount reserved (up to 10 percent) for the costs of administration, for youth, adult, or dislocated worker activities, as separately determined. A local area's eligibility to receive a reallocation must be separately determined for each funding stream.

§ 667.170 What responsibility review does the Department conduct for awards made under WIA title I, subtitle D?

(a) Before final selection as a potential grantee, the Department conducts a review of the available records to assess the organization's overall responsibility to administer Federal funds. As part of this review, the Department may consider any information that has come to its attention and will consider the organization's history with regard to the management of other grants, including DOL grants. The failure to meet any one responsibility test, except for those listed in paragraphs (a)(1) and (a)(2) of this section, does not establish that the organization is not responsible unless the failure is substantial or persistent (for two or more consecutive years). The responsibility tests include:

(1) The organization's efforts to recover debts (for which three demand letters have been sent) established by final agency action have been unsuccessful, or that there has been failure to comply with an approved repayment plan;

(2) Established fraud or criminal activity of a significant nature within the organization.

(3) Serious administrative deficiencies identified by the Department, such as failure to maintain a financial management system as required by Federal regulations;

(4) Willful obstruction of the audit process;

(5) Failure to provide services to applicants as agreed to in a current or recent grant or to meet applicable performance standards;

(6) Failure to correct deficiencies brought to the grantee's attention in writing as a result of monitoring activities, reviews, assessments, or other activities;

(7) Failure to return a grant closeout package or outstanding advances within 90 days of the grant expiration date or receipt of closeout package, whichever is later, unless an extension has been requested and granted; final billings reflecting serious cost category or total budget cost overrun;

(8) Failure to submit required reports;

(9) Failure to properly report and dispose of government property as instructed by DOL;

(10) Failure to have maintained effective cash management or cost controls resulting in excess cash on hand;

(11) Failure to ensure that a subrecipient complies with its OMB Circular A–133 audit requirements specified at § 667.200(b);

(12) Failure to audit a subrecipient within the required period;

(13) Final disallowed costs in excess of five percent of the grant or contract award if, in the judgement of the grant officer, the disallowances are egregious findings and;

(14) Failure to establish a mechanism to resolve a subrecipient's audit in a timely fashion.

(b) This responsibility review is independent of the competitive process. Applicants which are determined to be not responsible will not be selected as potential grantees irrespective of their standing in the competition.

Subpart B—Administrative Rules, Costs and Limitations

§ 667.200 What general fiscal and administrative rules apply to the use of WIA title I funds?

(a) *Uniform fiscal and administrative requirements.* (1) Except as provided in paragraphs (a)(3) through (6) of this section, State, local, and Indian tribal government organizations that receive grants or cooperative agreements under WIA title I must follow the common rule ''Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments'' which is codified at 29 CFR part 97.

(2) Except as provided in paragraphs (a)(3) through (6) of this section, institutions of higher education, hospitals, and other non-profit organizations must the follow the common rule implementing OMB Circular A–110 which is codified at 29 CFR part 95.

(3) In addition to the requirements at 29 CFR 95.48 or 29 CFR 97.36(i) (as appropriate), all procurement contracts and other transactions between Local Boards and units of State or local governments must be conducted only on a cost reimbursement basis. No provision for profit is allowed. (WIA sec. 184(a)(3)(B).)

(4) In addition to the requirements at 29 CFR 95.42 or 29 CFR 97.36(b)(3) (as appropriate), which address codes of conduct and conflict of interest issues related to employees:

(i) A State Board member or a Local Board member or Youth Council member must neither cast a vote on, nor participate in, any decision-making capacity on the provision of services by such member (or any organization which that member directly represents), nor on any matter which would provide any direct financial benefit to that member or a member of his immediate family.

(ii) Neither membership on the State Board, the Local Board or the Youth Council nor the receipt of WIA funds to provide training and related services, by itself, violates these conflict of interest provisions.

(5) The addition method, described at 29 CFR 95.24 or 29 CFR 97.25(g)(2) (as appropriate), must be used for the all program income earned under WIA title I grants. When the cost of generating program income has been charged to the program, the gross amount earned must be added to the WIA program. However, the cost of generating program income must be subtracted from the amount earned to establish the net amount of program income available for use under the grants when these costs have not been charged to the WIA program.

(6) Any excess of revenue over costs incurred for services provided by a governmental or non-profit entity must be included in program income. (WIA sec. 195(7)(A) and (B).)

(7) On a fee-for-service basis, employers may use local area services, facilities, or equipment funded under title I of WIA to provide employment and training activities to incumbent workers:

(i) When the services, facilities, or equipment are not being used by eligible participants;

(ii) If their use does not affect the ability of eligible particpants to use the services, facilities, or equipment; and

(iii) If the income generated from such fees is used to carry out programs authorized under this title.

(b) *Audit requirements.* (1) All governmental and non-profit organizations must follow the audit requirements of OMB Circular A–133. These requirements are found at 29 CFR 97.26 for governmental organizations and at 29 CFR 95.26 for institutions of higher education, hospitals, and other non-profit organizations.

(2)(i) The Department is responsible for audits of commercial organizations which are direct recipients of Federal financial assistance under WIA title I.

(ii) Commercial organizations which are subrecipients under WIA title I and

which expend more than the minimum level specified in OMB Circular A–133 ($300,000 as of April 15, 1999) must have either an organization-wide audit conducted in accordance with A–133 or a program specific financial and compliance audit.

(c) *Allowable costs/cost principles.* All recipients and subrecipients must follow the Federal allowable cost principles that apply to their kind of organizations. The DOL regulations at 29 CFR 95.27 and 29 CFR 97.22 identify the Federal principles for determining allowable costs which each kind of recipient and subrecipient must follow. The applicable Federal principles for each kind of recipient are described in paragraphs (c)(1) through (5) of this section; all recipients must comply with paragraph (c)(6) of this section. For those selected items of cost requiring prior approval, the authority to grant or deny approval is delegated to the Governor for programs funded under sections 127 or 132 of the Act.

(1) Allowable costs for State, local, and Indian tribal government organizations must be determined under OMB Circular A–87, ''Cost Principles for State, Local and Indian Tribal Governments.''

(2) Allowable costs for non-profit organizations must be determined under OMB Circular A–122, ''Cost Principles for Non-Profit Organizations.''

(3) Allowable costs for institutions of higher education must be determined under OMB Circular A–21, ''Cost Principles for Educational Institutions.''

(4) Allowable costs for hospitals must be determined in accordance under appendix E of 45 CFR part 74, ''Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals.''

(5) Allowable costs for commercial organizations and those non-profit organizations listed in Attachment C to OMB Circular A–122 must be determined under the provisions of the Federal Acquisition Regulation (FAR), at 48 CFR part 31.

(6) In addition to the allowable cost provisions identified above, the cost of information technology—computer hardware and software—will only be allowable under WIA title I grants when such computer technology is ''Year 2000 compliant.'' To meet this requirement, information technology must be able to accurately process date/time (including, but not limited to, calculating, comparing and sequencing) from, into and between the twentieth and twenty-first centuries, and the years 1999 and 2000. The information technology must also be able to make leap year calculations. Furthermore, ''Year 2000 compliant'' information technology, when used in combination with other information technology, must accurately process date/time data if the other information technology properly exchanges date/time with it.

(d) *Government-wide debarment and suspension, and government-wide drug-free workplace requirements.* All WIA title I grant recipients and subrecipients must comply with the government-wide requirements for debarment and suspension, and the government-wide requirements for a drug-free workplace codified at 29 CFR part 98.

(e) *Restrictions on Lobbying.* All WIA title I grant recipients and subrecipients must comply with the restrictions on lobbying which are codified in the DOL regulations at 29 CFR part 93.

(f) *Nondiscrimination.* All WIA title I recipients, as the term is defined in 29 CFR 31.2(h), must comply with the nondiscrimination and equal opportunity provisions of WIA sec. 188 and its implementing regulations. Information on the handling of discrimination complaints by participants and other interested parties may be found at § 667.600(f) of this part.

(g) *Nepotism.* (1) No individual may be placed in a WIA employment activity if a member of that person's immediate family is directly supervised by or directly supervises that individual.

(2) To the extent that an applicable State or local legal requirement regarding nepotism is more restrictive than this provision, such State or local requirement must be followed.

§ 667.210 What administrative cost limits apply to Workforce Investment Act title I grants?

(a) Formula grants to States:

(1) As part of the 15 percent that a State may reserve for Statewide activities, the State may spend up to five percent (5%) of the amount allotted

under sections 127(b)(1), 132(b)(1) and 132(b)(2) of the Act for the administrative costs of Statewide workforce investment activities.

(2) Local area expenditures for administrative purposes under WIA formula grants are limited to no more than ten percent (10%) of the amount allocated to the local area under sections 128(b) and 133(b) of the Act.

(3) Neither the five percent (5%) of the amount allotted that may be reserved for Statewide administrative costs nor the ten percent (10%) of the amount allotted that may be reserved for local administrative costs need to be allocated back to the individual funding streams.

(b) Limits on administrative costs for programs operated under subtitle D of title I will be identified in the grant or contract award document.

(c) Although administrative in nature, costs of information technology—computer hardware and software—needed for tracking and monitoring of WIA program, participant, or performance requirements; or for collecting, storing and disseminating information under the core services provisions at sections 134(d)(2)(E), (F), (G), (H) and (I) of the Act, are excluded from the administrative cost limit calculation.

(d) In a One-Stop environment, administrative costs borne by other sources of funds, such as the Wagner-Peyser Act, are not included in the administrative cost limit calculation. Each program's administrative activities area chargeable to its own grant and subject to its own administrative cost limitations.

§ 667.220 What Workforce Investment Act title I functions and activities constitute the costs of administration subject to the administrative cost limit?

(a) The costs of administration are that allocable portion of necessary and allowable costs that are associated with the overall management and administration of the workforce investment system and which are not related to the direct provision of workforce investment activities. These costs can be both personnel and non-personnel and both direct and indirect.

(b) The costs of administration include the costs associated with performing the responsibilities of the State and Local Workforce Investment Boards and of chief elected officials or boards of chief elected officials required for the local public/private partnership. The specific responsibilities of these boards and officials include, but are not limited to, those identified in the sections of the Act dealing with workforce investment boards and areas and one-stop systems, (WIA secs. 111(d), 116, 117(d), (e) & (h)(4), and 121(a)), such as:

(1) Performing overall general administrative functions and coordination of those functions under WIA title I including:

(i) Preparing program plans, budgets, related schedules, and amendments or modifications thereto;

(ii) Negotiating MOUs and awarding specific subgrants, contracts, and purchase orders through appropriate procurement processes,

(iii) Conducting public relations activities which are not related to program outreach,

(iv) Developing systems and procedures, including information systems for assuring compliance with program requirements, except:

(A) Those needed for tracking and monitoring of WIA program, participant, or performance requirements; or

(B) For collecting, storing and disseminating information under the core services provisions at WIA sections 134(d)(2)(E), (F), (G), (H) and (I) and information necessary to comply with WIA section 188 and its implementing regulations.

(v) Coordinating the resolution of findings arising from audits, reviews, investigations and incident reports, and

(vi) Performing administrative services, including such services as general legal services, financial management and accounting services, audit services; and managing purchasing, property, payroll, and personnel;

(2) Performing oversight responsibilities including monitoring of WIA programs, projects and subrecipients, and related systems and processes for compliance with program requirements,

(3) Costs for goods and services required for administration of the program, including goods and services

such as rental or purchase of equipment, utilities, office supplies, postage, and rental and maintenance of office space;

(4) The costs of organization-wide management functions;

(5) Travel costs incurred for official business in carrying out administrative activities or the overall management of the WIA system; and

(6) Costs of information systems not related to the tracking and monitoring of WIA program, participant, or performance requirements; or for collecting, storing and disseminating information under the core services provisions at sections 134(d)(2)(E), (F), (G), (H) and (I) of the Act, (for example, personnel, accounting and payroll systems).

(c)(1) That portion of the costs of One-Stop operators which are associated with the performance of the administrative functions described in paragraph (b) of this section are classified as administrative costs. That portion of the costs of one-stop operators which are associated with the direct provision of workforce investment activities are classified as program costs.

(2) Personnel and related non-personnel costs of the recipient's or subrecipient's staff, including project directors, who perform both administrative and programmatic services or activities may be allocated as administrative or program costs to the benefitting cost objectives/categories based on documented distributions of actual time worked or other equitable cost allocation methods.

(3) Costs of staff who provide program services directly to participants and, where applicable, the first line supervisors and/or team leaders responsible for those staff are classified as a program cost.

(4) Specific costs charged to an overhead or indirect cost pool that can be identified directly as a program cost may be charged as a program cost. Documentation of such charges must be maintained.

(5) The costs of contracts, whether fixed price or cost reimbursement, awarded for the purpose of obtaining specific goods or services may be charged to the administration or program category based on the purpose for which the contract was awarded.

(6) The following information systems and data entry costs are charged to the program category.

(i) Tracking or monitoring of participant and performance information;

(ii) Employment statistics information, including job listing information, job skills information, and demand occupation information;

(iii) Performance and program cost information on eligible providers of training services, youth activities, and appropriate education activities;

(iv) Local area performance information; and

(v) Information relating to supportive services and unemployment insurance claims for program participants;

(7) Continuous improvement activities are charged to administration or program category based on the purpose or nature of the activity to be improved. Documentation of such charges must be maintained.

§ 667.250 What requirements relate to the enforcement of the Military Selective Service Act?

The requirements relating to the enforcement of the Military Selective Service Act are found at WIA section 189(h).

§ 667.260 May WIA title I funds be spent for construction?

WIA title I funds must not be spent on construction or purchase of facilities or buildings except:

(a) To meet a recipient's, as the term is defined in 29 CFR 31.2(h), obligation to provide physical and programmatic accessibility and reasonable accommodation, as required by section 504 of the Rehabilitation Act of 1973, as amended, and the Americans with Disabilities Act of 1990, as amended;

(b) To fund repairs, alterations and capital improvements of:

(1) SESA real property, identified at WIA section 193, using a formula that assesses costs proportionate to space utilized;

(2) JTPA owned property which is transferred to WIA title I programs;

(c) For Job Corps facilities, as authorized by WIA section 160(3)(B); and

(d) To fund disaster relief employment on projects for demolition, cleaning, repair, renovation, and reconstruction of damaged and destroyed structures, facilities, and lands located within a disaster area. (WIA sec. 173(d).)

§ 667.262 Are employment generating activities, or similar activities, allowable under WIA title I?

(a) Under WIA section 181(e), WIA title I funds may not be spent on employment generating activities, economic development, and other similar activities, unless they are directly related to training for eligible individuals. For purposes of this section, employer outreach and job development activities are directly related to training for eligible individuals.

(b) These employer outreach and job development activities include:

(1) Contacts with potential employers for the purpose of placement of WIA participants;

(2) Participation in business associations (such as chambers of commerce);

(3) WIA staff participation on economic development boards and commissions, and work with economic development agencies, to:

(i) Provide information about WIA programs,

(ii) Assist in making informed decisions about community job training needs, and

(iii) Promote the use of first source hiring agreements and enterprise zone vouchering services,

(4) Active participation in local business resource centers (incubators) to provide technical assistance to small and new business to reduce the rate of business failure;

(5) Subscriptions to relevant publications;

(6) General dissemination of information on WIA programs and activities;

(7) The conduct of labor market surveys;

(8) The development of on-the-job training opportunities; and (9) Other allowable WIA activities in the private sector. (WIA sec. 181(e).)

§ 667.264 What other activities are prohibited under title I of WIA?

(a) WIA title I funds must not be spent on:

(1) The wages of incumbent employees during their participation in economic development activities provided through a Statewide workforce investment system, (WIA sec. 181(b)(1).);

(2) Public service employment, except to provide disaster relief employment, as specifically authorized in section 173(d) of WIA, (WIA sec. 195(10));

(3) Expenses prohibited under any other Federal, State or local law or regulation.

(b) WIA formula funds available to States and local areas under subtitle B, title I of WIA must not be used for foreign travel. (WIA sec. 181(e).)

§ 667.266 What are the limitations related to sectarian activities?

(a) WIA title I funds may not be spent on the employment or training of participants in sectarian activities.

(b) Participants must not be employed under title I of WIA to carry out the construction, operation, or maintenance of any part of any facility that is used or to be used for sectarian instruction or as a place for religious worship. However, WIA funds may be used for the maintenance of a facility that is not primarily or inherently devoted to sectarian instruction or religious worship if the organization operating the facility is part of a program or activity providing services to WIA participants. (WIA sec. 188(a)(3).)

§ 667.268 What prohibitions apply to the use of WIA title I funds to encourage business relocation?

(a) WIA funds may not be used or proposed to be used for:

(1) The encouragement or inducement of a business, or part of a business, to relocate from any location in the United States, if the relocation results in any employee losing his or her job at the original location;

(2) Customized training, skill training, or on-the-job training or company specific assessments of job applicants or employees of a business or a part of a business that has relocated from any location in the United States, until the

company has operated at that location for 120 days, if the relocation has resulted in any employee losing his or her jobs at the original location.

(b) Pre-award review. To verify that an establishment which is new or expanding is not, in fact, relocating employment from another area, standardized pre-award review criteria developed by the State must be completed and documented jointly by the local area with the establishment as a prerequisite to WIA assistance. The review must include names under which the establishment does business, including predecessors and successors in interest; the name, title, and address of the company official certifying the information, and whether WIA assistance is sought in connection with past or impending job losses at other facilities, including a review of whether WARN notices relating to the employer have been filed. (WIA sec. 181(d).)

§ 667.269 What procedures and sanctions apply to violations of §§ 667.260 through 667.268?

(a) The Secretary will promptly review and take appropriate action with regard to alleged violations of the provisions relating to:

(1) Employment generating activities (§ 667.262);

(2) Other prohibited activities (§ 667.264);

(3) The limitation related to sectarian activities (§ 667.266);

(4) The use of WIA title I funds to encourage business relocation (§ 667.268).

(b) Procedures for the investigation and resolution of the violations are provided for under the Grant Officer's resolution process at § 667.510 of this subpart. Sanctions and remedies are provided for under WIA section 184(c) for violations of the provisions relating to:

(1) Construction (§ 667.260);

(2) Employment generating activities (§ 667.262);

(3) Other prohibited activities (§ 667.264); and

(4) The limitation related sectarian activities in (§ 667.266(a)).

(c) Sanctions and remedies are provided for under WIA section 181(d)(3) for violations of § 667.268 of this subpart, which addresses business relocation.

(d) Violations of § 667.266(b) will be handled in accordance with the DOL nondiscrimination regulations implementing WIA section 188.

§ 667.270 What safeguards are there to ensure that participants in Workforce Investment Act employment and training activities do not displace other employees?

(a) A participant in a program or activitiy authorized under title I of WIA must not displace (including a partial displacement, such as a reduction in the hours of nonovertime work, wages, or employment benefits) any currently employed employee (as of the date of the participation).

(b) A program or activity authorized under title I of WIA must not impair existing contracts for services or collective bargaining agreements. When a program or activity authorized under title I of WIA would be inconsistent with a collective bargaining agreement, the appropriate labor organization and employer must provide written concurrence before the program or activity begins.

(c) A participant in a program or activity under title I of WIA may not be employed in or assigned to a job if:

(1) Any other individual is on layoff from the same or any substantially equivalent job;

(2) The employer has terminated the employment of any regular, unsubsidized employee or otherwise caused an involuntary reduction in its workforce with the intention of filling the vacancy so created with the WIA participant; or

(3) The job is created in a promotional line that infringes in any way on the promotional opportunities of currently employed workers.

(d) Regular employees and program participants alleging displacement may file a complaint under the applicable grievance procedures found at § 667.600 of this part. (WIA sec. 181.)

§ 667.272 What wage and labor standards apply to participants in activities under title I of WIA?

(a) Individuals in on-the-job training or individuals employed in activities

under title I of WIA must be compensated at the same rates, including periodic increases, as trainees or employees who are similarly situated in similar occupations by the same employer and who have similar training, experience and skills. Such rates must be in accordance with applicable law, but may not be less than the higher of the rate specified in section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) or the applicable State or local minimum wage law.

(b) Individuals in on-the-job training or individuals employed in programs and activities under Title I of WIA must be provided benefits and working conditions at the same level and to the same extent as other trainees or employees working a similar length of time and doing the same type of work.

(c) Allowances, earnings, and payments to individuals participating in programs under Title I of WIA are not considered as income for purposes of determining eligibility for and the amount of income transfer and in-kind aid furnished under any Federal or Federally assisted program based on need other than as provided under the Social Security Act (42 USC 301 *et seq.*). (WIA sec. 181(a)(2).)

§ 667.274 What health and safety standards apply to the working conditions of participants in activities under title I of WIA?

(a) Health and safety standards established under Federal and State law otherwise applicable to working conditions of employees are equally applicable to working conditions of participants engaged in programs and activities under Title I of WIA.

(b)(1) To the extent that a State workers' compensation law applies, workers' compensation must be provided to participants in programs and activities under Title I of WIA on the same basis as the compensation is provided to other individuals in the State in similar employment.

(2) If a State workers' compensation law applies to a participant in work experience, workers' compensation benefits must be available with respect to injuries suffered by the participant in such work experience. If a State workers' compensation law does not apply to a participant in work experience, insurance coverage must be secured for injuries suffered by the participant in the course of such work experience.

§ 667.275 What are a recipient's obligations to ensure nondiscrimination and equal opportunity, as well as nonparticipation in sectarian activities?

(a)(1) Recipients, including State and local workforce investment boards, One-Stop operators, service providers, vendors and subrecipients, must comply with the nondiscrimination and equal opportunity provisions of WIA section 188 and its implementing regulations.

(2) Nondiscrimination and equal opportunity requirements and procedures, including complaint processing and compliance reviews, are governed by the regulations implementing WIA sec. 188 and are administered and enforced by the DOL Civil Rights Center.

(3) As described in §667.260(a), funds may be used to meet a recipient's obligation to provide physical and programmatic accessibility and reasonable accommodation in regard to the WIA program, as required by section 504 of the Rehabilitation Act of 1973, as amended, and the Americans with Disabilities Act of 1990, as amended.

(b) Except with respect to the maintenance of a facility that is not primarily or inherently devoted to sectarian instruction or religious worship, in a case in which the organization operating the facility is part of a program or activity providing services to participants, the employment or training of participants in sectarian activities is prohibited.

Subpart C—Reporting Requirements

§ 667.300 What are the reporting requirements for Workforce Investment Act programs?

(a) *General.* All States and other direct grant recipients must report financial, participant, and performance data in accordance with instructions issued by DOL. Required reports must be submitted no more frequently than quarterly within a time period specified in the reporting instructions.

(b) *Subrecipient reporting.* (1) A State or other direct grant recipient may impose different forms or formats, shorter due dates, and more frequent reporting requirements on subrecipients. However, the recipient is required to meet the reporting requirements imposed by DOL.

(2) If a State intends to impose different reporting requirements, it must describe those reporting requirements in its State WIA plan.

(c) *Financial reports.* (1) Each grant recipient must submit financial reports to DOL.

(2) Reports must include any income or profits earned, including such income or profits earned by subrecipients, and any costs incurred (such as stand-in costs) that are otherwise allowable except for funding limitations. (WIA sec. 185(f)(2))

(3) Reported expenditures and program income, including any profits earned, must be on the accrual basis of accounting and cumulative by fiscal year of appropriation. If the recipient's accounting records are not normally kept on the accrual basis of accounting, the recipient must develop accrual information through an analysis of the documentation on hand.

(d) *Due date.* Financial reports and participant data reports are due no later than 45 days after the end of each quarter unless otherwise specified in reporting instructions. A final financial report is required 90 days after the expiration of a funding period or the termination of grant support.

(e) *Annual Performance Progress Report.* An annual performance progress report for each of the three programs under title I, subpart B is required by WIA section 136(d).

(1) A State failing to submit any of these annual performance progress reports within 45 days of the due date may have its grant (for that program or all title I, subpart B programs) for the succeeding year reduced by as much as five percent, as provided by WIA section 136(g)(1)(B).

(2) States submitting annual performance progress reports that cannot be validated or verified as accurately counting and reporting activities in accordance with the reporting instructions, may be treated as failing to submit annual reports, and be subject to sanction. Sanctions related to State performance or failure to submit these reports timely cannot result in a total grant reduction of more than five percent. Any sanction would be in addition to having to repay the amount of any incentive funds granted based on the invalid report.

Subpart D—Oversight and Monitoring

§ 667.400 Who is responsible for oversight and monitoring of WIA title I grants?

(a) The Secretary is authorized to monitor all recipients and subrecipients of all grants awarded and funds expended under WIA title I to determine compliance with the Act and these regulations, and may investigate any matter deemed necessary to determine such compliance. Federal oversight will be conducted primarily at the recipient level.

(b) In each fiscal year, the Secretary will also conduct in-depth reviews in several States, including financial and performance audits, to assure that funds are spent in accordance with the Act. Priority for such in-depth reviews will be given to States not meeting annual adjusted levels of performance.

(c)(1) Each recipient and subrecipient must continuously monitor grant-supported activities in accordance with the uniform administrative requirements at 29 CFR parts 95 and 97, as applicable, including the applicable cost principles indicated at 29 CFR 97.22(b) or 29 CFR 95.27, for all entities receiving WIA title I funds. For governmental units, the applicable requirements are at 29 CFR part 97. For nonprofit organizations, the applicable requirements are at 29 CFR part 95.

(2) In the case of grants under WIA secs. 127 and 132, the Governor must develop a State monitoring system that meets the requirements of § 667.410(b) of this subpart. The Governor must monitor Local Boards annually for compliance with applicable laws and regulations in accordance with the State monitoring system. Monitoring must include an annual review of each local area's compliance with the uniform administrative requirements.

§ 667.410 What are the oversight roles and responsibilities of recipients and subrecipients?

(a) *Roles and responsibilities for all recipients and subrecipients of funds under WIA title I in general.* Each recipient and subrecipient must conduct regular oversight and monitoring of its WIA activities and those of its subrecipients and contractors in order to:

(1) Determine that expenditures have been made against the cost categories and within the cost limitations specified in the Act and these regulations;

(2) Determine whether or not there is compliance with other provisions of the Act and these regulations and other applicable laws and regulations; and

(3) Provide technical assistance as necessary and appropriate.

(b) *State roles and responsibilities for grants under WIA sections 127 and 132.*

(1) The Governor is responsible for the development of the State monitoring system. The Governor must be able to demonstrate to the Department, through a monitoring plan or otherwise, that the State monitoring system meets the requirements of paragraph (b)(2) of this section.

(2) The State monitoring system must:

(i) Provide for annual on-site monitoring reviews of local areas' compliance with DOL uniform administrative requirements, as required by WIA section 184(a)(4);

(ii) Ensure that established policies to achieve program quality and outcomes meet the objectives of the Act and these regulations, including the provision of services by One-Stop Centers, eligible providers of training services, and eligible providers of youth activities;

(iii) Enable the Governor to determine if subrecipients and contractors have demonstrated substantial compliance with WIA requirements; and

(iv) Enable the Governor to determine whether a local plan will be disapproved for failure to make acceptable progress in addressing deficiencies, as required in WIA sec. 118(d)(1).

(3) The State must conduct an annual on-site monitoring review of each local area's compliance with DOL uniform administrative requirements, including the appropriate administrative requirements for subrecipients and the applicable cost principles indicated at § 667.200 for all entities receiving WIA title I funds.

(4) The Governor must require that prompt corrective action be taken if any substantial violation of standards identified in paragraphs (b)(2) or (3) of this section is found. (WIA sec. 184(a)(5).)

(5) The Governor must impose the sanctions provided in WIA sections 184(b) and (c) in the event of a subrecipients's failure to take required corrective action required under paragraph (b)(4) of this section.

(6) The Governor may issue additional requirements and instructions to subrecipients on monitoring activities.

(7) Governor must certify to the Secretary every two years that:

(i) The State has implemented uniform administrative requirements;

(ii) The State has monitored local areas to ensure compliance with uniform administrative requirements; and

(iii) The State has taken appropriate corrective action to secure such compliance. (WIA sec. 184(a)(6)(A), (B), and (C).)

Subpart E—Resolution of Findings From Monitoring and Oversight Reviews

§ 667.500 What procedures apply to the resolution of findings arising from audits, investigations, monitoring and oversight reviews?

(a) *Resolution of subrecipient-level findings.* (1) The Governor is responsible for resolving findings that arise from the State's monitoring reviews, investigations and audits (including OMB Circular A–133 audits) of subrecipients.

(2) A State must utilize the audit resolution, debt collection and appeal procedures that it uses for other Federal grant programs.

(3) If a State does not have such procedures, it must prescribe standards and procedures to be used for this grant program.

(b) *Resolution of State and other direct recipient level findings.* (1) The Secretary is responsible for resolving findings that arise from Federal audits, monitoring reviews, investigations, incident reports, and recipient level OMB Circular A–133 audits.

(2) The Secretary uses the DOL audit resolution process, consistent with the Single Audit Act of 1996 and OMB Circular A–133, and Grant Officer Resolution provisions of § 667.510 of this subpart, as appropriate.

(3) A final determination issued by a Grant Officer under this process may be appealed to the DOL Office of Administrative Law Judges under the procedures at § 667.800 of this part.

(c) *Resolution of nondiscrimination findings.* Findings arising from investigations or reviews conducted under nondiscrimination laws will be resolved in accordance with WIA section 188 and the Department of Labor nondiscrimination regulations implementing WIA section 188.

§ 667.505 How does the Department resolve investigative and monitoring findings?

(a) As a result of an investigation, on-site visit or other monitoring, the Department notifies the recipient of the findings of the investigation and gives the recipient a period of time (not more than 60 days) to comment and to take appropriate corrective actions.

(b) The Grant Officer reviews the complete file of the investigation or monitoring report and the recipient's actions under paragraph (a) of this section. The Grant Officer's review takes into account the sanction provisions of WIA sections 184(b) and (c). If the Grant Officer agrees with the recipient's handling of the situation, the Grant Officer so notifies the recipient. This notification constitutes final agency action.

(c) If the Grant Officer disagrees with the recipient's handling of the matter, the Grant Officer proceeds under § 667.510 of this subpart.

§ 667.510 What is the Grant Officer resolution process?

(a) *General.* When the Grant Officer is dissatisfied with the State's disposition of an audit or other resolution of violations (including those arising out of incident reports or compliance reviews), or with the recipient's response to findings resulting from investigations or monitoring report, the initial and final determination process, set forth in this section, is used to resolve the matter.

(b) *Initial determination.* The Grant Officer makes an initial determination on the findings for both those matters where there is agreement and those where there is disagreement with the recipient's resolution, including the allowability of questioned costs or activities. This initial determination is based upon the requirements of the Act and regulations, and the terms and conditions of the grants, contracts, or other agreements under the Act.

(c) *Informal resolution.* Except in an emergency situation, when the Secretary invokes the authority described in WIA section 184(e), the Grant Officer may not revoke a recipient's grant in whole or in part, nor institute corrective actions or sanctions, without first providing the recipient with an opportunity to present documentation or arguments to resolve informally those matters in controversy contained in the initial determination. The initial determination must provide for an informal resolution period of at least 60 days from issuance of the initial determination. If the matters are resolved informally, the Grant Officer must issue a final determination under paragraph (d) of this section which notifies the parties in writing of the nature of the resolution and may close the file.

(d) *Grant Officer's final determination.* (1) If the matter is not fully resolved informally, the Grant Officer provides each party with a written final determination by certified mail, return receipt requested. For audits of recipient-level entities and other recipients which receive WIA funds directly from DOL, ordinarily, the final determination is issued not later than 180 days from the date that the Office of Inspector General (OIG) issues the final approved audit report to the Employment and Training Administration. For audits of subrecipients conducted by the OIG, ordinarily the final determination is issued not later than 360 days from

the date the OIG issues the final approved audit report to ETA.

(2) A final determination under this paragraph (d) must:

(i) Indicate that efforts to informally resolve matters contained in the initial determination have been unsuccessful;

(ii) List those matters upon which the parties continue to disagree;

(iii) List any modifications to the factual findings and conclusions set forth in the initial determination and the rationale for such modifications;

(iv) Establish a debt, if appropriate;

(v) Require corrective action, when needed;

(vi) Determine liability, method of restitution of funds and sanctions; and

(vii) Offer an opportunity for a hearing in accordance with §667.800 of this part.

(3) Unless a hearing is requested, a final determination under this paragraph (d) is final agency action and is not subject to further review.

(e) Nothing in this subpart precludes the Grant Officer from issuing an initial determination and/or final determination directly to a subrecipient, in accordance with section 184(d)(3) of the Act. In such a case, the Grant Officer will inform the recipient of this action.

Subpart F—Grievance Procedures, Complaints, and State Appeals Processes

§667.600 What local area, State and direct recipient grievance procedures must be established?

(a) Each local area, State and direct recipient of funds under title I of WIA, except for Job Corps, must establish and maintain a procedure for grievances and complaints according to the requirements of this section. The grievance procedure requirements applicable to Job Corps are set forth at 20 CFR 670.990.

(b) Local area procedures must provide:

(1) A process for dealing with grievances and complaints from participants and other interested parties affected by the local Workforce Investment System, including one-stop partners and service providers;

(2) An opportunity for an informal resolution and a hearing to be completed within 60 days of the filing of the grievance or complaint;

(3) A process which allows an individual alleging a labor standards violation to submit the grievance to a binding arbitration procedure, if a collective bargaining agreement covering the parties to the grievance so provides; and

(4) An opportunity for a local level appeal to a State entity when:

(i) No decision is reached within 60 days; or

(ii) Either party is dissatisfied with the local hearing decision.

(c) State procedures must provide:

(1) A process for dealing with grievances and complaints from participants and other interested parties affected by the Statewide Workforce Investment programs;

(2) A process for resolving appeals made under paragraph (b)(4) of this section;

(3) A process for remanding grievances and complaints related to the local Workforce Investment Act programs to the local area grievance process; and

(4) An opportunity for an informal resolution and a hearing to be completed within 60 days of the filing of the grievance or complaint; and

(d) Procedures of direct recipients must provide:

(1) A process for dealing with grievance and complaints from participants and other interested parties affected by the recipient's Workforce Investment Act programs; and

(2) An opportunity for an informal resolution and a hearing to be completed within 60 days of the filing of the grievance or complaint.

(e) The remedies that may be imposed under local, State and direct recipient grievance procedures are enumerated at WIA section 181(c)(3).

(f)(1) Under WIA section 188(a), complaints of discrimination from participants and other interested parties must be handled in accordance with WIA section 188(b), and the Department of Labor nondiscrimination regulations implementing that section.

(2) Questions about or complaints alleging a violation of the nondiscrimination provisions of WIA section 188 may be directed or mailed to

the Director, Civil Rights Center, U.S. Department of Labor, Room N4123, 200 Constitution Avenue, NW, Washington, DC 20210, for processing.

(g) Nothing in this subpart precludes a grievant or complainant from pursuing a remedy authorized under another Federal, State or local law.

§ 667.610 What processes does the Secretary use to review State and local grievances and complaints?

(a) The Secretary investigates allegations arising through the grievance procedures described in § 667.600 when:

(1) A decision relating to a grievance or complaint under § 667.600(c) has not been reached within 60 days of receipt of the grievance or complaint or within 60 days of receipt of the request for appeal of a local level grievance and either party appeals to the Secretary; or

(2) A decision relating to a grievance or complaint under § 667.600(c) has been reached and the party to which such decision is adverse appeals to the Secretary.

(b) The Secretary must make a final decision on an appeal under paragraph (a) of this section no later than 120 days after receiving such appeal.

(c) Appeals made under to paragraph (a)(2) of this section must be filed within 60 days of the receipt of the decision being appealed. Appeals made under to paragraph (a)(1) of this section must be filed within 120 days of the filing of the grievance with the State, or the filing of the appeal of a local grievance with the State. All appeals must be submitted by certified mail, return receipt requested, to the Secretary, U.S. Department of Labor, Washington, DC 20210, Attention: ASET. A copy of the appeal must be simultaneously provided to the appropriate ETA Regional Administrator and the opposing party.

(d) Except for complaints arising under WIA section 184(f), grievances or complaints made directly to the Secretary will be referred to the appropriate State or local area for resolution in accordance with this section, unless the Secretary notifies the parties that the Department will investigate the grievance under the procedures at § 667.505.

§ 667.630 How are complaints and reports of criminal fraud and abuse addressed under WIA?

Information and complaints involving criminal fraud, waste, abuse or other criminal activity must be reported immediately through the Department's Incident Reporting System to the DOL Office of Inspector General, Office of Investigations, Room S5514, 200 Constitution Avenue NW., Washington, DC 20210, or to the corresponding Regional Inspector General for Investigations, with a copy simultaneously provided to the Employment and Training Administration. The Hotline number is 1–800–347–3756. Complaints of a non-criminal nature are handled under the procedures set forth in § 667.505 of this part or through the Department's Incident Reporting System.

§ 667.640 What additional appeal processes or systems must a State have for the WIA program?

(a) *Non-designation of local areas.* (1) The State must establish, and include in its State Plan, due process procedures which provide expeditious appeal to the State Board for a unit or combination of units of general local government or a rural concentrated employment program grant recipient (as described at WIA section 116(a)(2)(B)) that requests, but is not granted, automatic or temporary and subsequent designation as a local workforce investment area under WIA section 116(a)(2) or 116(a)(3).

(2) These procedures must provide an opportunity for a hearing and prescribe appropriate time limits to ensure prompt resolution of the appeal.

(3) If the appeal to the State Board does not result in designation, the appellant may request review by the Secretary under § 667.645.

(4) If the Secretary determines that the appellant was not accorded procedural rights under the appeal process established in paragraph (a)(1) of this section, or that the area meets the requirements for designation at WIA section 116(a)(2) or 116(a)(3), the Secretary may require that the area be designated as a workforce investment area.

(b) *Denial or termination of eligibility as a training provider.* (1) A State must establish procedures which allow providers of training services the opportunity to appeal:

(i) Denial of eligibility by a Local Board or the designated State agency under WIA section 122(b), (c) or (e);

(ii) Termination of eligibility or other action by a Local Board or State agency under section 122(f); or

(iii) Denial of eligibility as a provider of on-the-job training (OJT) or customized training by a One-Stop operator under WIA section 122(h).

(2) Such procedures must provide an opportunity for a hearing and prescribe appropriate time limits to ensure prompt resolution of the appeal.

(3) A decision under this State appeal process may not be appealed to the Secretary.

(c) *Testing and sanctioning for use of controlled substances.* (1) A State must establish due process procedures which provide expeditious appeal for:

(i) WIA participants subject to testing for use of controlled substances, imposed under a State policy established under WIA section 181(f); and

(ii) WIA participants who are sanctioned after testing positive for the use of controlled substances, under the policy described in paragraph (c)(i) of this section.

(2) A decision under this State appeal process may not be appealed to the Secretary.

§ 667.645 What procedures apply to the appeals of non-designation of local areas?

(a) A unit or combination of units of general local government or rural concentrated employment program grant recipient (as described at WIA section 116(a)(2)(B)) whose appeal of the denial of a request for automatic or temporary and subsequent designation as a local workforce investment area to the State Board has not resulted in designation may appeal the denial of local area designation to the Secretary.

(b) Appeals made under to paragraph (a) of this section must be filed no later than 30 days after receipt of written notification of the denial from the State Board, and must be submitted by certified mail, return receipt requested, to the Secretary, U.S. Department of Labor, Washington, DC 20210, Attention: ASET. A copy of the appeal must be simultaneously provided to the State Board.

(c) The appellant must establish that it was not accorded procedural rights under the appeal process set forth in the State Plan, or establish that it meets the requirements for designation in WIA sections 116(a)(2) or (a)(3). The Secretary may consider any comments submitted in response by the State Board.

(d) If the Secretary determines that the appellant has met its burden of establishing that it was not accorded procedural rights under the appeal process set forth in the State Plan, or that it meets the requirements for designation in WIA sections 116(a)(2) or (a)(3), the Secretary may require that the area be designated as a local workforce investment area.

(e) The Secretary must issue a written decision to the Governor and the appellant.

§ 667.650 What procedures apply to the appeals of the Governor's imposition of sanctions for substantial violations or performance failures by a local area?

(a) A local area which has been found in substantial violation of WIA title I, and has received notice from the Governor that either all or part of the local plan will be revoked or that a reorganization will occur, may appeal such sanctions to the Secretary under WIA section 184(b). The actions do not become effective until:

(1) The time for appeal has expired; or

(2) The Secretary has issued a decision.

(b) A local area which has failed to meet local performance measures for two consecutive years, and has received the Governor's notice of intent to impose a reorganization plan, may appeal such sanctions to the Secretary under WIA section 136(h)(1)(B).

(c) Appeals made under paragraph (a) or (b) of this section must be filed no later than 30 days after receipt of written notification of the revoked plan or imposed reorganization, and must be submitted by certified mail, return receipt requested, to the Secretary, U.S.

Department of Labor, Washington, DC 20210, Attention: ASET. A copy of the appeal must be simultaneously provided to the Governor.

(d) The Secretary may consider any comments submitted in response by the Governor.

(e) The Secretary will notify the Governor and the appellant in writing of the Secretary's decision under paragraph (a) of this section within 45 days after receipt of the appeal. The Secretary will notify the Governor and the appellant in writing of the Secretary's decision under paragraph (b) of this section within 30 days after receipt of the appeal.

Subpart G—Sanctions, Corrective Actions, and Waiver of Liability

§ 667.700 What procedure does the Department utilize to impose sanctions and corrective actions on recipients and subrecipients of WIA grant funds?

(a) Except for actions under WIA section 188(a) (relating to nondiscrimination requirements), the Grant Officer uses the initial and final determination procedures outlined in §667.510 of this part to impose a sanction or corrective action.

(b) To impose a sanction or corrective action regarding a violation of WIA section 188(a), the Department will utilize the procedures of WIA section 188(b) and the Department of Labor nondiscrimination regulations implementing that section.

(c) To impose a sanction or corrective action for noncompliance with the uniform administrative requirements set forth at section 184(a)(3) of WIA, and §667.200(a) of this part, when the Secretary determines that the Governor has not taken corrective action to remedy the violation required by WIA section 184(a)(5), the Grant Officer, under the authority of WIA section 184(a)(7), may impose any of the corrective actions set forth at WIA section 184(b)(1). In such situations, the Secretary may immediately suspend or terminate financial assistance in accordance with WIA section 184(e).

(d) The Grant Officer may also impose a sanction directly against a subrecipient, as authorized in section 184(d)(3) of the Act. In such a case, the Grant Officer will inform the recipient of the action.

§ 667.705 Who is responsible for funds provided under title I of WIA?

(a) The recipient is responsible for all funds under its grant(s).

(b) The political jurisdiction(s) of the chief elected official(s) in a local workforce investment area is liable for any misuse of the WIA grant funds allocated to the local area under WIA sections 128 and 133, unless the chief elected official(s) reaches an agreement with the Governor to bear such liability.

(c) When a local workforce area is composed of more than one unit of general local government, the joint liability of the individual jurisdictions must be specified in a written agreement between the chief elected officials.

§ 667.710 What actions are required to address the failure of a local area to comply with the applicable uniform administrative provisions?

(a) If, as part of the annual on-site monitoring of local areas, the Governor determines that a local area is not in compliance with the uniform administrative requirements found at 29 CFR part 95 or part 97, as appropriate, the Governor must:

(1) Require corrective action to secure prompt compliance; and

(2) Impose the sanctions provided for at section 184(b) if the Governor finds that the local area has failed to take timely corrective action.

(b) An action by the recipient to impose a sanction against a local area, in accordance with this section, may be appealed to the Secretary in accordance with §667.650, and will not become effective until:

(1) The time for appeal has expired; or

(2) The Secretary has issued a decision.

(c) If the Secretary finds that the Governor has failed to promptly take the actions required upon a determination under paragraph (a) of this section that a local area is not in compliance with the uniform administrative requirements, the Secretary must take

such actions against the State recipient or the local area, as appropriate.

§ 667.720 How does the Department handle a recipient's request for waiver of liability under WIA section 184(d)(2)?

(a) A recipient may request a waiver of liability, as described in WIA section 184(d)(2), and a Grant Officer may approve such a waiver under WIA section 184(d)(3).

(b)(1) When the debt for which a waiver of liability is desired was established in a non-Federal resolution proceeding, the resolution report must accompany the waiver request.

(2) When the waiver request is made during the ETA Grant Officer resolution process, the request must be made during the informal resolution period described in § 667.510(c) of this part.

(c) A waiver of the recipient's liability shall be considered by the Grant Officer only when:

(1) The misexpenditure of WIA funds occurred at a subrecipient's level;

(2) The misexpenditure was not due to willful disregard of the requirements of title I of the Act, gross negligence, failure to observe accepted standards of administration, or did not constitute fraud;

(3) If fraud did exist, it was perpetrated against the recipient/subrecipients; and

(i) The recipient/subrecipients discovered, investigated, reported, and cooperated in any prosecution of the perpetrator of the fraud; and

(ii) After aggressive debt collection action, it has been documented that further attempts at debt collection from the perpetrator of the fraud would be inappropriate or futile;

(4) The recipient has issued a final determination which disallows the misexpenditure, the recipient's appeal process has been exhausted, and a debt has been established; and

(5) The recipient requests such a waiver and provides documentation to demonstrate that it has substantially complied with the requirements of section 184(d)(2) of the Act, and this section.

(d) The recipient will not be released from liability for misspent funds under the determination required by section 184(d) of the Act unless the Grant Officer determines that further collection action, either by the recipient or subrecipients, would be inappropriate or would prove futile.

§ 667.730 What is the procedure to handle a recipient's request for advance approval of contemplated corrective actions?

(a) The recipient may request advance approval from the Grant Officer for contemplated corrective actions, including debt collection actions, which the recipient plans to initiate or to forego. The recipient's request must include a description and an assessment of all actions taken by the subrecipients to collect the misspent funds.

(b) Based on the recipient's request, the Grant Officer may determine that the recipient may forego certain collection actions against a subrecipient when:

(1) The subrecipient meets the criteria set forth in section 184(d)(2) of the Act;

(2) The misexpenditure of funds:

(i) Was not made by that subrecipient but by an entity that received WIA funds from that subrecipient;

(ii) Was not a violation of section 184(d)(1) of the Act, and did not constitute fraud; or

(iii) If fraud did exist,

(A) It was perpetrated against the subrecipient; and:

(B) The subrecipient discovered, investigated, reported, and cooperated in any prosecution of the perpetrator of the fraud; and

(C) After aggressive debt collection action, it has been documented that further attempts at debt collection from the perpetrator of the fraud would be inappropriate or futile;

(3) A final determination which disallows the misexpenditure and establishes a debt has been issued at the appropriate level;

(4) Final action within the recipient's appeal system has been completed; and

(5) Further debt collection action by that subrecipient or the recipient would be either inappropriate or futile.

§ 667.740 What procedure must be used for administering the offset/deduction provisions at WIA section 184(c)?

(a)(1) For recipient level misexpenditures, the Secretary may determine that a debt, or a portion thereof, may be offset against amounts that are allotted to the recipient. Recipients must submit a written request for an offset to the Grant Officer. Generally, the Secretary will apply the offset against amounts that are available at the recipient level for administrative costs.

(2) The Grant Officer may approve an offset request, under paragraph (b)(1) of this section, if the misexpenditures were not due to willful disregard of the requirements of the Act and regulations, gross negligence, failure to observe accepted standards of administration or a pattern of misexpenditure.

(b) For subrecipient level misexpenditures that were not due to willful disregard of the requirements of the Act and regulations, gross negligence, failure to observe accepted standards of administration or a pattern of misexpenditure, if the Secretary has required the State to repay such amount the State may deduct an amount equal to the misexpenditure from its subsequent year's allocations to the local area from funds available for the administrative costs of the local programs involved.

(c) If offset is granted, the debt will not be fully satisfied until the Grant Officer reduces amounts allotted to the State by the amount of the misexpenditure.

(d) A State may not make a deduction under paragraph (b)(2) of this section until the State has taken appropriate corrective action to ensure full compliance within the local area with regard to appropriate expenditure of WIA funds.

Subpart H—Administrative Adjudication and Judicial Review

§ 667.800 What actions of the Department may be appealed to the Office of Administrative Law Judges?

(a) An applicant for financial assistance under title I of WIA which is dissatisfied because the Secretary has issued a determination not to award financial assistance, in whole or in part, to such applicant; or a recipient, subrecipient, or a vendor against which the Grant Officer has directly imposed a sanction or corrective action, including a sanction against a State under 20 CFR part 666, may appeal to the U.S. Department of Labor, Office of Administrative Law Judges (OALJ) within 21 days of receipt of the final determination.

(b) Failure to request a hearing within 21 days of receipt of the final determination will constitute a waiver of the right to a hearing.

(c) A request for a hearing under this subpart must state specifically those issues in the final determination upon which review is requested. Those provisions of the final determination not specified for review, or the entire final determination when no hearing has been requested within the 21 days, are considered resolved and not subject to further review. Only alleged violations of the Act, its regulations, grant or other agreement under the Act fairly raised in the determination, and the request for hearing are subject to review.

(d) A request for a hearing must be transmitted by certified mail, return receipt requested, to the Chief Administrative Law Judge, U.S. Department of Labor, Suite 400, 800 K Street, NW, Washington, DC 20001, with one copy to the Departmental official who issued the determination.

(e) The procedures set forth in this subpart apply in the case of a complainant who has not had a dispute adjudicated under the alternative dispute resolution process set forth in § 667.840 of this part within the 60 days, except that the request for hearing before the OALJ must be filed within 15 days of the conclusion of the 60-day period. In addition to including the final determination upon which review is requested, the complainant must include a copy of any Stipulation of Facts and a brief summary of proceedings.

§ 667.810 What rules of procedure apply to hearings conducted under this subpart?

(a) *Rules of practice and procedure.* The rules of practice and procedure promulgated by the OALJ at subpart A

of 29 CFR part 18, govern the conduct of hearings under this subpart. However, a request for hearing under this subpart is not considered a complaint to which the filing of an answer by DOL or a DOL agency or official is required. Technical Rules of evidence will not apply to hearings conducted pursuant to this part. However, Rules or principles designed to assure production of the most credible evidence available and to subject testimony to cross-examination will apply.

(b) *Prehearing procedures.* In all cases, the Administrative Law Judge (ALJ) should encourage the use of prehearing procedures to simplify and clarify facts and issues.

(c) *Subpoenas.* Subpoenas necessary to secure the attendance of witnesses and the production of documents or other items at hearings must be obtained from the ALJ and must be issued under the authority contained in section 183(c) of the Act, incorporating 15 U.S.C. 49.

(d) *Timely submission of evidence.* The ALJ must not permit the introduction at the hearing of any documentation if it has not been made available for review by the other parties to the proceeding either at the time ordered for any prehearing conference, or, in the absence of such an order, at least 3 weeks prior to the hearing date.

(e) *Burden of production.* The Grant Officer has the burden of production to support her or his decision. To this end, the Grant Officer prepares and files an administrative file in support of the decision which must be made part of the record. Thereafter, the party or parties seeking to overturn the Grant Officer's decision has the burden of persuasion.

§ 667.820 What authority will the Administrative Law Judge have in ordering relief as an outcome of an administrative hearing?

In ordering relief, the ALJ has the full authority of the Secretary under the Act.

§ 667.825 What special rules apply to reviews of MSFW and WIA INA grant selections?

(a) An applicant whose application for funding as a WIA INA grantee under 20 CFR part 668 or as an MSFW grantee under 20 CFR part 669 is denied in whole or in part by the Department may request an administrative review under § 667.800(a) with respect to whether there is a basis in the record to support the Department's decision. This appeal will not in any way interfere with the Department's designation and funding of another organization to serve the area in question during the appeal period. The available remedy in such an appeal is the right to be designated in the future as the WIA INA or MSFW grantee for the remainder of the current grant cycle. Neither retroactive nor immediately effective selection status may be awarded as relief in a non-selection appeal under this section. The appellant may not be awarded a grant nor given any kind of preference beyond the current two year-grant period.

(b) If the ALJ rules that the organization should have been selected and the organization continues to meet the requirements of 20 CFR part 668 or part 669, the Department will select and fund the organization within 90 days of the ALJ's decision unless the end of the 90-day period is within six (6) months of the end of the funding period. An applicant so selected is not entitled to the full grant amount, but will only receive the funds remaining in the grant that have not been expended by the current grantee through its operation of the grant and its subsequent closeout.

(c) Any organization selected and/or funded as a WIA INA or MSFW grantee is subject to being removed as grantee in the event an ALJ decision so orders. The Grant Officer provides instructions on transition and close-out to a grantee which is removed. All parties must agree to the provisions of this paragraph as a condition for WIA INA or MSFW funding.

§ 667.830 When will the Administrative Law Judge issue a decision?

(a) The ALJ should render a written decision not later than 90 days after the closing of the record.

(b) The decision of the Administrative Law Judge (ALJ) constitutes final agency action unless, within 20 days of the decision, a party dissatisfied with the ALJ's decision has filed a petition

for review with the Administrative Review Board (ARB) (established under Secretary's Order No. 2–96, specifically identifying the procedure, fact, law or policy to which exception is taken. Any exception not specifically urged is deemed to have been waived. A copy of the petition for review must be sent to the opposing party at that time. Thereafter, the decision of the ALJ constitutes final agency action unless the ARB, within 30 days of the filing of the petition for review, notifies the parties that the case has been accepted for review. Any case accepted by the ARB must be decided within 120 days of acceptance. If not so decided, the decision of the ALJ constitutes final agency action.

§ 667.840 Is there an alternative dispute resolution process that may be used in place of an OALJ hearing?

(a) Parties to a complaint which has been filed according to the requirements of § 667.800 of this part may choose to waive their rights to an administrative hearing before the OALJ. Instead, they may choose to transfer the settlement of their dispute to an individual acceptable to all parties who will conduct an informal review of the stipulated facts and render a decision in accordance with applicable law. A written decision must be issued within 60 days after submission of the matter for informal review.

(b) The waiver of the right to request a hearing before the OALJ will automatically be revoked if a settlement has not been reached or a decision has not been issued within the 60 days provided in paragraph (a) of this section.

(c) The decision rendered under this informal review process will be treated as a final decision of an Administrative Law Judge under section 186(b) of the Act.

§ 667.850 Is there judicial review of a final order of the Secretary issued under WIA sec. 186 of the Act?

(a) Any party to a proceeding which resulted in a final order of the Secretary under section 186 of the Act may obtain a review in the United States Court of Appeals having jurisdiction over the applicant or recipient of funds involved, by filing a review petition within 30 days of the issuance of the Secretary's final order.

(b) The court has jurisdiction to make and enter a decree affirming, modifying, or setting aside the order of the Secretary, in whole or in part.

(c) No objection to the Secretary's order may be considered by the court unless the objection was specifically urged, in a timely manner, before the Secretary. The review is limited to questions of law, and the findings of fact of the Secretary are conclusive if supported by substantial evidence.

(d) The judgment of the court is final, subject to certiorari review by the United States Supreme Court.

§ 667.860 Are there other authorities for the pursuit of remedies outside of the Act?

Nothing contained in this subpart prejudices the separate exercise of other legal rights in pursuit of remedies and sanctions available outside the Act.

Subpart I—Transition

§ 667.900 What special rules apply during the JTPA/WIA transition?

(a)(1) To facilitate planning for the implementation of WIA, a Governor may reserve an amount equal to no more than 2 percent of the total amount of JTPA formula funds allotted to the State for PY's 1998 and 1999 for expenditure on transition planning activities. The funds may be from any one or more of the JTPA titles and subparts, that is, funds do not have to be drawn proportionately from all titles and subparts. The Governor must report the expenditure of these funds for transition planning separately in accordance with instructions issued by the Secretary, but is not required to be allocated to the various titles and subparts;

(2) These reserved transition funds may be excluded from any calculation of compliance with JTPA cost limitations.

(b) Not less than 50 percent of the funds reserved by the Governor in paragraph (a) of this section must be made available to local entities.

(c) The Secretary will issue such other transition guidance as necessary and appropriate.

Part 668—INDIAN AND NATIVE AMERICAN PROGRAMS UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

Subpart A—Purposes and Policies

Sec.

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AUTHORITY: Secs. 506(c) and 166(h)(2) Pub. L. 105–220; 20 U.S.C. 9276(c); 29 U.S.C. 2911(h)(2)

SOURCE: 64 FR 18736, Apr. 15, 1999, unless otherwise noted.

Subpart A—Purposes and Policies

§ 668.100 What is the purpose of the programs established to serve Native American peoples (INA programs) under sec. 166 of the Workforce Investment Act (WIA)?

(a) The purpose of WIA INA programs is to support comprehensive employment and training activities for Indian, Alaska Native and Native Hawaiian individuals in order to:

(1) Develop more fully their academic, occupational, and literacy skills;

(2) Make them more competitive in the workforce;

(3) Promote the economic and social development of Indian, Alaska Native, and Native Hawaiian communities according to the goals and values of such communities; and

(4) Help them achieve personal and economic self-sufficiency.

(b) The principal means of accomplishing these purposes is to enable tribes and Native American organizations to provide employment and training services to Native American peoples and their communities. Services should be provided in a culturally appropriate manner, consistent with the principles of Indian self-determination. (WIA sec. 166(a)(1).)

§ 668.120 How must INA programs be administered?

(a) The Department will administer INA programs to maximize the Federal commitment to support the growth and development of Native American people and communities as determined by representatives of such communities.

(b) In administering these programs, the Department will observe the Congressional declaration of policy set forth in the Indian Self-Determination and Education Assistance Act, at 25 U.S.C. 450a, as well as the Department of Labor's ''American Indian and Alaska Native Policy,'' dated July 29, 1998.

(c) These regulations are not intended to abrogate the trust responsibilities of the Federal Government to Native American bands, tribes, or groups in any way.

(d) The Department will administer INA programs through a single organizational unit and consistent with the

requirements in section 166(h) of the Act. The Department has designated the Division of Indian and Native American Programs (DINAP) within the Employment and Training Administration (ETA) as this single organizational unit required by WIA section 166(h)(1).

(e) The Department will establish and maintain administrative procedures for the selection, administration, monitoring, and evaluation of Native American employment and training programs authorized under this Act. The Department will utilize staff who have a particular competence in this field to administer these programs. (WIA sec. 166(h).)

§ 668.130 What obligation does the Department have to consult with the INA grantee community in developing rules, regulations, and standards of accountability for INA programs?

The Department will consult with the Native American grantee community as a full partner in developing policies for the INA programs. The Department will actively seek and consider the views of all INA grantees, and will discuss options with the grantee community prior to establishing policies and program regulations. The primary consultation vehicle is the Native American Employment and Training Council. (WIA sec. 166(h)(2).)

§ 668.140 How do the WIA regulations apply to the INA program?

(a) The regulations found in this subpart.

(b) The general administrative requirements found in 20 CFR part 667, including the regulations concerning Complaints, Investigations and Hearings found at 20 CFR part 667 subpart E through subpart H.

(c) The Department's regulations codifying the common rules implementing Office of Management and Budget (OMB) Circulars which generally apply to Federal programs carried out by Indian tribal governments and nonprofit organizations, at 29 CFR parts 95, 96, and 97, as applicable.

§ 668.150 What definitions apply to terms used in the regulations in this part?

In addition to the definitions found in WIA sections 101 and 166 and 20 CFR 660.300, the following definitions apply:

DINAP means the Division of Indian and Native American Programs within the Employment and Training Administration of the Department.

Governing Body means a body of representatives who are duly elected, appointed by duly elected officials, or selected according to traditional tribal means. A governing body must have the authority to provide services to and to enter into grants on behalf of the organization that selected or designated it.

Grant Officer means a Department of Labor official authorized to obligate Federal funds.

Indian or Native American (INA) Grantee means an entity which is formally designated under subpart B of this part to operate an INA program and which has a grant agreement pursuant to 20 CFR 668.292.

NEW means the Native Employment Works Program, the tribal work program authorized under section 412(a)(2) of the Social Security Act, as amended by the Personal Responsibility and Work Opportunity Reconciliation Act (Pub. L. 104–193).

Underemployed means an individual who is working part time but desires full time employment, or who is working in employment not commensurate with the individual's demonstrated level of educational attainment.

Subpart B—Service Delivery Systems Applicable to Section 166 Programs

§ 668.200 What are the requirements for designation as an "Indian or Native American (INA) grantee"?

(a) To be designated as an INA grantee for PY 1999, an entity must have:

(1) A legal status as a government or as an agency of a government, as a private non-profit corporation, or a consortium which contains at least one of these entities;

(2) The ability to administer INA program funds, as defined at §668.220 of this subpart; and

(3) For PY 1999 only, a population within the designated geographic service area of 1,000 or more Native American persons.

(b) For PY 2000 and beyond, an entity must have:

(1) A legal status as a government or as an agency of a government, private non-profit corporation, or a consortium which contains at least one of these entities;

(2) The ability to administer INA program funds, as defined at §668.220 of this subpart; and

(3) A new (non-incumbent) entity must have a population within the designated geographic service area which would provide funding under the funding formula found at §668.296(b) in the amount of at least $100,000, including any amounts received for supplemental youth services under the funding formula at §668.440(a). Incumbent grantees which do not meet this dollar threshold for PY 2000 and beyond will be grandfathered in. We will make an exception for grantees wishing to participate in the demonstration program under Pub. L. 102–477 if all resources to be consolidated under the Pub. L. 102–477 plan total at least $100,000.

(c) To be designated as a Native American grantee, a consortium or its members must meet the requirements of paragraphs (a) and (b) of this section and must:

(1) Be in close proximity to one another, but they may operate in more than one State;

(2) Have an administrative unit legally authorized to run the program and to commit the other members to contracts, grants, and other legally-binding agreements; and

(3) Be jointly and individually responsible for the actions and obligations of the consortium, including debts.

(d) Entities potentially eligible for designation under paragraph (a)(1) or (b)(1) of this section are:

(1) Federally-recognized Indian tribes;

(2) Tribal organizations, as defined in 25 U.S.C. 450b;

(3) Alaska Native-controlled organizations representing regional or village areas, as defined in the Alaska Native Claims Settlement Act;

(4) Native Hawaiian-controlled entities;

(5) State-recognized Indian tribes;

(6) Native American-controlled organizations serving Indians; and

(7) Consortia of eligible entities which meets the legal requirements for a consortium described in paragraph (c) of this section.

§ 668.210 What priority for designation is given to eligible organizations?

(a) Federally-recognized Indian tribes, Alaska Native entities, or consortia that include a tribe or entity will have the highest priority for designation. To be designated, the organizations must meet the requirements in this Subpart. These organizations will be designated for those geographic areas over which they have legal jurisdiction. (WIA section 166(c)(1).)

(b) If the Department decides not to designate Indian tribes or Alaska Native entities to serve their service areas, the Department will enter into arrangements to provide services with entities which the tribes or Alaska Native entities involved approve.

(c) In geographic areas not served by Indian tribes or Alaska Native entities, entities with a Native American-controlled governing body and which are representative of the Native American community or communities involved will have priority for designation.

§ 668.220 What is meant by the "ability to administer funds" for designation purposes?

An organization has the ''ability to administer funds'' if it:

(a) Is in compliance with Departmental debt management procedures, if applicable;

(b) Has not been found guilty of fraud or criminal activity which would affect the entity's ability to safeguard Federal funds or deliver program services;

(c) Can demonstrate that it has or can acquire the necessary program and financial management personnel to safeguard Federal funds and effectively deliver program services; and

(d) Can demonstrate that it has successfully carried out, or has the capacity to successfully carry out activities that will strengthen the ability of the

individuals served to obtain or retain unsubsidized employment.

§ 668.230 How will the Department determine an entity's "ability to administer funds?"

(a) Before determining which entity to designate for a particular service area, the Department will conduct a review of the entity's ability to administer funds.

(b) The review for an entity that has served as a grantee in either of the two designation periods before the one under consideration, also will consider the extent of compliance with these regulations or the JTPA regulations at 20 CFR part 632. Evidence of the ability to administer funds may be established by a satisfactory Federal audit record. It may also be established by a recent record showing substantial compliance with Federal record keeping, reporting, program performance standards, or similar standards imposed on grantees by this or other public sector supported programs.

(c) For other entities, the review includes the experience of the entity's management in administering funds for services to Native American people. This review also includes an assessment of the relationship between the entity and the Native American community or communities to be served.

§ 668.240 What is the process for applying for designation as an INA grantee?

(a) Every entity seeking designation must submit a Notice of Intent (NOI) which complies with the requirements of the Solicitation for Grant Application (SGA). An SGA will be issued every two years, covering all areas except for those for which competition is waived for the incumbent grantee under WIA section 166(c)(2).

(b) NOI's must be submitted to the Chief of DINAP, bearing a U.S. Postal Service postmark indicating its submission no later than October 1st of the year which precedes the first year of a new designation cycle. For NOI's received after October 1, only a timely official U.S. Postal Service postmark is acceptable as proof of timely submission. Dates indicating submission by private express delivery services or metered mail are unacceptable as proof of the timely submission of designation documents.

(c) NOI's must include the following:

(1) Documentation of the legal status of the entity, as described in § 668.200(a)(1);

(2) A Standard Form (SF) 424—Application for Federal Assistance;

(3) A specific description, by State, county, reservation or similar area, or service population, of the geographic area for which the entity requests designation;

(4) A brief summary of the employment and training or human resource development programs serving Native Americans that the entity currently operates or has operated within the previous two-year period.

(5) A description of the planning process used by the entity, including the involvement of the governing body and local employers.

(6) Evidence to establish an entities ability to administer funds under §§ 668.220–668.230.

§ 668.250 What happens if two or more entities apply for the same area?

(a) Every two years, unless there has been a waiver of competition for the area, the Department issues a Solicitation for Grant Application (SGA) seeking applicants for INA program grants.

(b) If two or more entities apply for grants for the same service area, or for overlapping service areas, and a waiver of competition under WIA section 166(c)(2) is not granted to the incumbent grantee, the following additional procedures apply:

(1) The Grant Officer will follow the regulations for priority designation at § 668.210.

(2) If no applicant is entitled to priority designation, DINAP will inform each entity which submitted a NOI, including the incumbent grantee, in writing, of all the competing Notices of Intent no later than November 15 of the year the NOI's are received.

(3) Each entity will have an opportunity to describe its service plan, and may submit additional information addressing the requirements of § 668.240(c) or such other information as the applicant determines is appropriate. Revised Notices must be received or contain an

official U.S. Postal Service postmark, no later than January 5th.

(4) The Grant Officer selects the entity that demonstrates the ability to produce the best outcomes for its customers.

§ 668.260 How are INA grantees designated?

(a) On March 1 of each designation year, the Department designates or conditionally designates Native American grantees for the coming two program years. The Grant Officer informs, in writing, each entity which submitted a Notice of Intent that the entity has been:

(1) Designated;

(2) Conditionally designated;

(3) Designated for only a portion of its requested area or population; or

(4) Denied designation.

(b) Designated Native American entities must ensure and provide evidence to DOL that a system is in place to afford all members of the eligible population within their service area an equitable opportunity to receive employment and training activities and services.

§ 668.270 What appeal rights are available to entities that are denied designation?

Any entity that is denied designation in whole or in part for the area or population that it requested may appeal the denial to the Office of the Administrative Law Judges using the procedures at 20 CFR 667.800 or the alternative dispute resolution procedures at 20 CFR 667.840. The Grant Officer will provide an entity whose request for designation was denied, in whole or in part, with a copy of the appeal procedures.

§ 668.280 Are there any other ways in which an entity may be designated as an INA grantee?

Yes, for an area which would otherwise go unserved. The Grant Officer may designate an entity, which has not submitted an NOI, but which meets the qualifications for designation, to serve the particular geographic area. Under such circumstances, DINAP will seek the views of Native American leaders in the area involved about the decision to designate the entity to serve that community. DINAP will inform the Grant Officer of their views. The Grant Officer will accommodate their views to the extent possible.

§ 668.290 Can an INA grantee's designation be terminated?

(a) Yes. The Grant Officer can terminate a grantee's designation for cause, or the Secretary or another DOL official confirmed by the Senate can terminate a grantee's designation in emergency circumstances where termination is necessary to protect the integrity of Federal funds or ensure the proper operation of the program. (WIA sec. 184(e).)

(b) The Grant Officer may terminate a grantee's designation for cause only if there is a substantial or persistent violation of the requirements in the Act or these regulations. The grantee must be provided with written notice 60 days before termination, stating the specific reasons why termination is proposed. The appeal procedures at 20 CFR 667.800 apply.

(c) The Secretary must give a grantee terminated in emergency circumstances prompt notice of the termination and an opportunity for a hearing within 30 days of the termination.

§ 668.292 How does a designated entity become an INA grantee?

A designated entity becomes a grantee on the effective date of an executed grant agreement, signed by the authorized official of the grantee organization and the Grant Officer. The grant agreement includes a set of certifications and assurances that the grantee will comply with the terms of the Act, these regulations, and other appropriate requirements. Funds are released to the grantee upon Departmental approval of the required planning documents, as described in §§ 668.710 through 668.740.

§ 668.294 Does the Department have to designate an INA grantee for every part of the country?

No. Beginning with the PY 2000 grant awards, if there are no entities meeting the requirements for designation in a particular area, or willing to serve that

area, the Department will not allocate funds for that service area. The funds allocated to that area will be distributed to the remaining INA grantees, or used for other program purposes such as technical assistance and training (TAT). Remaining funds used for technical assistance and training are in addition to, and not subject to the limitations on, amounts reserved under §668.296(e). Areas which are unserved by the INA program may be restored during a subsequent designation cycle, when and if a current grantee or other eligible entity applies for and is designated to serve that area.

§668.296 How are WIA funds allocated to INA grantees?

(a) Except for reserved funds described in paragraph (e) of this section, all funds available for WIA section 166(d)(2)(A)(i) comprehensive workforce investment services program at the beginning of a Program Year will be allocated to Native American grantees for their designated geographic service areas.

(b) Each INA grantee will receive the sum of the funds calculated under the following formula:

(1) One-quarter of the funds available will be allocated on the basis of the number of unemployed Native American persons in the grantee's designated INA service area(s) compared to all such persons in all such areas in the United States.

(2) Three-quarters of the funds available will be allocated on the basis of the number of Native American persons in poverty in the grantee's designated INA service area(s) as compared to all such persons in all such areas in the United States.

(3) The data and definitions used to implement these formulas is provided by the U.S. Bureau of the Census.

(c) In years immediately following the use of new data in the formula described in paragraph (b) of this section, the Department, based upon criteria to be described in the SGA, may utilize a hold harmless factor to reduce the disruption in grantee services which would otherwise result from changes in funding levels. This factor will be determined in consultation with the grantee community and the Native American Employment and Training Council.

(d) The Department may reallocate funds from one INA grantee to another if a grantee is unable to serve its area for any reason, such as audit or debt problems, criminal activity, internal (political) strife, or lack of ability or interest. Funds may also be reallocated if a grantee has carry-in excess of 20 percent of the total funds available to it. Carry-in amounts greater than 20 percent but less than 25 percent of total funds available may be allowed under an approved waiver issued by DINAP.

(e) The Department may reserve up to one percent (1 percent) of the funds appropriated under WIA section 166(d)(2)(A)(i) for any Program Year for TAT purposes. Technical assistance will be provided in consultation with the Native American Employment and Training Council.

Subpart C—Services to Customers

§668.300 Who is eligible to receive services under the INA program?

(a) A person is eligible to receive services under the INA program if that person is:

(1) An Indian, as determined by a policy of the Native American grantee. The grantee's definition must at least include anyone who is a member of a Federally-recognized tribe; or

(2) An Alaska Native, as defined in section 3(b) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1602(b); or

(3) A Native Hawaiian, as defined in WIA section 166(b)(3).

(b) The person must also be any one of the following:

(1) Unemployed; or

(2) Underemployed, as defined in §668.150; or

(3) A low-income individual, as defined in WIA section 101(25); or

(4) The recipient of a bona fide lay-off notice which has taken effect in the last six months or will take effect in the following six month period, who is unlikely to return to a previous industry or occupation, and who is in need of retraining for either employment with another employer or for job retention with the current employer; or

(5) An individual who is employed, but is determined by the grantee to be in need of employment and training services to obtain or retain employment that allows for self-sufficiency.

(c) If applicable, male applicants must also register or be registered for the Selective Service.

(d) For purposes of determining whether a person is a low-income individual under paragraph (b)(3) of this section, the Secretary issues guidance for the determination of family income. (WIA sec. 189(h).)

§ 668.340 What are INA grantee allowable activities?

(a) The INA grantee may provide any services consistent with the purposes of this section that are necessary to meet the needs of Native Americans preparing to enter, reenter, or retain unsubsidized employment. (WIA sec. 166(d)(1)(B).) Comprehensive workforce investment activities authorized under WIA section 166(d)(2) include:

(b) Core services, which must be delivered in partnership with the One-Stop delivery system, include:

(1) Outreach;

(2) Intake;

(3) Orientation to services available;

(4) Initial assessment of skill levels, aptitudes, abilities and supportive service needs;

(5) Eligibility certification;

(6) Job Search and placement assistance;

(7) Career counseling;

(8) Provision of employment statistics information and local, regional, and national Labor Market Information;

(9) Provision of information regarding filing of Unemployment Insurance claims;

(10) Assistance in establishing eligibility for Welfare-to-Work programs;

(11) Assistance in establishing eligibility for financial assistance for training;

(12) Provision of information relating to supportive services;

(13) Provision of performance and cost information relating to training providers and training services; and

(14) Follow-up services.

(c) Allowable intensive services which include:

(1) Comprehensive and specialized testing and assessment;

(2) Development of an individual employment plan;

(3) Group counseling;

(4) Individual counseling and career planning;

(5) Case Management for seeking training services;

(6) Short term pre-vocational services;

(7) Work experience in the public or private sector;

(8) Tryout employment;

(9) Dropout prevention activities;

(10) Supportive services; and

(11) Other services identified in the approved Two Year Plan.

(d) Allowable training services which include:

(1) Occupational skill training;

(2) On-the-job training;

(3) Programs that combine workplace training with related instruction, which may include cooperative education programs;

(4) Training programs operated by the private sector;

(5) Skill upgrading and retraining;

(6) Entrepreneurial and small business development technical assistance and training;

(7) Job readiness training;

(8) Adult basic education, GED attainment, literacy training, and English language training, provided in combination with any training services described in paragraphs (d)(1) through (8) of this section;

(9) Customized training conducted with a commitment by an employer or group of employers to employ an individual upon successful completion of training; and

(10) Educational and tuition assistance.

(e) Allowable activities specifically designed for youth are identified in section 129 of the Act and include:

(1) Improving educational and skill competencies;

(2) Adult mentoring;

(3) Training opportunities;

(4) Supportive services as defined in WIA section 101(46);

(5) Incentive programs for recognition and achievement;

(6) Opportunities for leadership, development, decision-making, citizenship and community service;

(7) Preparation for postsecondary education, academic and occupational learning, unsubsidized employment opportunities, and other effective connections to intermediaries with strong links to the job market and local and regional employers;

(8) Tutoring, study skills training, and other drop-out prevention strategies;

(9) Alternative secondary school services;

(10) Summer employment opportunities that are directly linked to academic and occupational learning;

(11) Paid and unpaid work experiences, including internships and job shadowing;

(12) Occupational skill training;

(13) Leadership development opportunities as defined in § 664.420;

(14) Follow-up services as defined in § 664.450;

(15) Comprehensive guidance and counseling, which may include drug and alcohol abuse counseling and referral; and

(16) Information and referral.

(f) In addition, allowable activities include job development and employment outreach, including:

(1) Support of the Tribal Employment Rights Office (TERO) program;

(2) Negotiation with employers to encourage them to train and hire participants;

(3) Establishment of linkages with other service providers to aid program participants;

(4) Establishment of management training programs to support tribal administration or enterprises; and

(5) Establishment of linkages with remedial education, such as Adult Basic Education (ABE), basic literacy training, and English-as-a-second-language (ESL) training programs, as necessary.

(g) Participants may be enrolled in more than one activity at a time and may be sequentially enrolled in multiple activities.

(h) INA grantees may provide any services which may be carried out by fund recipients under any provisions of the Act. (WIA section 166(d).)

(i) In addition, INA grantees must develop programs which contribute to occupational development, upward mobility, development of new careers, and opportunities for nontraditional employment. (WIA section 195(1).)

§ 668.350 Are there any restrictions on allowable activities?

(a) All occupational training must be for occupations for which there are employment opportunities in the local area or another area to which the participant is willing to relocate. (WIA sec. 134(d)(4)(A)(iii).)

(b) INA grantees must provide OJT services consistent with the definition provided in WIA section 101(31) and other limitations in the Act. Individuals in OJT must:

(1) Be compensated at the same rates, including periodic increases, as trainees or employees who are similarly situated in similar occupations by the same employer and who have similar training, experience, and skills; and (WIA sec. 181(a)(1).)

(2) Be provided benefits and working conditions at the same level and to the same extent as other trainees or employees working a similar length of time and doing the same type of work. (WIA sec. 181(b)(5).)

(c) In addition, OJT contracts under this title must not be entered into with employers who have:

(1) Received payments under previous contracts and have exhibited a pattern of failing to provide OJT participants with continued, long-term employment as regular employees with wages and employment benefits and working conditions at the same level and to the same extent as other employees working a similar length of time and doing the same work, or

(2) Who have violated paragraphs (b)(1) and/or (2) of this section. (WIA 195(4).)

(d) INA grantees are prohibited from using funds to encourage the relocation of a business as described in WIA section 181(d) and 20 CFR 667.268.

(e) INA grantees must only use funds for activities which are in addition to those that would otherwise be available to the Native American population in the area in the absence of such funds. (WIA § 195(2).)

(f) INA grantees must not spend funds on activities that displace currently employed individuals, impair existing contracts for services, or in any way affect union organizing. (WIA § 181(b).)

§ 668.360 What is the role of INA grantees in the One-Stop system?

(a) In those local workforce investment areas where there is a INA grantee field office, the INA grantee is a required partner in the local One-Stop delivery system and is subject to the provisions relating to such partners described in 20 CFR part 662. Consistent with those provisions, a Memorandum of Understanding (MOU) between the INA grantee and the Local Board over the operation of the One-Stop Center(s) in the Local Board's workforce investment area must also be executed.

(b) At a minimum, the MOU must contain provisions related to:

(1) The services to be provided through the One-Stop Service System;

(2) The methods for referral of individuals between the One-Stop operator and the INA grantee which take into account the services provided by the INA grantee and the other One-Stop partners;

(3) The exchange of information on the services available and accessible through the One-Stop system and the INA program;

(4) As necessary to provide referrals and case management services, the exchange of information on Native American participants in the One-Stop system and the INA program;

(5) Arrangements for the funding of services provided by the One-Stop(s), consistent with the requirement that no expenditures may be made with INA program funds for individuals who are not eligible under this part.

(c) The INA grantee's Two Year Plan must describe the efforts the grantee has made to negotiate MOU's consistent with paragraph (b) of this section, for each planning cycle during which Local Boards are operating under the terms of WIA.

§ 668.370 What policies govern payments to participants, including wages, training allowances or stipends, or direct payments for supportive services?

(a) INA grantees may pay training allowances or stipends to participants for their successful participation in and completion of education or training services (except such allowance may not be provided to participants in OJT). Allowances or stipends may not exceed the Federal or State minimum wage, whichever is higher.

(b) INA grantees may not pay a participant in a training activity when the person fails to participate without good cause.

(c) If a participant in a WIA-funded activity is involved in an employer-employee relationship, including participants in OJT, that participant must be paid wages and fringe benefits at the same rates as trainees or employees who have similar training, experience and skills and which are not less than the higher of the applicable Federal, State or local minimum wage. (WIA section 181(a)(1).)

(d) In accordance with the policy described in the two-year plan, INA grantees may pay incentive bonuses to participants who meet or exceed individual employability or training goals established in writing in the individual employment plan.

(e) INA grantees must comply with other restrictions listed in WIA sections 181 through 199 which apply to all programs funded under title I of WIA.

(f) INA grantees must comply with the provisions on labor standards in WIA section 181(b).

§ 668.380 What will DOL do to strengthen the capacity of INA grantees to deliver effective services?

The Department will provide appropriate TAT, as necessary, to INA grantees. This TAT will assist INA grantees to improve program performance and enhance services to the target population(s), as resources permit. (WIA sec. 166(h)(5).)

Subpart D—Supplemental Youth Services

§ 668.400 What is the purpose of the supplemental youth services program?

The purpose of this program is to provide supplemental employment and training and related services to Native American youth on or near Indian reservations, or in Oklahoma, Alaska, and Hawaii. (WIA sec. 166(d)(2)(A)(ii).)

§ 668.410 What entities are eligible to receive supplemental youth services funding?

Eligible recipients for supplemental youth services funding are limited to those tribal, Alaska Native, Native Hawaiian and Oklahoma tribal grantees funded under WIA section 166(d)(2)(A)(i), or other grantees serving those areas and/or populations specified in §668.400, that received funding under title II–B of the Job Training Partnership Act, or that are designated to serve an eligible area as specified in WIA section 166(d)(2)(A)(ii).

§ 668.420 What are the planning requirements for receiving supplemental youth services funding?

Beginning with PY 2000, eligible INA grantees must describe the supplemental youth services which they intend to provide in their Two Year Plan, (described more fully in §§668.710 and 668.720 of this part). This Plan includes the target population the grantee intends to serve, for example, drop-outs, juvenile offenders, and/or college students. It also includes the performance measures/standards to be utilized to measure program progress.

§ 668.430 What individuals are eligible to receive supplemental youth services?

(a) Participants in supplemental youth services activities must be Native Americans, as determined by the INA grantee according to §668.300(a) and must meet the definition of Eligible Youth, as defined in WIA section 101(13);

(b)Youth participants must be low-income individuals, except that not more than five percent (5%) who do not meet the minimum income criteria, may be considered eligible youth if they meet one or more of the following categories:

(1) School dropouts;

(2) Basic skills deficient as defined in WIA section 101(4);

(3) Have educational attainment that is one or more grade levels below the grade level appropriate to their age group;

(4) Pregnant or parenting;

(5) Have disabilities, including learning disabilities;

(6) Homeless or runaway youth;

(7) Offenders; or

(8) Other eligible youth who face serious barriers to employment as identified by the grantee in its Plan. (WIA section 129(c)(5).)

§ 668.440 How is funding for supplemental youth services determined?

(a) Beginning with PY 2000, supplemental youth funding will be allocated to eligible INA grantees on the basis of the relative number of Native American youth between the ages of 14 and 21, inclusive, in the grantee's designated INA service area as compared to the number of Native American youth in other INA service areas.

(b) The data used to implement this formula is provided by the U.S. Bureau of the Census.

(c) The hold harmless factor described in §668.296(c) also applies to supplemental youth services funding. This factor also will be determined in consultation with the grantee community and the Native American Employment and Training Council.

(d) The reallocation provisions of §668.296(d) will also apply to supplemental youth services funding.

(e) Any supplemental youth services funds not allotted to a grantee or refused by a grantee may be used for the purposes outlined in §668.296(e). Any such funds are in addition to, and not subject to the limitations on, amounts reserved under §668.296(e).

§ 668.450 How will supplemental youth services to be provided?

(a) INA grantees may offer supplemental services to youth throughout the school year, during the summer vacation, and/or during other breaks during the school year at their discretion;

(b) The Department encourages INA grantees to work with Local Educational Agencies to provide academic credit for youth activities whenever possible;

(c) INA grantees may provide participating youth with the activities listed in 20 CFR 668.340(e).

§ 668.460 Are there performance measures and standards applicable to the supplemental youth services program?

Yes. WIA section 166(e)(5) requires that the program plan contain a description of the performance measures to be used to assess the performance of grantees in carrying out the activities assisted under this section. Specific indicators of performance and levels of performance for supplemental youth services activities will be developed by the Department in partnership with the Native American Employment and Training Council, and transmitted to INA grantees as an administrative issuance.

Subpart E—Services to Communities

§ 668.500 What services may INA grantees provide to or for employers under section 166?

(a) INA grantees may provide a variety of services to employers in their areas. These services may include:

(1) Workforce planning which involves the recruitment of current or potential program participants, including job restructuring services;

(2) Recruitment and assessment of potential employees, with priority given to potential employees who are or who might become eligible for program services;

(3) Pre-employment training;

(4) Customized training;

(5) On-the-Job training (OJT);

(6) Post-employment services, including training and support services to encourage job retention and upgrading;

(7) Work experience for public or private sector work sites;

(8) Other innovative forms of worksite training.

(b) In addition to the services listed above, other grantee-determined services intended to assist eligible participants to obtain or retain employment may also be provided to or for employers approved in the grantee's Two Year Plan.

§ 668.510 What services may INA grantees provide to the community at large under section 166?

(a) INA grantees may provide services to the Native American communities in their designated service areas by engaging in program development and service delivery activities which:

(1) Strengthen the capacity of Native American-controlled institutions to provide education and work-based learning services to Native American youth and adults, whether directly or through other Native American institutions such as tribal colleges;

(2) Increase the community's capacity to deliver supportive services, such as child care, transportation, housing, health, and similar services needed by clients to obtain and retain employment;

(3) Use program participants engaged in education, training, work experience, or similar activities to further the economic and social development of Native American communities in accordance with the goals and values of those communities; and

(4) Engage in other community-building activities described in the INA grantee's Two Year Plan.

(b) INA grantees should develop their Two Year Plan in conjunction with, and in support of, strategic tribal planning and community development goals.

§ 668.520 Must INA grantees give preference to Indian/Native American entities in the selection of contractors or service providers?

Yes. INA grantees must give as much preference as possible to Indian organizations and to Indian-owned economic enterprises, as defined in section 3 of the Indian Financing Act of 1974 (25 U.S.C. 1452), when awarding any contract or subgrant.

§ 668.530 What rules govern the issuance of contracts and/or subgrants?

In general, INA grantees must follow the rules of OMB Circulars A–102 (for

tribes) or A–110 (for private non-profits) when awarding contracts and/or subgrants under WIA section 166. The common rules implementing those circulars are codified for DOL-funded programs at 29 CFR part 97 (A–102) or 29 CFR part 95 (A–110), and covered in the WIA regulations at 20 CFR 667.200. These rules do not apply to OJT contract awards.

Subpart F—Accountability for Services and Expenditures

§ 668.600 To whom is the INA grantee accountable for the provision of services and the expenditure of INA funds?

(a) The INA grantee is responsible to the Native American community to be served by INA funds.

(b) The INA grantee is also responsible to the Department of Labor, which is charged by law with ensuring that all WIA funds are expended:

(1) according to applicable laws and regulations;

(2) for the benefit of the identified Native American client group; and

(3) for the purposes approved in the grantee's plan and signed grant document.

§ 668.610 How is this accountability documented and fulfilled?

(a) Each INA grantee must establish its own internal policies and procedures to ensure accountability to the INA grantee's governing body, as the representative of the Native American community(ies) served by the INA program. At a minimum, these policies and procedures must provide a system for governing body review and oversight of program plans and measures and standards for program performance.

(b) Accountability to the Department is accomplished in part through on-site program reviews (monitoring), which strengthen the INA grantee's capability to deliver effective services and protect the integrity of Federal funds.

(c) In addition to audit information, as described at §668.850, and program reviews, accountability to the Department is documented and fulfilled by the submission of reports. These report requirements are as follows:

(1) Each INA grantee must submit an annual report on program participants and activities. This report must be received no later than 90 days after the end of the Program Year, and may be combined with the report on program expenditures. The reporting format is developed by DINAP, in consultation with the Native American Advisory Council, and published in the FEDERAL REGISTER.

(2) Each INA grantee must submit an annual report on program expenditures. This report must be received no later than 90 days after the end of the Program Year, and may be combined with the report on program participants and activities. For the purposes of report submission, a postmark or date indicating receipt by a private express delivery service is acceptable proof of timely submission.

(3) INA grantees are encouraged, but not required, to submit a descriptive narrative with their annual reports describing the barriers to successful plan implementation they have encountered. This narrative should also discuss program successes and other notable occurrences that effected the INA grantee's overall performance that year.

(4) Each INA grantee may be required to submit interim reports on program participants and activities and/or program expenditures during the Program Year. Interim reports must be received no later than 45 days after the end of the reporting period.

§ 668.620 What performance measures are in place for the INA program?

Indicators of performance measures and levels of performance in use for INA program will be those indicators and standards proposed in individual grantee plans and approved by DOL, in accordance with guidelines developed by the Department in consultation with INA grantees under WIA section 166(h)(2)(A).

§ 668.630 What are the requirements for preventing fraud and abuse under section 166?

(a) Each INA grantee must implement program and financial management procedures to prevent fraud and abuse. Such procedures must include a

process which enables the grantee to take action against contractors or subgrantees to prevent any misuse of funds. (WIA sec. 184.)

(b) Each INA grantee must have rules to prevent conflict of interest by its governing body. These conflict of interest rules must include a rule prohibiting any member of any governing body or council associated with the INA grantee from voting on any matter which would provide a direct financial benefit to that member, or to a member of his or her immediate family, in accordance with 20 CFR 667.200(a)(4) and 29 CFR 97.36(b) or 29 CFR 95.42.

(c) Officers or agents of the INA grantee must not solicit or personally accept gratuities, favors, or anything of monetary value from any actual or potential contractor, subgrantee, vendor or participant. This rule must also apply to officers or agents of the grantee's contractors and/or subgrantees. This prohibition does not apply to:

(1) Any rebate, discount or similar incentive provided by a vendor to its customers as a regular feature of its business;

(2) Items of nominal monetary value distributed consistent with the cultural practices of the Native American community served by the grantee.

(d) No person who selects program participants or authorizes the services provided to them may select or authorize services to any participant who is such a person's husband, wife, father, mother, brother, sister, son, or daughter unless:

(1)(i) The participant involved is a low income individual; or

(ii) The community in which the participant resides has a population of less than 1,000 Native American people; and

(2) The INA grantee has adopted and implemented the policy described in the Two Year Plan to prevent favoritism on behalf of such relatives.

(e) INA grantees are subject to the provisions of 41 U.S.C. 53 relating to kickbacks.

(f) No assistance provided under this Act may involve political activities. (WIA section 195(6).)

(g) INA grantees may not use funds under this Act for lobbying as provided in 29 CFR part 93.

(h) The provisions of 18 U.S.C. 665 and 666 regarding embezzlement apply to programs under WIA.

(i) Sectarian activities involving WIA funding or participants are prohibited.

(j) INA grantees are prohibited from discriminatory practices as outlined at WIA section 188, and the regulations implementing WIA section 188. However, this does not affect the legal requirement that all INA participants be Native American. Also, INA grantees are not obligated to serve populations other than those for which they were designated.

§ 668.640 What grievance systems must a section 166 program provide?

INA grantees must establish grievance procedures consistent with the requirements of WIA section 181(c) and 20 CFR 667.600.

§ 668.650 Can INA grantees exclude eligible segments of the population?

(a) No. INA grantees cannot exclude segments of the eligible population. INA grantees must document in their Two Year Plan that a system is in place to afford all members of the eligible population within the service area for which the grantee was designated an equitable opportunity to receive WIA services and activities.

(b) Nothing in this section restricts the ability of INA grantees to target subgroups of the eligible population (for example, the disabled, substance abusers, TANF recipients, or similar categories), as outlined in an approved Two Year Plan.

Subpart G—Section 166 Planning/ Funding Process

§ 668.700 What process must an INA grantee use to plan its employment and training services ?

(a) The INA grantee may utilize the planning procedures it uses to plan other activities and services.

(b) However, in the process of preparing its Two Year Plan for Native American WIA services, the INA grantee must consult with:

(1) Customers or prospective customers of such services;

(2) Prospective employers of program participants or their representatives;

(3) Service providers, including local educational agencies, which can provide services which support or are complementary to the grantee's own services; and

(4) Tribal or other community officials responsible for the development and administration of strategic community development efforts.

§ 668.710 What planning documents must an INA grantee submit to the Department?

Each grantee receiving funds under WIA sec. 166 must submit to DINAP a comprehensive services plan and a projection of participant services and expenditures covering the two-year planning cycle. The Department will, in consultation with the Native American Advisory Council, issue budget and planning instructions which grantees must use when preparing their plan.

§ 668.720 What information must these planning documents contain?

(a) The comprehensive services plan must cover the two Program Years included within a designation cycle. According to planning instructions issued by the Department, the comprehensive services plan must describe in narrative form:

(1) The specific goals of the INA grantee's program for the two Program Years involved;

(2) The method the INA grantee will use to target its services on specific segments of its service population;

(3) The array of services which the INA grantee intends to make available;

(4) The system the INA grantee will use to be accountable for the results of its program services. Such results must be judged in terms of the outcomes for individual participants and/or the benefits the program provides to the Native American community(ies) which the INA grantee serves. Plans must include the performance information required by § 668.620;

(5) The ways in which the INA grantee will seek to integrate or coordinate and ensure nonduplication of its employment and training services with:

(i) The One-Stop delivery system in its local workforce investment area, including a description of any MOU's which affect the grantee's participation;

(ii) Other services provided by local Workforce Investment Boards;

(iii) Other program operators;

(iv) Other services available within the grantee organization; and

(v) Other services which are available to Native Americans in the community, including planned participation in the One-Stop system.

(b) Beginning in PY 2000, eligible INA grantees must include in their plan narratives a description of activities planned under the supplemental youth program, including items described in paragraph (a) (1) through (5) of this section.

(c) INA grantees must include a detailed budget of proposed Administrative Costs, utilizing the definition at 20 CFR 667.220, to use as a basis of negotiation with DINAP.

(d) INA grantees' plans must contain a projection of participant services and expenditures for each Program Year, consistent with guidance issued by the Department.

(e) For PY 1999, INA grantees who are early implementers under WIA must prepare and submit an Annual Plan rather than a Two Year Plan.

§ 668.730 When must these plans be submitted?

(a) The two-year plans are due at a date specified by DINAP in the year in which the two-year designation cycle begins. The Department will announce exact submission dates in the biennial planning instructions.

(b) Plans from INA grantees who are eligible for supplemental youth services funds must include their supplemental youth plans as part of their regular Two Year Plan. For PY 1999, a separate youth plan is required, and INA grantees will be required to submit their plans early, to allow for prompt funding of the youth component.

(c) INA grantees must submit modifications for the second year reflecting exact funding amounts, after the individual allotments have been determined. They will be submitted at a time determined by the Department, but no later than June 1 prior to the

beginning of the second year of the designation cycle.

§ 668.740 How will the Department review and approve such plans?

(a) The Department will approve a grantee's planning documents prior to the date on which funds for the program become available unless:

(1) The planning documents do not contain the information specified in these regulations; or

(2) The services which the INA grantee proposes are not permitted under WIA or applicable regulations.

(b) The Department may approve a portion of the plan, and disapprove other portions. The grantee also has the right to appeal the Department's decision to the Office of the Administrative Law Judges under the procedures at 20 CFR 667.800 or 667.840. While the INA grantee exercises its right to appeal, the grantee must implement the approved portions of the plan.

(c) If the Department disapproves all or part of an INA grantee's plan, and that disapproval is sustained in the appeal process, the INA grantee will be given the opportunity to amend its plan so that it can be approved.

(d) If an INA grantee's plan is amended but is still disapproved, the grantee will have the right to appeal the Department's decision to the Offices of the Administrative Law Judges under the procedures at 20 CFR 667.800 or 667.840.

§ 668.750 Under what circumstances can the Department or the INA grantee modify the terms of the grantee's plan(s)?

(a) The Department may unilaterally modify the INA grantee's plan to add funds or, if required by Congressional action, to reduce the amount of funds available for expenditure.

(b) The INA grantee may request Departmental approval to modify its plan to add, expand, delete, or diminish any service allowable under these regulations. The INA grantee may modify its plan without Departmental approval, unless the modification reduces the total number of participants to be served annually under the grantee's program by a number which exceeds 25 percent of the participants previously proposed to be served, or by 25 participants, whichever is larger.

(c) The Department will act upon any modification within thirty (30) calendar days of receipt of the proposed modification. In the event that further clarification or modification is required, the Department may extend the thirty (30) day time frame to conclude appropriate negotiations.

Subpart H—Administrative Requirements

§ 668.800 What systems must an INA grantee have in place to administer an INA program?

(a) Each INA grantee must have a written system describing the procedures the grantee uses with respect to:

(1) The hiring and management of personnel paid with program funds;

(2) The acquisition and management of property purchased with program funds;

(3) Financial management practices;

(4) A participant grievance system which meets the requirements in section 181(c) of WIA and 20 CFR 667.600; and

(5) A participant records system.

(b) Participant records systems must include:

(1) A written or computerized record containing all the information used to determine the person's eligibility to receive program services;

(2) The participant's signature certifying that all the eligibility information he or she provided is true to the best of his/her knowledge; and

(3) The information necessary to comply with all program reporting requirements.

§ 668.810 What types of costs are allowable expenditures under the INA program?

Rules relating to allowable costs under WIA are covered in the consolidated regulations at 20 CFR 667.200 through 667.220.

§ 668.820 What rules apply to administrative costs under the INA program?

The definition and treatment of administrative costs are covered in the

consolidated regulations at 20 CFR 667.210 and 667.220.

§ 668.830 How should INA program grantees classify costs?

Cost classification is covered in the WIA regulations at 20 CFR 667.200 through 667.220. For purposes of the INA program, program costs also include costs associated with other activities such as Tribal Employment Rights Office (TERO), and supportive services as defined in WIA sec. 101(46).

§ 668.840 What cost principles apply to INA funds?

The cost principles described in OMB Circulars A–87 (for tribal governments), A–122 (for private non-profits), and A–21 (for educational institutions), and the regulations at 20 CFR 667.200(c), apply to INA grantees, depending on the nature of the grantee organization.

§ 668.850 What audit requirements apply to INA grants?

The audit requirements established under the Department's regulations at 29 CFR part 99, which implement OMB Circular A–133, apply to all Native American WIA grants. These regulations, for all of WIA, are cited at 20 CFR 667.200(b). Audit resolution procedures are covered at 20 CFR 667.500 and 667.510.

§ 668.860 What cash management procedures apply to INA grant funds?

INA grantees must draw down funds only as they actually need them. The U.S. Department of Treasury regulations which implement the Cash Management Improvement Act, found at 31 CFR part 205, apply by law to most recipients of Federal funds. Special rules may apply to those grantees required to keep their funds in interest-bearing accounts, and to grantees participating in the demonstration under Pub. L. 102–477.

§ 668.870 What is "program income" and how is it regulated in the INA program?

(a) Program income is defined and regulated by WIA section 195(7), 20 CFR 667.200(a)(5) and the applicable rules in 29 CFR parts 95 and 97.

(b) For grants made under this part, program income does not include income generated by the work of a work experience participant in an enterprise, including an enterprise owned by an Indian tribe or Alaska Native entity, whether in the public or private sector.

(c) Program income does not include income generated by the work of an OJT participant in an establishment under paragraph (b) of this section.

Subpart I—Miscellaneous Program Provisions

§ 668.900 Does the WIA provide regulatory and/or statutory waiver authority?

Yes. WIA section 166(h)(3) permits waivers of any statutory or regulatory requirement imposed upon INA grantees (except for the areas cited in § 668.920). Such waivers may include those necessary to facilitate WIA support of long term community development goals.

§ 668.910 What information is required to document a requested waiver?

To request a waiver, an INA grantee must submit a plan indicating how the waiver will improve the grantee's WIA program activities. The Department will provide further guidance on the waiver process, consistent with the provisions of WIA section 166(h)(3).

§ 668.920 What provisions of law or regulations may not be waived?

Requirements relating to:

(a) Wage and labor standards;

(b) Worker rights;

(c) Participation and protection of workers and participants;

(d) Grievance procedures;

(e) Judicial review; and

(f) Non-discrimination may not be waived. (WIA sec 166(h)(3)(A).)

§ 668.930 May INA grantees combine or consolidate their employment and training funds?

Yes. INA grantees may consolidate their employment and training funds under WIA with assistance received from related programs in accordance with the provisions of the Indian Employment, Training and Related Services Demonstration Act of 1992 (Pub. L.

102–477) (25 U.S.C. 3401 *et seq.*). Also, Federally-recognized tribes that administer INA funds and funds provided by more than one State under other sections of WIA title I may enter into an agreement with the Governors to transfer the State funds to the INA program. (WIA sec. 166(f) and (h)(6).)

§ 668.940 What is the role of the Native American Employment and Training Council?

The Native American Employment and Training Council is a body composed of representatives of the grantee community which advises the Secretary on all aspects of Native American employment and training program implementation. WIA section 166(h)(4) continues the Council essentially as it is currently constituted, with the exception that all the Council members no longer have to be Native American. However, the nature of the consultative process remains essentially unchanged. The Department continues to support the Council.

PART 669—MIGRANT AND SEASONAL FARMWORKER PROGRAMS UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

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Sec.

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AUTHORITY: Section 506(c), Pub. L. 105–220; 20 U.S.C. 9276(c)

SOURCE: 64 FR 18746, Apr. 15, 1999, unless otherwise noted.

Subpart A—Purpose and Definitions

§ 669.100 What is the purpose of the Migrant and Seasonal Farmworker (MSFW) program established under WIA section 167?

The purpose of the MSFW Program is to strengthen the ability of eligible migrant and seasonal farmworkers and their families to achieve economic self-sufficiency. This part provides the regulatory requirements applicable to the expenditure of WIA section 167 funds for such program.

§ 669.110 What definitions apply to this program?

In addition to the definitions found in WIA secs. 101 and 167 and in 20 CFR 660.330, the following definitions apply to programs under this subpart:

Allowances means direct payments, which must not exceed the higher of the State or Federal minimum wage, made to MSFW participants during their enrollment to enable them to participate in training services.

Capacity enhancement means the technical assistance afforded to grantees and grantee staff by the Department to improve the quality of the program and the delivery of program services to MSFWs.

Department means the U.S. Department of Labor, including its agencies and organizational units, unless otherwise indicated.

Disadvantaged means a farmworker whose income, for any 12 consecutive months out of the 24 months immediately before the farmworker applies for the program, does not exceed the higher of either the poverty line or 70 percent of the lower living standard income level.

DSFP means the Division of Seasonal Farmworker Programs within the Employment and Training Administration of the Department, or a successor organizational unit.

Eligibility determination period means any consecutive 12-month period within the 24-month period immediately preceding the date of application for the MSFW program by the applicant farmworker.

Emergency Assistance means assistance that addresses immediate needs of farmworkers and their families, provided by MSFW grantees. Except for evidence to support legal working status in the United States and Selective Service registration, where applicable, the applicant's self-attestation is accepted as eligibility for emergency assistance.

Farmwork means those occupations in the agricultural industries identified by the Department for inclusion in its allocation formula for MSFW-funded programs.

MSFW program grantee means an entity which is awarded a WIA grant directly from the Department to carry out the MSFW program in one or more designated States or substate areas.

MSFW means a Migrant or Seasonal Farmworker under WIA section 167.

MOU means Memorandum of Understanding.

Self-certification means a farmworker's signed attestation that the information he/she submits to demonstrate eligibility for the MSFW program is true and accurate.

Service area means the geographical jurisdiction in which a WIA section 167 grantee is designated to operate.

Work experience means a planned, structured learning experience that takes place in a workplace for a limited period of time. Work experience may paid or unpaid, as appropriate.

§ 669.120 How is the MSFW program administered by the Department of Labor?

This program is centrally administered by the Department of Labor in a manner consistent with the requirements of WIA section 167. As described in §669.210, the Secretary designates grantees using procedures consistent with standard Federal government competitive procedures. The Secretary awards other grants and contracts using similar competitive procedures.

§ 669.130 What unit within the Department administers the Migrant and Seasonal Farmworker programs funded under WIA section 167?

The Department has designated the Division of Seasonal Farmworker Programs (DSFP), or its successor organization, within the Employment and Training Administration, as the organizational unit that administers MSFW programs at the Federal level.

§ 669.140 How does the DSFP assist the MSFW grantee organizations serve farmworker customers?

The Department provides technical assistance and training to MSFW grantees, for the purposes of program implementation and program performance management leading to enhancement of services to and continuous improvement in the employment outcomes of farmworkers.

§ 669.150 How are regulations established for this program?

In developing regulations for WIA section 167, the Secretary consults with the Migrant and Seasonal Farmworker Employment and Training Advisory Committee. The regulations and program guidance consider the economic circumstances and demographics of eligible migrant and seasonal farmworkers.

§ 669.160 How does the Department consult with MSFW organizations in developing rules, regulations and standards of accountability and other policy guidance for the MSFW Programs?

(a) The Department considers the MSFW grantee community as a full partner in the development of policies for the MSFW programs under the Act.

(b) The Department has established and continues to support the MSFW Employment and Training Advisory Committee. Through the Advisory Committee, the Department actively seeks and considers the views of the grantee community prior to establishing policies and/or program regulations, according to the requirements of WIA section 167.

§ 669.170 What WIA regulations apply to the programs funded under WIA section 167?

(a) The regulations found in this subpart;

(b) The general administrative requirements found in 20 CFR part 667, including the regulations concerning Complaints, Investigations and Hearings found at 20 CFR part 667, subpart E through subpart H, which cover programs under WIA section 167;

(c) The Department's regulations codifying the common rules implementing Office of Management and Budget (OMB) Circulars, which generally apply to Federal programs carried out by State and local governments and nonprofit organizations at 29 CFR parts 95, 96, 97, and 99, as applicable.

Subpart B—MSFW Program's Service Delivery System

§ 669.200 Who is eligible to receive a MSFW grant?

(a) To be eligible to receive a grant under this section, an entity must have:

(1) An understanding of the problems of eligible migrant and seasonal farmworkers and their dependents;

(2) A familiarity with the agricultural industry and the labor market needs of the geographic area to be served;

(3) The capacity to effectively administer a diversified program of workforce investment activities and related assistance for eligible migrant and seasonal farmworkers (including farmworker youth) as described in paragraph (b) of this section.

(b) For purposes of paragraph (a)(3) of this section, an entity's ''capacity to effectively administer'' a program may be demonstrated by:

(1) Organizational experience; or

(2) Significant experience of its key staff in administering similar programs.

§ 669.210 How does an eligible entity become a MSFW grantee?

To become a MSFW grantee and receive a grant under this subpart, the entity must respond to a Solicitation for Grant Applications (SGA). The SGA may contain additional requirements for the grant application or the grantee's two-year plan. Under the SGA, grantees will be selected using standard Federal Government competitive procedures. The entity's proposal must describe a two-year strategy for meeting the needs of eligible migrant and seasonal farmworkers in the geographic area the entity seeks to serve.

§ 669.220 What is the role of the MSFW grantee in the One-Stop delivery system?

(a) In those local areas where there is a grantee MSFW field office, the grantee is a required partner of the local One-Stop delivery system and is subject to the provisions relating to such partners described in 20 CFR part 662. Consistent with those provisions, the grantee and the Local Board must negotiate an MOU which sets forth their respective responsibilities for making the full range of core services available to farmworkers. In local areas without a grantee MSFW field office but with a large concentration of MSFWs, the grantee should consider the availability of electronic connections and other means to participate in the One-stop system in that area, in order to serve those individuals.

(b) The MOU should reflect appropriate and equitable services to MSFWs, and may include costs of services to MSFWs incurred by the One-Stop that extend beyond Wagner-Peyser funded services and activities.

§ 669.230 Can a MSFW grantee's designation be terminated?

Yes, a grantee's designation may be terminated for cause:

(a) By the Secretary, in emergency circumstances when such action is necessary to protect the integrity of Federal funds or ensure the proper operation of the program. Any grantee so terminated will be provided with written notice and an opportunity for a hearing within 30 days after the termination (WIA sec. 184(e).); or

(b) By the Grant Officer, if there is a substantial or persistent violation of the requirements in the Act or these regulations. In such a case, the Grant Officer must provide the grantee with 60 days prior written notice, stating the reasons why termination is proposed, and the applicable appeal procedures.

§ 669.240 How will the Department use funds appropriated under WIA section 167 for MSFW programs?

(a) At least 94 percent of the funds appropriated each year for WIA section 167 activities must be allocated to State service areas, based on the distribution of the eligible MSFW population determined under a formula which has been published in the FEDERAL REGISTER. Grants are awarded under the competitive process for the provision of services to eligible farmworkers within each service area.

(b) The balance, 6 percent of the appropriated funds, will be used for discretionary purposes for such activities as grantee technical assistance and support of farmworker housing activities.

Subpart C—MSFW Program Customers and Available Program Services

§ 669.300 What are the general responsibilities of the MSFW grantees?

Each grantee is responsible for providing needed services in accordance with a service delivery strategy described in its approved grant plan. These services must reflect the needs of the MSFW population in the service

area and include the services and training activities that are necessary to achieve each participant's employment goals.

§ 669.310 What are the basic components of a MSFW service delivery strategy?

The MSFW service delivery strategy must include:

(a) A customer-centered case management approach;

(b) The provision of workforce investment activities, which include, core services, intensive services, and training services as described in WIA section 134, as appropriate;

(c) The arrangements under the MOUs with the applicable Local Workforce Investment Boards for the delivery of core services to MSFWs.

§ 669.320 Who is eligible to receive services under the MSFW Program?

Disadvantaged migrant and seasonal farmworkers, as defined in § 669.110, and their dependents are eligible for services funded by the MSFW program.

§ 669.330 How are services delivered to the customer?

To ensure that all services are focused on the customer's needs, services are provided through a case-management approach and may include: Core, intensive and training services; and related assistance, which includes emergency assistance and supportive services. The basic services and delivery of case-management activities are further described at §§ 669.340 through 669.410 of this subpart. Consistent with 20 CFR part 663, prior to intensive services, a participant must receive at least one core service, and, prior to training services, a participant must receive at least one intensive service.

§ 669.340 What core services are available to eligible MSFWs?

The core services identified in WIA section 134(d)(2).

§ 669.350 How are core services delivered to MSFWs?

(a) The full range of core services are available to MSFWs, as well as other individuals, at One-Stop Centers as described in 20 CFR part 662.

(b) Where a MSFW field office is located within the workforce investment area of a One-Stop center, core services must be made available through the One-Stop delivery system, as determined in the required MOU between the Local Board and the MSFW grantee.

§ 669.360 May grantees provide emergency assistance to MSFWs?

(a) Yes. Emergency assistance (as defined in § 669.110 of this part) is a form of the related assistance that is authorized under WIA section 167(d) and may be provided by a grantee as described in the grant plan.

(b) In providing emergency assistance, the MSFW may use an abbreviated eligibility determination process that accepts the applicant's self-attestation as final evidence of eligibility, except that self-attestation may not be used to establish the requirements of legal working status in the United States, and Selective Service registration, where applicable.

§ 669.370 What intensive services may be provided to eligible MSFWs?

(a) Intensive services available to farmworkers include those described in WIA section 134(d)(3)(C).

(b) Intensive services may also include:

(1) Dropout prevention activities;

(2) Allowance payments;

(3) Work experience, which:

(i) Is designed to promote the development of good work habits and basic work skills at the work-site (work experience may be conducted with public and private non-profit and private for-profit sectors); and

(ii) Compensates participants at no less than the applicable State or Federal minimum wage.

(4) Literacy and English-as-a-Second language; and

(5) Other services identified in the approved grant plan.

§ 669.380 What is the objective assessment that is authorized as an intensive service?

(a) An objective assessment is a procedure designed to comprehensively assess the skills, abilities, and interests

of each employment and training participant through the use of diagnostic testing and other assessment tools. The methods used by the grantee in conducting the objective assessment may include:

(1) Structured in-depth interviews;

(2) Skills and aptitude assessments;

(3) Performance assessments (for example, skills or work samples, including those that measure interest and capability to train in nontraditional employment);

(4) Interest or attitude inventories;

(5) Career guidance instruments;

(6) Aptitude tests; and

(7) Basic skills tests.

(b) The objective assessment is an ongoing process that requires the grantee staff to remain in close consultation with each participant to continuously obtain current information about the participant's progress that may be relevant to his/her Individual Employment Plan (IEP).

§ 669.400 What are the elements of the IEP that is authorized as an intensive service?

The elements of the IEP are:

(a) Joint development: The grantee develops the IEP in partnership with the participant;

(b) Customer focus: The combination of services chosen with the participant must be consistent with the results of any objective assessment, responsive to the expressed goals of the participant, and must include periodic evaluation of planned goals and a record of accomplishments in consultation with the participant;

(c) Length/type of service: The type and duration of intensive or training services must be based upon:

(1) The employment/career goal;

(2) Referrals to other programs for specified activities; and

(3) The delivery agents and schedules for intensive services, training and training-related supportive services; and

(d) Privacy: As a customer-centered case management tool, an IEP is a personal record and must receive confidential treatment.

§ 669.410 What training services may be provided to eligible MSFWs?

(a) Training services include those described in WIA sections 134(d)(4)(D) and 167(d), and may be described in the IEP and may include:

(1) On-the-job training activities under a contract between the participating employer and the grantee;

(2) Workplace safety and farmworker pesticide training;

(3) Housing development assistance;

(4) Training-related supportive services; and

(b) Other training activities identified in the approved grant plan.

§ 669.420 What must be included in an on-the-job training contract?

At a minimum, the on-the-job training contract must include:

(a) The occupation(s) for which training is to be provided;

(b) The duration of training;

(c) The wage rate to be paid to the trainee;

(d) The rate of reimbursement;

(e) The maximum amount of reimbursement;

(f) A training outline that reflects the work skills required for the position;

(g) An outline of any other separate classroom training that may be provided by the employer;

(h) Application of the general program requirements of WIA section 195(4) and section 101(31); and

(i) The employer's agreement to maintain and make available time and attendance, payroll and other records to support amounts claimed by the employer for reimbursement under the OJT contract;

Subpart D—Performance Accountability, Planning and Waiver Provision

§ 669.500 What performance measures and standards apply to the MSFW Program?

(a) The MSFW program will use the core indicators of performance common to the adult and youth programs, described in 20 CFR part 666. The levels of performance for the farmworker indicators will be established pursuant to a negotiation between the Department

and the grantee. The levels must take into account the characteristics of the population to be served and the economic conditions in the service area. Proposed levels of performance are to be included in the grantee plan submission, and the agreed to levels must be included in the approved plan.

(b) The Department may develop additional performance indicators with appropriate levels of performance for evaluating programs that serve farmworkers and which are reflective of the State service area economy and local demographics of eligible MSFWs. The levels of performance for these additional indicators must be negotiated with the grantee and included in the approved plan.

§ 669.510 What planning documents must a MSFW grantee submit to the Department?

Each grantee receiving WIA section 167 program funds must submit to DSFP a comprehensive service delivery plan and a projection of participant services and expenditures covering the two-year designation cycle.

§ 669.520 What information is required in the MSFW grant plans?

An MSFW grantee's biennial plan must describe:

(a) The employment and education needs of the farmworker population to be served;

(b) The manner in which proposed services to farmworkers and their families will strengthen their ability to obtain or retain employment or stabilize their agricultural employment;

(c) The related assistance and supportive services to be provided and the manner in which such assistance and services are to be coordinated with other available services;

(d) The performance indicators and proposed levels of performance used to assess the performance of such entity, including the specific goals of the grantee's program for the two Program Years involved;

(e) The method the grantee will use to target its services on specific segments of the eligible population, as appropriate;

(f) The array of services which the grantee intends to make available, with costs specified on forms prescribed by the Department. These forms will indicate how many participants the grantee expects to serve, by activity, the results expected under the grantee's plan, and the anticipated expenditures by cost category; and

(g) Its response to any other requirements set forth in the SGA issued under § 669.210 of this part.

§ 669.530 What are the submission dates for these plans?

Plan submission dates will be announced by the Department in the SGA issued under § 669.220 of this part.

§ 669.540 Under what circumstances are the terms of the grantee's plan modified by the grantee or the Department?

(a) Plans must be modified to reflect the funding level for the second year of the designation cycle. Modifications for second year funding must be submitted at a time to be determined by the Department, generally no later than June 1 prior to the beginning of the second year of the designation cycle.

(b) The Department may unilaterally modify the grantee's plan to add funds or, if the total amount of funds available for allotment is reduced by Congress, to reduce each grantee's grant amount.

(c) The grantee may modify its plan to add, delete, expand, or reduce any part of the program plan or allowable activities. Such modifications may be made by the grantee without Departmental approval except where the modification reduces the total number of participants to be served annually under intensive and/or training services by 15 percent or more, in which case the plan may only be modified with Departmental approval.

(d) If the grantee is approved for a regulatory waiver under §§ 669.560 and 669.570, the grantee must submit a modification of its service delivery plan to reflect the effect of the waiver.

§ 669.550 How are costs classified under the MSFW Program?

Costs are classified as follows:

(a) Administrative costs, as defined in 20 CFR 667.220; and

(b) Program costs, which are all other costs not defined as administrative.

Program costs must be classified and reported in the following categories:

(1) Related assistance including emergency assistance and supportive services, including allocated staff costs; and

(2) All other program services, including allocated staff costs.

§ 669.560 Are there regulatory and/or statutory waiver provisions that apply to WIA section 167?

(a) The statutory waiver provision at WIA section 189(i) does not apply to WIA section 167.

(b) MSFW grantees may request waiver of any regulatory provisions only when such regulatory provisions are:

(1) Not required by WIA;

(2) Not related to wage and labor standards, nondisplacement protection, worker rights, participation and protection of workers and participants, and eligibility of participants, grievance procedures, judicial review, nondiscrimination, allocation of funds, procedures for review and approval of plans; and

(3) Not related to the key reform principles embodied in WIA, described in 20 CFR 661.400.

§ 669.570 What information is required to document a requested waiver?

(a) To request a waiver, a grantee must submit a waiver plan that:

(1) Describes the goals of the waiver, the expected programmatic outcomes, and how the waiver will improve the provision of WIA activities;

(2) Is consistent with guidelines established by the Department and the waiver provisions at 20 CFR 661.400 through 661.420; and

(b) Includes a modified service delivery plan reflecting the effect of requested waiver.

Subpart E—The MSFW Youth Program

§ 669.600 What is the purpose of the WIA section 167 MSFW Youth Program?

The purpose of the MSFW youth program is to provide an effective and comprehensive array of educational opportunities, employment skills, and life enhancement activities to at-risk and out-of-school MSFW youth that lead to success in school, economic stability and development into productive members of society.

§ 669.610 What is the relationship between the MSFW youth program and the MSFW program authorized at WIA section 167?

The MSFW youth program is funded under WIA section 127(b)(1)(A)(iii) to provide farmworker youth activities under the auspices of WIA section 167. These funds are specifically earmarked for MSFW youth. Funds provided for the section 167 program may also be used for youth, but are not limited to this age group.

§ 669.620 How do the MSFW youth program regulations apply to the MSFW program authorized under WIA section 167?

(a) This subpart applies only to the administration of grants for MSFW youth programs funded under WIA section 127(b)(1)(A)(iii).

(b) The regulations for the MSFW program in this part apply to the administration of the MSFW youth program, except as modified in this subpart.

§ 669.630 What are the requirements for designation as a "MSFW youth program grantee"?

Any entity may apply for designation as a ''MSFW youth program grantee'' consistent with requirements described in the SGA. The Department gives special consideration to an entity in any service area for which the entity has been designated as a WIA section 167 MSFW program grantee.

§ 669.640 What is the process for applying for designation as a MSFW youth program grantee?

(a) To apply for designation as a MSFW youth program grantee, entities must respond to an SGA by submitting a plan that meets the requirements of WIA section 167(c)(2) and describes a two-year strategy for meeting the needs of eligible MSFW youth in the service area the entity seeks to serve.

(b) The designation process is conducted competitively (subject to §669.210) through a selection process distinct from the one used to select WIA section 167 MSFW program grantees.

§ 669.650 How are MSFW youth funds allocated to section 167 grantees?

The allocation of funds among entities designated as WIA section 167 MSFW Youth Program grantees is based on the comparative merits of the applications, in accordance with criteria set forth in the SGA. However, the Secretary may include criteria in the SGA that promote a geographical distribution of funds and that encourages both large- and small-scale programs.

§ 669.660 What planning documents and information are required in the application for MSFW youth grants and when must they be filed?

The required planning documents and other required information and the submission dates for filing are described in the SGA.

§ 669.670 Who is eligible to receive services under the section 167 MSFW youth program?

Disadvantaged youth, ages 14 through 21, who are individually eligible or are members of eligible families under the WIA sec. 167 MSFW program may receive these services.

§ 669.680 What activities and services may be provided under the MSFW youth program?

(a) Based on an evaluation and assessment of the needs of MSFW youth participants, grantees may provide activities and services to MSFW youth that include:

(1) Intensive services and training services, as described in §§669.400 and 669.410 of this part;

(2) Life skills activities which may include self and interpersonal skills development;

(3) Community service projects;

(4) Small business development technical assistance and training in conjunction with entrepreneurial training;

(5) Supportive services; and

(b) Other activities and services that conform to the use of funds for youth activities described in 20 CFR part 664.

PART 670—THE JOB CORPS UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

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AUTHORITY: Sec. 506(c), Pub. L. 105–220; 20 U.S.C. 9276(c).

SOURCE: 64 FR 18750, Apr. 15, 1999, unless otherwise noted.

Subpart A—Scope and Purpose

§ 670.100 What is the scope of this part?

The regulations in this part are an outline of the requirements that apply to the Job Corps program. More detailed policies and procedures are contained in a Policy and Requirements Handbook issued by the Secretary. Throughout this part, phrases like ''according to instructions (procedures) issued by the Secretary'' refer to the Policy and Requirements Handbook and other Job Corps directives.

§ 670.110 What is the Job Corps program?

Job Corps is a national program that operates in partnership with States and communities, local Workforce Investment Boards, youth councils, One-Stop Centers and partners, and other youth programs to provide education and training, primarily in a residential setting, for low income young people. The objective of Job Corps is to provide young people with the skills they need to obtain and hold a job, enter the Armed Forces, or enroll in advanced training or further education.

§ 670.120 What definitions apply to this part?

The following definitions apply to this part:

Absent Without Official Leave (AWOL) means an adverse enrollment status to which a student is assigned based on extended, unapproved absence from his/her assigned center or off-center place of duty. Students do not earn Job Corps allowances while in AWOL status.

Applicable local board means a local Workforce Investment Board that:

(1) works with a Job Corps center and provides information on local demand occupations, employment opportunities, and the job skills needed to obtain the opportunities, and

(2) serves communities in which the graduates of the Job Corps seek employment when they leave the program.

Capital improvement means any modification, addition, restoration or other improvement:

(1) Which increases the usefulness, productivity, or serviceable life of an existing site, facility, building, structure, or major item of equipment;

(2) Which is classified for accounting purposes as a ''fixed asset;'' and

(3) The cost of which increases the recorded value of the existing building, site, facility, structure, or major item of equipment and is subject to depreciation.

Center means a facility and an organizational entity, including all of its parts, providing Job Corps training and designated as a Job Corps center.

Center operator means a Federal, State or local agency, or a contractor that runs a center under an agreement or contract with DOL.

Civilian conservation center (CCC) means a center operated on public land under an agreement between DOL and another Federal agency, which provides, in addition to other training and assistance, programs of work-based learning to conserve, develop, or manage public natural resources or public recreational areas or to develop community projects in the public interest.

Contract center means a Job Corps center operated under a contract with DOL.

Contracting officer means the Regional Director or other official authorized to enter into contracts or agreements on behalf of DOL.

Enrollee means an individual who has voluntarily applied for, been selected for, and enrolled in the Job Corps program, and remains with the program, but has not yet become a graduate. Enrollees are referred to as ''students'' in this part.

Enrollment means the process by which individual formally becomes a student in the Job Corps program.

Graduate means an enrollee who has:

(1) Completed the requirements of a vocational training program, or received a secondary school diploma or its equivalent as a result of participating in the Job Corps program; and

(2) Achieved job readiness and employment skills as a result of participating in the Job Corps program.

Individual with a disability means an individual with a disability as defined in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102).

Interagency agreement means a formal agreement between DOL and another Federal agency administering and operating centers. The agreement establishes procedures for the funding, administration, operation, and review of those centers as well as the resolution of any disputes.

Job Corps means the agency of the Department established by section 143 of the Workforce Investment Act of 1998 (WIA) (20 U.S.C. 9201) to perform those functions of the Secretary of Labor set forth in subtitle C of WIA Title I.

Job Corps Director means the chief official of the Job Corps or a person authorized to act for the Job Corps Director.

Low income individual means an individual who meets the definition in WIA section 101(25).

National Office means the national office of Job Corps.

National training contractor means a labor union, union-affiliated organization, business organization, association or a combination of such organizations, which has a contract with the national office to provide vocational training, placement, or other services.

Operational support services means activities or services required to support the operation of Job Corps, including:

(1) Outreach and admissions services;

(2) Contracted vocational training and off-center training;

(3) Placement services;

(4) Continued services for graduates;

(5) Certain health services; and

(6) Miscellaneous logistical and technical support.

Outreach and admissions agency means an organization that performs outreach, and screens and enrolls youth under a contract or other agreement with Job Corps.

Placement means student employment, entry into the Armed Forces, or enrollment in other training or education programs following separation from Job Corps.

Placement agency means an organization acting under a contract or other agreement with Job Corps to provide placement services for graduates and, the extent possible, for former students.

Regional appeal board means the board designated by the Regional Director to consider student appeals of disciplinary discharges.

Regional Director means the chief Job Corps official of a regional office or a person authorized to act for the Regional Director.

Regional Office means a regional office of Job Corps.

Regional Solicitor means the chief official of a regional office of the DOL Office of the Solicitor, or a person authorized to act for the Regional Solicitor.

Separation means the action by which an individual ceases to be a student in the Job Corps program, either voluntarily or involuntarily.

Student means an individual enrolled in the Job Corps.

Unauthorized goods means:

(1) Firearms and ammunition;

(2) Explosives and incendiaries;

(3) Knives with blades longer than 2 inches;

(4) Homemade weapons;

(5) All other weapons and instruments used primarily to inflict personal injury;

(6) Stolen property;

(7) Drugs, including alcohol, marijuana, depressants, stimulants, hallucinogens, tranquilizers, and drug paraphernalia except for drugs and/or paraphernalia that are prescribed for medical reasons; and

(8) Any other goods prohibited by the center operator in a student handbook.

§ 670.130 What is the role of the Job Corps Director?

The Job Corps Director has been delegated the authority to carry out the responsibilities of the Secretary under Subtitle I–C of the Act. Where the term ''Secretary'' is used in this part 670 to refer to establishment or issuance of guidelines and standards directly relating to the operation of the Job Corps program, the Job Corps Director has that responsibility.

Subpart B—Site Selection and Protection and Maintenance of Facilities

§ 670.200 Who decides where Job Corps centers will be located?

(a) The Secretary must approve the location and size of all Job Corps centers.

(b) The Secretary establishes procedures for making decisions concerning the establishment, relocation, expansion, or closing of contract centers.

§ 670.210 How are center facility improvements and new construction handled?

The Secretary issues procedures for requesting, approving, and initiating capital improvements and new construction on Job Corps centers.

§ 670.220 Is the Secretary responsible for protection and maintenance of center facilities?

(a) Yes. The Secretary establishes procedures for the protection and maintenance of contract center facilities owned or leased by the Department of Labor, that are consistent with Federal Property Management Regulations at 41 CFR Chapter 101.

(b) Federal agencies operating civilian conservation centers (CCC's) on public land are responsible for protection and maintenance of CCC facilities.

(c) The Secretary issues procedures for conducting periodic facility surveys of centers to determine their condition and to identify needs such as correction of safety and health deficiencies, rehabilitation, and/or new construction.

Subpart C—Funding and Selection of Service Providers

§ 670.300 What entities are eligible to receive funds to operate centers and provide training and operational support services?

(a) Entities eligible to receive funds under this subpart to operate centers include:

(1) Federal, State, and local agencies;

(2) Private for-profit and non-profit corporations;

(3) Indian tribes and organizations; and

(4) Area vocational education or residential vocational schools. (WIA sec. 147(a)(1)(A) and (d)).

(b) Entities eligible to receive funds to provide outreach and admissions, placement and other operational support services include:

(1) One-Stop Centers and partners;

(2) Community action agencies;

(3) Business organizations;

(4) Labor organizations;

(5) Private for-profit and non-profit corporations; and

(6) Other agencies, and individuals that have experience and contact with youth. (WIA sec. 145(a)(3)).

§ 670.310 How are entities selected to receive funding?

(a) The Secretary selects eligible entities to operate contract centers and operational support service providers on a competitive basis in accordance with the Federal Property and Administrative Services Act of 1949 unless sections 303 (c) and (d) of that Act apply. In selecting an entity, Job Corps issues requests for proposals (RFP) for the operation of all contract centers and for provision of operational support services according to Federal Acquisition Regulation (48 CFR chapter 1, *et seq.*) and DOL Acquisition Regulation (48 CFR chapter 29). Job Corps develops RFP's for center operators in consultation with the Governor, the

center industry council (if established), and the Local Board for the workforce investment area in which the center is located.

(b) The RFP for each contract center and each operational support service contract describes uniform specifications and standards, as well as specifications and requirements that are unique to the operation of the specific center or to the specific required operational support services.

(c) The contracting officer selects and funds Job Corps contract center operators on the basis of an evaluation of the proposals received using criteria established by the Secretary, and set forth in the RFP. The criteria include the following:

(1) The offeror's ability to coordinate the activities carried out through the Job Corps center with activities carried out under the appropriate State and local workforce investment plans;

(2) The degree to which the offeror is proposing vocational training that reflects employment opportunities in the local areas in which most of the students intend to seek employment;

(3) The degree to which the offeror is familiar with the surrounding community, including the applicable One-Stop Centers, and the State and region in which the center is located; and

(4) The offeror's past performance.

(d) The contracting officer selects and funds operational support service contractors on the basis of an evaluation of the proposals received using criteria established by the Secretary and set forth in the RFP.

(e) The Secretary enters into interagency agreements with Federal agencies for the funding, establishment, and operation of CCCs which will include provisions to ensure that the Federal agencies comply with the regulations under this part.

§ 670.320 What are the requirements for award of contracts and payments to Federal agencies?

(a) The requirements of the Federal Property and Administrative Services Act of 1949, as amended; the Federal Grant and Cooperative Agreement Act of 1977; the Federal Acquisition Regulation (48 CFR chapter 1); and the DOL Acquisition Regulation (48 CFR chapter 29) apply to the award of contracts and to payments to Federal agencies.

(b) Job Corps funding of Federal agencies that operate CCCs are made by a transfer of obligational authority from DOL to the respective operating agency.

Subpart D—Recruitment, Eligibility, Screening, Selection and Assignment, and Enrollment

§ 670.400 Who is eligible to participate in the Job Corps program?

To be eligible to participate in the Job Corps, an individual must be:

(a) At least 16 and not more than 24 years of age at the time of enrollment, except

(1) There is no upper age limit for an otherwise eligible individual with a disability; and

(2) Not more than 20% of individuals enrolled nationwide may be individuals who are aged 22 to 24 years old;

(b) A low-income individual; and

(c) An individual who is facing one or more of the following barriers to education and employment:

(1) Is basic skills deficient, as defined in WIA section 101(4); or

(2) Is a school dropout; or

(3) Is homeless, or a runaway, or a foster child; or

(4) Is a parent; or

(5) Requires additional education, vocational training, or intensive counseling and related assistance in order to participate successfully in regular schoolwork or to secure and hold meaningful employment.

(d) Meets the requirements of §670.420, if applicable.

§ 670.410 Are there additional factors which are considered in selecting an eligible applicant for enrollment?

Yes. In accordance with procedures issued by the Secretary, an eligible applicant may be selected for enrollment, only if:

(a) A determination is made, based on information relating to the background, needs and interests of the applicant, that the applicant's educational and vocational needs can best be met through the Job Corps program;

(b) A determination is made that there is a reasonable expectation the applicant can participate successfully in group situations and activities, and is not likely to engage in actions that would potentially:

(1) Prevent other students from receiving the benefit of the program;

(2) Be incompatible with the maintenance of sound discipline; or

(3) Impede satisfactory relationships between the center to which the student is assigned and surrounding local communities;

(c) The applicant is made aware of the center's rules and what the consequences are for failure to observe the rules, as described by procedures issued by the Secretary;

(d) The applicant passes a background check conducted according to procedures established by the Secretary. The background check must find that the applicant is not on probation, parole, under a suspended sentence or under the supervision of any agency as a result of court action or institutionalization, unless the court or appropriate agency certifies in writing that it will approve of the applicant's release from its supervision and that the applicant's release does not violate applicable laws and regulations. No one will be denied enrollment in Job Corps solely on the basis of contact with the criminal justice system. (WIA secs. 145(b)(1)(C) and 145(b)(2).)

(e) Suitable arrangements are made for the care of any dependent children for the proposed period of enrollment.

§ 670.420 Are there any special requirements for enrollment related to the Military Selective Service Act?

(a) Yes. Each male applicant 18 years of age or older must present evidence that he has complied with section 3 of the Military Selective Service Act (50 U.S.C. App. 451 *et seq.*) if required; and

(b) When a male student turns 18 years of age, he must submit evidence to the center that he has complied with the requirements of the Military Selective Service Act (50 U.S.C. App. 451 *et seq.*).

§ 670.430 What entities conduct outreach and admissions activities for the Job Corps program?

The Regional Director makes arrangements with outreach and admissions agencies to perform Job Corps recruitment, screening and admissions functions according to standards and procedures issued by the Secretary. One-Stop Centers or partners, community action organizations, private for-profit and non-profit businesses, labor organizations, or other entities that have contact with youth over substantial periods of time and are able to offer reliable information about the needs of youth, conduct outreach and admissions activities. The Regional Director awards contracts for provision of outreach and screening services on a competitive basis in accordance with the requirements in §670.310 of this part.

§ 670.440 What are the responsibilities of outreach and admissions agencies?

(a) Outreach and admissions agencies are responsible for:

(1) Developing outreach and referral sources;

(2) Actively seeking out potential applicants;

(3) Conducting personal interviews with all applicants to identify their needs and eligibility status; and

(4) Identifying youth who are interested and likely Job Corps participants.

(b) Outreach and admissions agencies are responsible for completing all Job Corps application forms and determining whether applicants meet the eligibility and selection criteria for participation in Job Corps as provided in §§670.400 and 670.410 of this subpart.

(c) The Secretary may decide that determinations with regard to one or more of the eligibility criteria will be made by the Regional Director.

§ 670.450 How are applicants who meet eligibility and selection criteria assigned to centers?

(a) Each applicant who meets the application and selection requirements of §670.400 and §670.410 is assigned to a

center based on an assignment plan developed by the Secretary. The assignment plan identifies a target for the maximum percentage of students at each center who come from the State or region nearest the center, and the regions surrounding the center. The assignment plan is based on an analysis of:

(1) The number of eligible individuals in the State and region where the center is located and the regions surrounding where the center is located;

(2) The demand for enrollment in Job Corps in the State and region where the center is located and in surrounding regions; and

(3) The size and enrollment level of the center.

(b) Eligible applicants are assigned to centers closest to their homes, unless it is determined, based on the special needs of applicants, including vocational interests and English literacy needs, the unavailability of openings in the closest center, or parent or guardian concerns, that another center is more appropriate.

(c) A student who is under the age of 18 must not be assigned to a center other than the center closest to home if a parent or guardian objects to the assignment.

§ 670.460 What restrictions are there on the assignment of eligible applicants for nonresidential enrollment in Job Corps?

(a) No more than 20 percent of students enrolled in Job Corps nationwide may be nonresidential students.

(b) In enrolling individuals who are to be nonresidential students, priority is given to those eligible individuals who are single parents with dependent children. (WIA sec 147(b)).

§ 670.470 May a person who is determined to be ineligible or an individual who is denied enrollment appeal that decision?

(a) A person who is determined to be ineligible to participate in Job Corps under §670.400 or a person who is not selected for enrollment under §670.410 may appeal the determination to the outreach and admissions agency or to the center, within 60 days of the determination. The appeal will be resolved according to the procedures in §§670.990 and 670.991 of this part. If the appeal is denied by the outreach/admissions contractor or the center, the person may appeal the decision in writing to the Regional Director within 60 days the date of the denial. The Regional Director will decide within 60 days whether to reverse or approve the appealed decision. The decision by the Regional Director is the Department's final decision.

(b) If an applicant believes that he or she has been determined ineligible or not selected for enrollment based upon a factor prohibited by WIA sec. 188, the individual may proceed under the applicable DOL nondiscrimination regulations implementing WIA sec. 188.

(c) An applicant who is determined to be ineligible or a person who is denied enrollment must be referred to the appropriate One-Stop Center or other local service provider.

§ 670.480 At what point is an applicant considered to be enrolled in Job Corps?

(a) To become enrolled as a Job Corps student, an applicant selected for enrollment must physically arrive at the assigned Job Corps center on the appointed date. However, applicants selected for enrollment who arrive at their assigned centers by government furnished transportation are considered to be enrolled on their dates of departure by such transportation.

(b) Center operators must document the enrollment of new students according to procedures issued by the Secretary.

§ 670.490 How long can a student be enrolled in Job Corps?

(a) Except as provided in paragraph (b) of this section, a student may remain enrolled in Job Corps for no more than two years.

(b)(1) An extension of a student's enrollment may be authorized in special cases according to procedures issued by the Secretary; and

(2) A student's enrollment in an advanced career training program may be extended in order to complete the program for a period not to exceed one year.

Subpart E—Program Activities and Center Operations

§ 670.500 What services must Job Corps centers provide?

(a) Job Corps centers must provide:

(1) Academic, vocational, employability and social skills training;

(2) Work-based learning; and

(3) Recreation, counseling and other residential support services.

(b) In addition, centers must provide students with access to the core services described in WIA section 134(d)(2) and the intensive services described in WIA section 134(d)(3).

§ 670.505 What types of training must Job Corps centers provide?

(a) Job Corps centers must provide basic education, vocational and social skills training. The Secretary provides curriculum standards and guidelines.

(b) Each center must provide students with competency-based or individualized training in an occupational area that will best contribute to the students' opportunities for permanent long-term employment.

(1) Specific vocational training programs offered by individual centers must be approved by the Regional Director according to policies issued by the Secretary.

(2) Center industry councils described in § 670.800 of this part, must review appropriate labor market information, identify employment opportunities in local areas where students will look for employment, determine the skills and education necessary for those jobs, and as appropriate, recommend changes in the center's vocational training program to the Secretary.

(c) Each center must implement a system to evaluate and track the progress and achievements of each student at regular intervals.

(d) Each center must develop a training plan that must be available for review and approval by the appropriate Regional Director.

§ 670.510 Are Job Corps center operators responsible for providing all vocational training?

No. In order to facilitate students' entry into the workforce, the Secretary may contract with national business, union, or union-affiliated organizations for vocational training programs at specific centers. Contractors providing such vocational training will be selected in accordance with the requirements § 670.310 of this part.

§ 670.515 What responsibilities does the center operators have in managing work-based learning?

(a) The center operator must emphasize and implement work-based learning programs for students through center program activities, including vocational skills training, and through arrangements with employers. Work-based learning must be under actual working conditions and must be designed to enhance the employability, responsibility, and confidence of the students. Work-based learning usually occurs in tandem with students' vocational training.

(b) The center operator must ensure that students are assigned only to workplaces that meet the safety standards described in § 670.935 of this part.

§ 670.520 Are students permitted to hold jobs other than work-based learning opportunities?

Yes. A center operator may authorize a student to participate in gainful leisure time employment, as long as the employment does not interfere with required scheduled activities.

§ 670.525 What residential support services must Job Corps center operators provide?

Job Corps center operators must provide the following services according to procedures issued by the Secretary:

(a) A quality living and learning environment that supports the overall training program and includes a safe, secure, clean and attractive physical and social environment, seven days a week, 24 hours a day;

(b) An ongoing, structured counseling program for students;

(c) Food service, which includes provision of nutritious meals for students;

(d) Medical services, through provision or coordination of a wellness program which includes access to basic medical, dental and mental health services, as described in the Policy and Requirements Handbook, for all students from the date of enrollment until

separation from the Job Corps program;

(e) A recreation/avocational program;

(f) A student leadership program and an elected student government; and

(g) A student welfare association for the benefit of all students that is funded by non-appropriated funds which come from sources such as snack bars, vending machines, disciplinary fines, and donations, and is run by an elected student government, with the help of a staff advisor.

§ 670.530 Are Job Corps centers required to maintain a student accountability system?

Yes. Each Job Corps center must establish and operate an effective system to account for and document the whereabouts, participation, and status of students during their Job Corps enrollment. The system must enable center staff to detect and respond to instances of unauthorized or unexplained student absence. Each center must operate its student accountability system according to requirements and procedures issued by the Secretary.

§ 670.535 Are Job Corps centers required to establish behavior management systems?

(a) Yes. Each Job Corps center must establish and maintain its own student incentives system to encourage and reward students' accomplishments.

(b) The Job Corps center must establish and maintain a behavior management system, according to procedures established by the Secretary. The behavior management system must include a zero tolerance policy for violence and drugs policy as described in § 670.540.

§ 670.540 What is Job Corps' zero tolerance policy?

(a) Each Job Corps center must have a zero tolerance policy for:

(1) An act of violence as defined in procedures issued by the Secretary;

(2) Use, sale, or possession of a controlled substance, as defined at 21 U.S.C. 802;

(3) Abuse of alcohol;

(4) Possession of unauthorized goods; or

(5) Other illegal or disruptive activity.

(b) As part of this policy, all students must be tested for drugs as a condition of enrollment. (WIA sec. 145(a)(1) and 152(b)(2).)

(c) According to procedures issued by the Secretary, the policy must specify the offenses that result in the automatic separation of a student from the Job Corps. The center director is responsible for determining when there is a violation of a specified offense.

§ 670.545 How does Job Corps ensure that students receive due process in disciplinary actions?

The center operator must ensure that all students receive due process in disciplinary proceedings according to procedures developed by the Secretary. These procedures must include, at a minimum, center fact-finding and behavior review boards, the penalty of separation from Job Corps might be imposed, and procedures for students to appeal a center's decision to discharge them involuntarily from Job Corps to a regional appeal board.

§ 670.550 What responsibilities do Job Corps centers have in assisting students with child care needs?

(a) Job Corps centers are responsible for coordinating with outreach and admissions agencies to assist students with making arrangements for child care for their dependent children.

(b) Job Corps centers may operate on center child development programs with the approval of the Secretary.

§ 670.555 What are the center's responsibilities in ensuring that students' religious rights are respected?

(a) Centers must ensure that a student has the right to worship or not worship as he or she chooses.

(b) Religious services may not be held on-center unless the center is so isolated that transportation to and from community religious facilities is impractical.

(c) If religious services are held on-center, no Federal funds may be paid to those who conduct services. Services may not be confined to one religious denomination, and centers may not require students to attend services.

§ 670.560 Is Job Corps authorized to conduct pilot and demonstration projects?

(a) Yes. The Secretary may undertake experimental, research and demonstration projects related to the Job Corps program according to WIA section 156.

(b) The Secretary establishes policies and procedures for conducting such projects.

(c) All studies and evaluations produced or developed with Federal funds become the property of the United States.

Subpart F—Student Support

§ 670.600 Is government-paid transportation provided to Job Corps students?

Yes. Job Corps provides for the transportation of students between their homes and centers as described in policies and procedures issued by the Secretary.

§ 670.610 When are students authorized to take leaves of absence from their Job Corps centers?

Job Corps students are eligible for annual leaves, emergency leaves and other types of leaves of absence from their assigned centers according to criteria and requirements that are issued by the Secretary. Center operators and other service providers must account for student leave according to procedures issued by the Secretary.

§ 670.620 Are Job Corps students eligible to receive cash allowances and performance bonuses?

(a) Yes. According to criteria and rates that are established by the Secretary, Job Corps students receive cash living allowances, performance bonuses, and allotments for care of dependents, and graduates receive post-separation readjustment allowances and placement bonuses. The Secretary may provide former students with post-separation allowances.

(b) In the event of a student's death, any amount due under this section are paid according to provisions of 5 U.S.C. 5582 relating to issues such as designation of beneficiary; order of precedence and related matters.

§ 670.630 Are student allowances subject to Federal Payroll Taxes?

Yes. Job Corps student allowances are subject to Federal payroll tax withholding and social security taxes. Job Corps students are considered to be Federal employees for purposes of Federal payroll taxes. (WIA sec. 157(a)(2).)

§ 670.640 Are students provided with clothing?

Yes. Job Corps students are provided cash clothing allowances and/or articles of clothing, including safety clothing, when needed for their participation in Job Corps and their successful entry into the work force. Center operators and other service providers must issue clothing and clothing assistance to students according to rates, criteria, and procedures that are issued by the Secretary.

Subpart G—Placement and Continued Services

§ 670.700 What are Job Corps centers' responsibilities in preparing students for placement services?

Job Corps centers must test and counsel students to assess their competencies and capabilities and determine their readiness for placement.

§ 670.710 What placement services will be provided for Job Corps students?

(a) Job Corps placement services focus on placing program graduates in:

(1) Full-time jobs that are related to their vocational training and that pay wages that allow for self-sufficiency;

(2) Higher education; or

(3) Advanced training programs, including apprenticeship programs.

(b) Placement service levels for students may vary, depending on whether the student is a graduate or a former student.

(c) Procedures relating to placement service levels are issued by the Secretary.

§ 670.720 Who will provide placement services?

The One-Stop system must be used to the fullest extent possible in placing graduates and former students in jobs. Job Corps placement agencies provide

placement services under a contract or other agreement with the Department of Labor.

§ 670.730 What are the responsibilities of placement agencies?

(a) Placement agencies are responsible for:

(1) Contacting graduates;

(2) Assisting them in improving skills in resume preparation, interviewing techniques and job search strategies;

(3) Identifying job leads or educational and training opportunities through coordination with local Workforce Investment Boards, One-Stop operators and partners, employers, unions and industry organizations; and

(4) Placing graduates in jobs, apprenticeship, the Armed Forces, or higher education or training, or referring former students for additional services in their local communities as appropriate. Placement services may be provided for former students according to procedures issued by the Secretary.

(b) Placement agencies must record and submit all Job Corps placement information according to procedures established by the Secretary.

§ 670.740 Must continued services be provided for graduates?

Yes. According to procedures issued by the Secretary, continued services, including transition support and workplace counseling, must be provided to program graduates for 12 months after graduation.

§ 670.750 Who may provide continued services for graduates?

Placement agencies, centers or other agencies, including One-Stop partners, may provide post-program services under a contract or other agreement with the Regional Director. In selecting a provider for continued services, priority is given to One-Stop partners. (WIA sec. 148(d)).

§ 670.760 How will Job Corps coordinate with other agencies?

(a) The Secretary issues guidelines for the National Office, Regional Offices, Job Corps centers and operational support providers to use in developing and maintaining cooperative relationships with other agencies and institutions, including law enforcement, educational institutions, communities, and other employment and training programs and agencies.

(b) The Secretary develops polices and requirements to ensure linkages with the One-Stop delivery system to the greatest extent practicable, as well as with other Federal, State, and local programs, and youth programs funded under this title. These linkages enhance services to youth who face multiple barriers to employment and must include, where appropriate:

(1) Referrals of applicants and students;

(2) Participant assessment;

(3) Pre-employment and work maturity skills training;

(4) Work-based learning;

(5) Job search, occupational, and basic skills training; and

(6) Provision of continued services for graduates.

Subpart H—Community Connections

§ 670.800 How do Job Corps centers and service providers become involved in their local communities?

(a) Job Corps representatives serve on Youth Councils operating under applicable Local Boards wherever geographically feasible.

(b) Each Job Corps center must have a Business and Community Liaison designated by the director of the center to establish relationships with local and distant employers, applicable One-Stop centers and local boards, and members of the community according to procedures established by the Secretary. (WIA sec. 153(a).)

(c) Each Job Corps center must implement an active community relations program.

(d) Each Job Corps center must establish an industry advisory council, according to procedures established by the Secretary. The industry advisory council must include:

(1) Distant and local employers;

(2) Representatives of labor organizations (where present) and employees; and

(3) Job Corps students and graduates.

(e) A majority of the council members must be local and distant business

owners, chief executives or chief operating officers of nongovernmental employers or other private sector employers, who have substantial management, hiring or policy responsibility and who represent businesses with employment opportunities in the local area and the areas to which students will return.

(f) The council must work with Local Boards and must review labor market information to provide recommendations to the Secretary regarding the center's vocational training offerings, including identification of emerging occupations suitable for training. (WIA sec.154(b)(1).)

(g) Job Corps is identified as a required One-Stop partner. Wherever practicable, Job Corps centers and operational support contractors must establish cooperative relationships and partnerships with One-Stop centers and other One-Stop partners, Local Boards, and other programs for youth.

Subpart I—Administrative and Management Provisions

§ 670.900 Are damages caused by students eligible for reimbursement under the Tort Claims Act?

Yes. Students are considered Federal employees for purposes of the Tort Claims Act (28 U.S.C. 2671 (*et seq.*). If a student is alleged to be involved in the damage, loss, or destruction of the property of others, or in causing personal injury to or the death of another individual(s), the injured person(s), or their agent may file a claim with the Center Director. Director must investigate all of the facts, including accident and medical reports, and interview witnesses, and submit the claim for a decision to the Regional Solicitor's Office. All tort claims for $25,000 or more must be sent to the Associate Solicitor for Employee Benefits, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, DC 20210.

§ 670.905 Are damages that occur to private parties at Job Corps Centers eligible for reimbursement under the Tort Claims Act?

(a) Whenever there is loss or damage to persons or property, which is believed to have resulted from operation of a Job Corps center and to be a proper charge against the Federal Government, the owner(s) of the property, the injured person(s), or their agent may submit a claim for the damage to the Regional Solicitor. Claims must be filed no later than two years from the date of loss or damage. The Regional Solicitor will determine if the claim is valid under the Tort Claims Act. If the Regional Solicitor determines a claim is not valid under the Tort Claims Act, the Regional Solicitor must consider the facts and may still settle the claim, in an amount not to exceed $1,500.

(b) The Job Corps may pay students for valid claims under the Tort Claims Act for lost, damaged, or stolen property, up to a maximum amount set by the Secretary, when the loss is not due to the negligence of the student. Students must file claims no later than six months from the date of loss. Students are compensated for losses including those that result from a natural disaster or those that occur when the student's property is in the protective custody of the Job Corps, such as when the student is AWOL. Claims must be filed with Job Corps regional offices. The regional office will promptly notify the student and the center of its determination.

§ 670.910 Are students entitled to Federal Employees Compensation Benefits?

(a) Job Corps students are considered Federal employees for purposes of the Federal Employees Compensation Act (FECA). (WIA sec. 157(a)(3).)

(b) Job Corps students may be entitled to Federal Employees Compensation Benefits as specified in (WIA sec. 157.)

(c) Job Corps students must meet the same eligibility tests for FECA payments that apply to all other Federal employees. One of those tests is that the injury must occur ''in the performance of duty.'' This test is described in § 670.915.

§ 670.915 When are residential students considered to be in the performance of duty?

Residential students will be considered to be in the ''performance of duty'' at all times while:

(a) They are on center under the supervision and control of Job Corps officials;

(b) They are engaged in any authorized Job Corps activity;

(c) They are in authorized travel status; or

(d) They are engaged in any authorized offsite activity.

§ 670.920 When are non-resident students considered to be in the performance of duty?

Non-resident students are considered ''in performance of duty'' as Federal employees when they are engaged in any authorized Job Corps activity, from the time they arrive at any scheduled center activity until they leave the activity. The standard rules governing coverage of Federal employees during travel to and from work apply. These rules are described in guidance issued by the Secretary.

§ 670.925 When are students considered to be not in the performance of duty?

Students are considered to be not in the performance of duty when:

(a) They are AWOL;

(b) They are at home, whether on pass or on leave;

(c) They are engaged in an unauthorized offsite activity; or

(d) They are injured or ill due to their own:

(1) Willful misconduct;

(2) Intent to cause injury or death to oneself or another; or

(3) By intoxication or drugs.

§ 670.930 How are FECA benefits computed?

(a) FECA benefits for disability or death are computed using the entrance salary for a grade GS–2 as the student's monthly pay.

(b) The provisions of 5 U.S.C. 8113 (a) and (b), relating to compensation for work injuries apply to students. Compensation for disability will not begin to accrue until the day following the date on which the injured student completes his or her Job Corps separation.

(c) Whenever a student is injured, develops an occupationally related illness, or dies while in the performance of duty, the procedures in the DOL Employment Standards Administration regulations, at 20 CFR ch. I, must be followed. A thorough investigation of the circumstances and a medical evaluation must be completed and required forms must be timely filed by the center operator with the DOL Office of Workers' Compensation Programs.

§ 670.935 How will students be protected from unsafe or unhealthy situations?

(a) The Secretary establishes procedures to ensure that students are not required or permitted to work, be trained, reside in, or receive services in buildings or surroundings or under conditions that are unsanitary or hazardous. Whenever students are employed or in training for jobs, they must be assigned only to jobs or training which observe applicable Federal, State and local health and safety standards.

(b) The Secretary develops procedures to ensure compliance with applicable DOL Occupational Safety and Health Administration regulations.

§ 670.940 What are the requirements relating to criminal law enforcement jurisdiction on center property?

(a) All Job Corps property which would otherwise be under exclusive Federal legislative jurisdiction is considered under concurrent jurisdiction with the appropriate State and locality with respect to criminal law enforcement. Concurrent jurisdiction extends to all portions of the property, including housing and recreational facilities, in addition to the portions of the property used for education and training activities.

(b) Centers located on property under concurrent Federal-State jurisdiction must establish agreements with Federal, State and local law enforcement agencies to enforce criminal laws.

(c) The Secretary develops procedures to ensure that any searches of a student's person, personal area or belongings for unauthorized goods follow applicable right-to-privacy laws.

§ 670.945 Are Job Corps operators and service providers authorized to pay State or local taxes on gross receipts?

(a) A private for-profit or a nonprofit Job Corps service provider is not liable, directly or indirectly, to any State or subdivision for any gross receipts taxes, business privilege taxes measured by gross receipts, or any similar taxes in connection with any payments made to or by such service provider for operating a center or other Job Corps program or activity. The service provider is not liable to any State or subdivision to collect or pay any sales, excise, use, or similar tax imposed upon the sale to or use by such deliverer of any property, service, or other item in connection with the operation of a center or other Job Corps program or activity. (WIA sec. 158(d).)

(b) If a State or local authority compels a center operator or other service provider to pay such taxes, the center operator or service provider may pay the taxes with Federal funds, but must document and report the State or local requirement according to procedures issued by the Secretary.

§ 670.950 What are the financial management responsibilities of Job Corps center operators and other service providers?

(a) Center operators and other service providers must manage Job Corps funds using financial management information systems that meet the specifications and requirements of the Secretary.

(b) These financial management information systems must:

(1) Provide accurate, complete, and current disclosures of the costs of their Job Corps activities;

(2) Ensure that expenditures of funds are necessary, reasonable, allocable and allowable in accordance with applicable cost principles;

(3) Use account structures specified by the Secretary;

(4) Ensure the ability to comply with cost reporting requirements and procedures issued by the Secretary; and

(5) Maintain sufficient cost data for effective planning, monitoring, and evaluation of program activities and for determining the allowability of reported costs.

§ 670.955 Are Center Operators and Service Providers Subject to Federal Audits?

(a) Yes. Center operators and service providers are subject to Federal audits.

(b) The Secretary arranges for the survey, audit, or evaluation of each Job Corps center and service provider at least once every three years, by Federal auditors or independent public accountants. The Secretary may arrange for more frequent audits. (WIA sec. 159(b)(2).)

(c) Center operators and other service providers are responsible for giving full cooperation and access to books, documents, papers and records to duly appointed Federal auditors and evaluators. (WIA sec. 159(b)(1).)

§ 670.960 What are the procedures for management of student records?

The Secretary issues guidelines for a system of maintaining records for each student during enrollment and for disposition of such records after separation.

§ 670.965 What procedures apply to disclosure of information about Job Corps students and program activities?

(a) The Secretary develops procedures to respond to requests for information or records or other necessary disclosures pertaining to students.

(b) DOL disclosure of Job Corps information must be handled according to the Freedom of Information Act and according to DOL regulations at 29 CFR part 70.

(c) Job Corps contractors are not ''agencies'' for Freedom of Information Act purposes. Therefore, their records are not subject to disclosure under the Freedom of Information Act or 29 CFR part 70.

(d) The regulations at 29 CFR Part 70a apply to a system of records covered by the Privacy Act of 1974 maintained by DOL or to a similar system maintained by a contractor, such as a screening agency, contract center operator, or placement agency on behalf of the Job Corps.

§ 670.970 What are the reporting requirements for center operators and operational support service providers?

The Secretary establishes procedures to ensure the timely and complete reporting of necessary financial and program information to maintain accountability. Center operators and operational support service providers are responsible for the accuracy and integrity of all reports and data they provide.

§ 670.975 How will performance of the Job Corps program be assessed?

The performance of the Job Corps program as a whole, and the performance of individual program components, is assessed on an ongoing basis, in accordance with these regulations and procedures and standards, including a national performance measurement system, issued by the Secretary. Annual performance assessments are done for each center operator and other service providers, including screening and admissions and placement agencies.

§ 670.980 What are the indicators of performance for Job Corps?

(a) At a minimum, the performance assessment system established under § 670.975 of this subpart will include expected levels of performance established for each of the indicators of performance contained in WIA section 159(c). These are:

(1) The number of graduates and rate of graduation, analyzed by the type of vocational training received and the training provider;

(2) The job placement rate of graduates into unsubsidized employment, analyzed by the vocational training received, whether or not the job placement is related to the training received, the vocational training provider, and whether the placement is made by a local or national service provider;

(3) The average placement wage of graduates in training-related and non-training related unsubsidized jobs;

(4) The average wage of graduates on the first day of employment and at 6 and 12 months following placement, analyzed by the type of vocational training received;

(5) The number of and retention rate of graduates in unsubsidized employment after 6 and 12 months ;

(6) The number of graduates who entered unsubsidized employment for 32 hours per week or more, for 20 to 32 hours per week, and for less than 20 hours per week.

(7) The number of graduates placed in higher education or advanced training; and

(8) The number of graduates who attained job readiness and employment skills.

(b) The Secretary issues the expected levels of performance for each indicator. To the extent practicable, the levels of performance will be continuous and consistent from year to year.

§ 670.985 What happens if a center operator, screening and admissions contractor or other service provider fails to meet the expected levels of performance?

(a) The Secretary takes appropriate action to address performance issues through a specific performance plan.

(b)The plan may include the following actions:

(1) Providing technical assistance to a Job Corps center operator or support service provider, including a screening and admissions contractor;

(2) Changing the management staff of a center;

(3) Changing the vocational training offered at a center;

(4) Contracting out or recompeting the contract for a center or operational support service provider;

(5) Reducing the capacity of a Job Corps center;

(6) Relocating a Job Corps center; or

(7) Closing a Job Corps center. (WIA sec. 159(f).)

§ 670.990 What procedures are available to resolve complaints and disputes?

(a) Each Job Corps center operator and service provider must establish and maintain a grievance procedure for filing complaints and resolving disputes from applicants, students and/or other interested parties about its programs and activities. A hearing on each complaint or dispute must be conducted

within 30 days of the filing of the complaint or dispute. A decision on the complaint must be made by the center operator or service provider, as appropriate, within 60 days after the filing of the complaint, and a copy of the decision must be immediately served, by first-class mail, on the complainant and any other party to the complaint. Except for complaints under § 670.470 of this part or complaints alleging fraud or other criminal activity, complaints may be filed within one year of the occurrence that led to the complaint.

(b) The procedure established under paragraph (a) of this section must include procedures to process complaints alleging violations of WIA section 188, consistent with DOL nondiscrimination regulations implementing WIA section 188 and § 670.995 of this subpart.

§ 670.991 How does Job Corps ensure that complaints or disputes are resolved in a timely fashion?

(a) If a complaint is not resolved by the center operator or service provider in the time frames described in § 670.990 of this subpart, the person making the complaint may request that the Regional Director determine whether reasonable cause exists to believe that the Act or regulations for this part of the Act have been violated. The request must be filed with the Regional Director within 60 days from the date that the center operator or service provider should have issued the decision.

(b) Following the receipt of a request for review under paragraph (a) of this section, the Regional Director must determine within 60 days whether there has been a violation of the Act or these regulations. If the Regional Director determines that there has been a violation of the Act or Regulations, (s)he may direct the operator or service provider to remedy the violation or direct the service provider to issue a decision to resolve the dispute according to the service provider's grievance procedures. If the service provider does not comply with the Regional Director's decision within 30 days, the Regional Director may impose a sanction on the center operator or service provider for violating the Act or regulations, and/or for failing to issue a decision. Decisions imposing sanctions upon a center operator or service provider may be appealed to the DOL Office of Administrative Law Judges under 20 CFR 667.800 or 667.840.

§ 670.992 How does Job Corps ensure that centers or other service providers comply with the Act and regulations?

(a) If DOL receives a complaint or has reason to believe that a center or other service provider is failing to comply with the requirements of the Act or regulations, the Regional Director must investigate the allegation and determine within 90 days after receiving the complaint or otherwise learning of the alleged violation, whether such allegation or complaint is true.

(b) As a result of such a determination, the Regional Director may:

(1) Direct the center operator or service provider to handle a complaint through the grievance procedures established under § 670.990 of this subpart; or

(2) Investigate and determine whether the center operator or service provider is in compliance with the Act and regulations. If the Regional Director determines that the center or service provider is not in compliance with the Act or regulations, the Regional Director may take action to resolve the complaint under § 670.991(b) of this subpart, or will report the incident to the DOL Office of the Inspector General, as described in 20 CFR 667.630.

§ 670.993 How does Job Corps ensure that contract disputes will be resolved?

A dispute between DOL and a Job Corps contractor will be handled according to the Contract Disputes Act and applicable regulations.

§ 670.994 How does Job Corps resolve disputes between DOL and other Federal Agencies?

Disputes between DOL and a Federal Agency operating a center will he handled according to the interagency agreement with the agency which is operating the center.

§ 670.995 What DOL equal opportunity and nondiscrimination regulations apply to Job Corps?

Nondiscrimination requirements, procedures, complaint processing, and compliance reviews are governed by, as applicable, provisions of the following Department of Labor regulations:

(a) Regulations implementing WIA section 188 for programs receiving Federal financial assistance under WIA.

(b) 29 CFR part 33 for programs conducted by the Department of Labor; and

(c) 41 CFR chapter 60 for entities that have a Federal government contract.

PART 671—NATIONAL EMERGENCY GRANTS FOR DISLOCATED WORKERS

Sec.

671.100 What is the purpose of national emergency grants under WIA section 173?
671.105 What funds are available for national emergency grants?
671.110 What are major economic dislocations or other events which may qualify for a national emergency grant?
671.120 Who is eligible to apply for national emergency grants?
671.125 What are the requirements for submitting applications for national emergency grants?
671.130 When should applications for national emergency grants be submitted to the Department?
671.140 What are the allowable activities and what dislocated workers may be served under national emergency grants?
671.150 How do statutory and workflex waivers apply to national emergency grants?
671.160 What rapid response activities are required before a national emergency grant application is submitted ?
671.170 What are the program and administrative requirements that apply to national emergency grants?

AUTHORITY: Sec. 506(c), Pub. L. 105–220; 20 U.S.C. 9276(c).

SOURCE: 64 FR 18760, Apr. 15, 1999, unless otherwise noted.

§ 671.100 What is the purpose of national emergency grants under WIA section 173?

The purpose of national emergency grants is to provide supplemental dislocated worker funds to States, Local Boards and other eligible entities in order to respond to the needs of dislocated workers and communities affected by major economic dislocations and other worker dislocation events which cannot be met with formula allotments.

§ 671.105 What funds are available for national emergency grants?

The Secretary uses funds reserved under WIA section 132(a)(2)(A) to provide financial assistance to eligible applicant for grants under WIA section 173.

§ 671.110 What are major economic dislocations or other events which may qualify for a national emergency grant?

These include:

(a) Plant closures;

(b) Mass layoffs affecting 50 or more workers at a single site of employment;

(c) Closures and realignments of military installations;

(d) Multiple layoffs in a single local community that have significantly increased the total number of unemployed individuals in a community;

(e) Emergencies or natural disasters, as defined in paragraphs (1) and (2) respectively, of section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122(1) and (2)) which have been declared eligible for public assistance by the Federal Emergency Management Agency (FEMA); and

(f) Other events, as determined by the Secretary.

§ 671.120 Who is eligible to apply for national emergency grants?

(a) *For projects within a State.* A State, a Local Board or another entity determined to be appropriate by the Governor of the State in which the project will be located may apply for a national emergency grant. Also, Indian tribes, tribal organizations, Alaska Native entities, Indian-controlled organizations serving Indians, or Native Hawaiian organizations which are recipients of funds under section 166 of the Act (Indian and Native American Programs) may apply for a national emergency grant.

(b) *For inter-State projects.* Consortia of States and/or Local Boards may apply. Other private entities which can

demonstrate, in the application for assistance, that they possess unique capabilities to effectively respond to the circumstances of the major economic dislocation(s) covered in the application may apply.

(c) *Other entities.* The Secretary may consider applications from other entities, to ensure that appropriate assistance is provided in response to major economic dislocations.

§ 671.125 What are the requirements for submitting applications for national emergency grants?

The Department publishes instructions for submitting applications for National Emergency Grants in the FEDERAL REGISTER. The instructions specify application procedures, selection criteria and the approval process.

§ 671.130 When should applications for national emergency grants be submitted to the Department?

(a) Applications for national emergency grants to respond to mass layoffs and plant closures may be submitted to the Department as soon as:

(1) The State receives a notification of a mass layoff or a closure as a result of a WARN notice, a general announcement or some other means determined by the Governor to be sufficient to respond;

(2) Rapid response assistance has been initiated; and

(3) A determination has been made, in collaboration with the applicable Local Board(s) and chief elected official(s), that State and local formula dislocated worker funds are inadequate to provide the level of services needed by the workers being laid off.

(b) An eligible entity may apply for a national emergency grant at any time during the year.

(c) Applications for national emergency grants to respond to a declared emergency or natural disaster as described in §671.110(e) of this subpart, cannot be considered until FEMA has declared that the affected area is eligible for disaster-related public assistance.

§ 671.140 What are the allowable activities and what dislocated workers may be served under national emergency grants?

(a) National emergency grants may provide adjustment assistance for eligible dislocated workers, described at WIA section 173(c)(2) or (d)(2).

(b) Adjustment assistance includes the core, intensive, and training services authorized at WIA sections 134(d) and 173. The scope of services to be provided in a particular project are negotiated between the Department and the grantee, taking into account the needs of the target population covered by the grant. The scope of services may be changed through grant modifications, if necessary.

(c) National emergency grants may provide for supportive services to help workers who require such assistance to participate in activities provided for in the grant. Needs-related payments, in support of other employment and training assistance, may be available for the purpose of enabling dislocated workers who are eligible for such payments to participate in programs of training services. Generally, the terms of a grant must be consistent with Local Board policies regarding such financial assistance with formula funds (including the payment levels and duration of payments). However, the terms of the grant agreement may diverge from established Local Board policies, for example:

(1) If unemployed dislocated workers served by the project are not able to meet the 13 or 8 weeks enrollment in training requirement at WIA section 134(e)(3)(B) because of the lack of formula or emergency grant funds in the State or local area at the time of dislocation, such individuals may be eligible for needs-related payments if they are enrolled in training by the end of the 6th week following the date of the emergency grant award; and

(2) Trade-impacted workers who are not eligible for trade readjustment assistance under NAFTA–TAA may be eligible for needs-related payments under a national emergency grant if the worker is enrolled in training by the end of the 16th week following layoff.

(d) A national emergency grant to respond to a declared emergency or natural disaster, as defined at §671.110(e) of this subpart, may provide short-term disaster relief employment for:

(1) Individuals who are temporarily or permanently laid off as a consequence of the disaster;

(2) Dislocated workers; and

(3) Long-term unemployed individuals.

(e) Temporary employment assistance is authorized on disaster projects that provide food, clothing, shelter and other humanitarian assistance for disaster victims; and on projects that perform demolition, cleaning, repair, renovation and reconstruction of damaged and destroyed structures, facilities and lands located within the disaster area. For such temporary jobs, each eligible worker is limited to no more than six months of employment for each single disaster. The amounts, duration and other limitations on wages will be negotiated for each grant.

(f) Additional requirements that apply to national emergency grants, including natural disaster grants, are contained in the application instructions.

§ 671.150 How do statutory and workflex waivers apply to national emergency grants?

(a) Application of existing general statutory or regulatory waivers and workflex waivers to National Emergency Grants may be requested by State and Local Board grantees, and approved by the Department for a National Emergency Grant award. The application for grant funds must describe any statutory waivers which the applicant wishes to apply to the project that the State and Local Board, as applicable, have been granted under its waiver plan, or that the State has approved for implementation in the applicable local area under workflex waivers. The Department considers such requests as part of the overall application review and decision process.

(b) If, during the operation of the project, the grantee wishes to apply a waiver not identified in the application, the grantee must request a modification which includes the provision to be waived, the operational barrier to be removed and the effect upon the outcome of the project.

§ 671.160 What rapid response activities are required before a national emergency grant application is submitted?

(a) Rapid response is a required Statewide activity under WIA section 134(a)(2)(A), to be carried out by the State or its designee in collaboration with the Local Board(s) and chief elected official(s). Pursuant to 20 CFR 665.310, rapid response encompasses, among other activities, an assessment of the general needs of the affected workers and the resources available to them.

(b) In accordance with national emergency grant application guidelines published by the Department, each applicant must demonstrate that:

(1) The rapid response activities described in 20 CFR 665.310 have been initiated and carried out, or are in the process of being carried out;

(2) State and local funds, including those made available under section 132(b)(2)(B) of the Act, have been used to initiate appropriate services to the eligible workers;

(3) There is a need for additional funds to effectively respond to the assistance needs of the workers and, in the case of declared emergencies and natural disasters, the community; and

(4) The application has been developed by or in conjunction with the Local Board(s) and chief elected official(s) of the local area(s) in which the proposed project is to operate.

§ 671.170 What are the program and administrative requirements that apply to national emergency grants?

(a) In general, the program requirements and administrative standards set forth at 20 CFR parts 663 and 667 will apply.

(b) Exceptions include:

(1) Funds provided in response to a natural disaster may be used for temporary job creation in areas declared eligible for public assistance by FEMA, subject to the limitations of WIA section 173(d), this subpart and the application guidelines issued by the Department;

(2) National emergency grant funds may be used to pay an appropriate level of administrative costs based on the design and complexity of the project. Administration costs are negotiated between the applicant and the Department as part of the application review and grant award and modification processes;

(3) The period of availability for expenditure of funds under a national emergency grant is specified in the grant agreement.

(4) The Secretary may establish supplemental reporting, monitoring and oversight requirements for national emergency grants. The requirements will be identified in the grant application instructions or the grant document.

(5) The Secretary may negotiate and fund projects under terms other than those specified in this subpart where it can be clearly demonstrated that such adjustments will achieve a greater positive benefit for the workers and/or communities being assisted.

CHAPTER VI—EMPLOYMENT STANDARDS ADMINISTRATION, DEPARTMENT OF LABOR

SUBCHAPTER A—LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AND RELATED STATUTES

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SUBCHAPTER A—LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AND RELATED STATUTES

PART 701—GENERAL; ADMINISTERING AGENCY; DEFINITIONS AND USE OF TERMS

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701.102 Organization of this subchapter.

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TERMS USED IN THIS SUBCHAPTER

701.301 Definitions and use of terms.

COVERAGE UNDER STATE COMPENSATION PROGRAMS

701.401 Coverage under State compensation programs.

AUTHORITY: 5 U.S.C. 301; Reorg. Plan No. 6 of 1950, 15 FR 3174, 64 Stat. 1263; 33 U.S.C. 939; 36 D.C. Code 501 *et seq.*; 42 U.S.C. 1651 *et seq.*; 43 U.S.C. 1331; 5 U.S.C. 6171 *et seq.*; Secretary's Order 1–89; Employment Standards Order No. 90–02.

SOURCE: 38 FR 26860, Sept. 26, 1973, unless otherwise noted.

RULES IN THIS SUBCHAPTER

§ 701.101 Scope of this subchapter and subchapter B.

(a) This subchapter contains the regulations governing the administration of the Longshore and Harbor Workers' Compensation Act (LHWCA) and its direct extensions, the Defense Base Act (DBA), the Outer Continental Shelf Lands Act (OCSLA), and the Nonappropriated Fund Instrumentalities Act (NFLA), and such other amendments and extensions as may hereinafter be enacted.

(b) The regulations also apply to claims filed under the District of Columbia Workmen's Compensation Act (DCCA). That law applies to all claims for injuries or deaths based on employment events that occurred prior to July 26, 1982, the effective date of the District of Columbia Workers' Compensation Act.

(c) The regulations governing administration of the Black Lung Benefits Program are in subchapter B of this chapter.

[50 FR 391, Jan. 3, 1985, as amended at 51 FR 4281, Feb. 3, 1986]

§ 701.102 Organization of this subchapter.

This part 701 is intended to provide a general description of the regulations in this subchapter, information as to the persons and agencies within the Department of Labor authorized by the Secretary of Labor to administer the Longshoremen's and Harbor Workers' Compensation Act and its extensions and the regulations in this subchapter, and guidance as to the meaning and use of specific terms in the several parts of this subchapter. Part 702 of this subchapter contains the general administrative regulations governing claims filed under the LHWCA, and part 703 of this subchapter contains the regulations governing authorization of insurance carriers, authorization of self-insurers, and issuance of certificates of compliance with said insurance regulations, as required by sections 32 and 37 of the LHWCA, 33 U.S.C. 932, 937. Inasmuch as the extensions of the LHWCA (see §701.101) incorporate by reference nearly all of the provisions of the LHWCA, such that the regulations governing the latter apply to the extensions with very few exceptions, it has been determined that no useful purpose would be served by repeating the same provisions for each of the extensions. Accordingly, the regulations in parts 702 and 703 shall apply to the administration of the extensions (DBA, DCCA, OCSLA, and NFIA), unless otherwise noted. The exceptions to the general applicability of parts 702 and 703 of this subchapter are set forth in succeeding parts in this subchapter. Part 704 of this subchapter contains the exceptions for the DBA, the DCCA, the OCSLA, and the NFIA.

OFFICE OF WORKERS' COMPENSATION PROGRAMS

§ 701.201 Establishment of Office of Workers' Compensation Programs.

The Assistant Secretary of Labor for Employment Standards, by authority vested in him or her by the Secretary of Labor in Secretary's Order No. 7–87 (52 FR 48466), established in the Employment Standards Administration (ESA) an Office of Workers' Compensation Programs (OWCP). The Assistant Secretary further designated as the head thereof a Director, who shall administer the programs assigned to that office by the Assistant Secretary.

[55 FR 28606, July 12, 1990]

§ 701.202 Transfer of functions.

Pursuant to the authority vested in him or her by the Secretary of Labor, the Assistant Secretary for Employment Standards transferred from the Bureau of Employees' Compensation to the Office of Workers' Compensation Programs all functions of the Department of Labor with respect to the administration of benefits programs under the following statutes:

(a) The Longshore and Harbor Workers' Compensation Act, as amended and extended, 33 U.S.C. 901 et seq.;

(b) Defense Base Act, 42 U.S.C. 1651 et seq.;

(c) District of Columbia Workmen's Compensation Act, 36 D.C. Code 501 et seq.;

(d) Outer Continental Shelf Lands Act, 43 U.S.C. 1331;

(e) Nonappropriated Fund Instrumentalities Act, 5 U.S.C. 8171 et seq.;

(f) Title IV of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. 901 et seq.

[55 FR 28606, July 12, 1990]

§ 701.203 Historical background.

Administration of the Longshoremen's and Harbor Workers' Compensation Act (and the Federal Employees' Compensation Act, formerly known as the U.S. Employees' Compensation Act), was initially vested in an independent establishment known as the U.S. Employees' Compensation Commission. By Reorganization Plan No. 2 of 1946 (3 CFR 1943–1949 Comp., p. 1064; 60 Stat. 1095, effective July 16, 1946), the Commission was abolished and its functions were transferred to the Federal Security Agency to be performed by a newly created Bureau of Employees' Compensation within such Agency. By Reorganization Plan No. 19 of 1950 (15 FR 3178, 64 Stat. 1263) said Bureau was transferred to the Department of Labor, and the authority formerly vested in the Administrator, Federal Security Agency, was vested in the Secretary of Labor. By Reorganization Plan No. 6 of 1950 (15 FR 3174, 64 Stat. 1263), the Secretary of Labor was authorized to make from time to time such provisions as he shall deem appropriate, authorizing the performance of any of his functions by any other officer, agency or employee of the Department of Labor.

TERMS USED IN THIS SUBCHAPTER

§ 701.301 Definitions and use of terms.

(a) As used in this subchapter, except where the context clearly indicates otherwise:

(1) *Act* means the Longshoremen's and Harbor Workers' Compensation Act, as amended (33 U.S.C. 901 et seq.), also referred to in this subchapter as LHWCA, and includes the provisions of any statutory extension of such Act (see § 701.101) pursuant to which compensation on account of an injury is sought.

(2) *Secretary* means the Secretary of Labor, United States Department of Labor, or his authorized representative.

(3) *Employment Standards Administration* means the Employment Standards Administration in the United States Department of Labor, headed by the Assistant Secretary of Labor for Employment Standards.

(4) [Reserved]

(5) *Office of Workers' Compensation Programs* or *OWCP* or *the Office* means the Office of Workers' Compensation Programs in the Department of Labor, described in § 701.201 of this part. Whenever the term *Office of Workmen's Compensation Programs* appears in this part or in part 702, it shall have the same meaning as *Office of Worker's Compensation Programs.*

(6) *Director* means the Director, OWCP, or his authorized representative.

(7) *District Director* means a person appointed as provided in sections 39 and 40 of the LHWCA or his or her designee, authorized by the Director to perform functions with respect to the processing and determination of claims for compensation under such Act and its extensions as provided therein and under this subchapter. These regulations substitute this term for the term ''Deputy Commissioner'' which is used in the statute. This substitution is for administrative purposes only and in no way affects the power or authority of the position as established in the statute.

(8) *Administrative Law Judge* means an administrative law judge appointed as provided in 5 U.S.C. 3105 and subpart B of 5 CFR part 930 (see 37 FR 16737), who is qualified to preside at hearings under 5 U.S.C. 557 and is empowered by the Secretary to conduct formal hearings whenever necessary in respect of any claim for compensation arising under the LHWCA and its extensions.

(9) *Chief Administrative Law Judge* means the Chief Judge of the Office of Administrative Law Judges, United States Department of Labor.

(10) *Board* or *Benefits Review Board* means the Benefits Review Board established by section 21 of the LHWCA (33 U.S.C. 921) as amended and constituted and functioning pursuant to the provisions of chapter VII of this Title 20 and Secretary of Labor's Order No. 38–72 (38 FR 90).

(11) *Department* means the United States Department of Labor.

(12)(i) *Employee* means any person engaged in maritime employment, including:

(A) Any longshore worker or other person engaged in longshoring operations;

(B) Any harbor worker, including a ship repairer, shipbuilder and shipbreaker;

(C) Any other individual to whom an injury may be the basis for a compensation claim under the LHWCA as amended, or any of its extensions;

(ii) The term does not include:

(A) A master or member of a crew of any vessel;

(B) Any person engaged by a master to load or unload or repair any small vessel under eighteen tons net.

(iii) Nor does this term include the following individuals (whether or not the injury occurs over the navigable waters of the United States) where it is first determined that they are covered by a state workers' compensation act:

(A) Individuals employed exclusively to perform office clerical, secretarial, security, or data processing work (but not longshore cargo checkers and cargo clerks);

(B) Individuals employed by a club (meaning a social or fraternal organization whether profit or nonprofit), camp, recreational operation (meaning any recreational activity, including but not limited to scuba diving, commercial rafting, canoeing or boating activities operated for pleasure of owners, members of a club or organization, or renting, leasing or chartering equipment to another for the latter's pleasure), restaurant, museum or retail outlet;

(C) Individuals employed by a marina, provided they are not engaged in its construction, replacement or expansion, except for routine maintenance such as cleaning, painting, trash removal, housekeeping and small repairs;

(D) Employees of suppliers, vendors and transporters temporarily doing business on the premises of a covered employer, provided they are not performing work normally performed by employees of the covered employer;

(E) Aquaculture workers, meaning those employed by commercial enterprises involved in the controlled cultivation and harvest of aquatic plants and animals, including the cleaning, processing or canning of fish and fish products, the cultivation and harvesting of shellfish, and the controlled growing and harvesting of other aquatic species;

(F) Individuals engaged in the building, repairing or dismantling of recreational vessels under 65 feet in length. For purposes of this subparagraph *recreational vessel* means a vessel manufactured or operated primarily for pleasure, or rented, leased or chartered by another for the latter's pleasure, and *length* means a straight line measurement of the overall length

from the foremost part of the vessel to the aftmost part of the vessel, measured parallel to the center line. The measurement shall be from end to end over the deck, excluding sheer.

(13) *Employer* includes any employer who may be obligated as an employer under the provisions of the LHWCA as amended or any of its extensions to pay and secure compensation as provided therein.

(14) *Carrier* means an insurance carrier or self-insurer meeting the requirements of section 32 of the LHWCA as amended and of this subchapter with respect to authorization to provide insurance fulfilling the obligation of an employer to secure the payment of compensation due his employees under the LHWCA as amended or a statutory extension thereof.

(15) The terms *wages, national average weekly wage, injury, disability, death,* and *compensation* shall have the meanings set forth in section 2 of the LHWCA.

(16) *Claimant* includes any person claiming compensation or benefits under the provisions of the LHWCA as amended or a statutory extension thereof on account of the injury or death of an employee.

(b) The definitions contained in paragraph (a) of this section shall not be considered to derogate from any definitions or delimitations of terms in the LHWCA as amended or any of its statutory extensions in any case where such statutory definitions or delimitations would be applicable.

(c) As used in this subchapter, the singular includes plural and the masculine includes the feminine.

[38 FR 26860, Sept. 26, 1973, as amended at 42 FR 3848, Jan. 21, 1977; 50 FR 391, Jan. 3, 1985; 51 FR 4281, Feb. 3, 1986; 55 FR 28606, July 12, 1990]

COVERAGE UNDER STATE COMPENSATION PROGRAMS

§ 701.401 Coverage under state compensation programs.

(a) Exclusions from the definition of ''employee'' under § 701.301(a)(12), and the employees of small vessel facilities otherwise covered which are exempted from coverage under § 702.171, are dependent upon coverage under a state workers' compensation program. For these purposes, a worker or dependent must first claim compensation under the appropriate state program and receive a final decision on the merits of the claim, denying coverage, before any claim may be filed under this Act.

(b) The intent of the Act is that state law will apply to those categories of employees if it otherwise would. Accordingly, not withstanding any contrary state law, claims by any of the categories of workers excluded under § 701.301 or 702.171 must be made to and processed by the state and a merit decision denying coverage on jurisdictional grounds must be made before coverage or benefits under the Act may be sought.

(c) The time for filing notice and claim under the Act (see subpart B of part 702) does not begin to run for purposes of claims by those workers or dependents described in § 701.301(a)(12) and § 702.171, until a final adverse decision denying coverage under a state compensation act is received.

[50 FR 392, Jan. 3, 1985]

PART 702—ADMINISTRATION AND PROCEDURE

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AUTHORITY: 5 U.S.C. 301, 8171 *et seq.,* Reorganization Plan No. 6 of 1950, 15 FR 3174, 3 CFR 1949–1953, Comp., p. 1004, 64 Stat. 1263; 28 U.S.C. 2461, 33 U.S.C. 930, 36 D.C. Code 501 *et seq.*, 42 U.S.C. 1651 *et seq.*, 43 U.S.C. 1331; Secretary's Order 5–96, 62 FR 107.

SOURCE: 38 FR 26861, Sept. 26, 1973, unless otherwise noted.

Subpart A—General Provisions

ADMINISTRATION

§ 702.101 [Reserved]

§ 702.102 Establishment and modification of compensation districts, establishment of suboffices and jurisdictional areas.

(a) The Director has, pursuant to section 39(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 939(b), established compensation districts as required for improved administration or as otherwise determined by the Director (see 51 FR 4282, Feb. 3, 1986). The boundaries of the compensation districts may be modified at any time, and the Director shall notify all interested parties directly by mail of the modifications.

(b) As administrative exigencies from time to time may require, the Director may, by administrative order, establish special areas outside the continental United States, Alaska, and Hawaii, or change or modify any areas so established, notwithstanding their inclusion within an established compensation district. Such areas shall be designated ''jurisdictional areas.'' The Director shall also designate which of his district directors shall be in charge thereof.

(c) To further aid in the efficient administration of the OWCP, the Director may from time to time establish suboffices within compensation districts or jurisdictional areas, and shall designate a person to be in charge thereof.

[38 FR 26861, Sept. 26, 1973, as amended at 60 FR 51348, Oct. 2, 1995]

§ 702.103 Effect of establishment of suboffices and jurisdictional areas.

Whenever the Director establishes a suboffice or jurisdictional area, those reports, records, or other documents with respect to processing of claims that are required to be filed with the district director of the compensation district in which the injury or death occurred, may instead be required to be filed at the suboffice, or office established for the jurisdictional area.

§ 702.104 Transfer of individual case file.

(a) At any time after a claim is filed, the district director having jurisdiction thereof may, with the prior or subsequent approval of the Director, transfer such case to the district director in another compensation district for the purpose of making an investigation, ordering medical examinations, or taking such other action as may be necessary or appropriate to further develop the claim. If, after filing a claim, the claimant moves to another compensation district, the district director may, upon request by the claimant or the employer and with the approval of the Director, transfer the case to such other compensation district.

(b) The district director making the transfer may by letter or memorandum to the district director to whom the case is transferred give advice, comments, suggestions, or directions if appropriate to the particular case. The transfer of cases shall be by registered or certified mail. All interested parties shall be advised of the transfer.

[42 FR 45301, Sept. 9, 1977]

§ 702.105 Use of the title District Director in place of Deputy Commissioner.

Wherever the statute refers to Deputy Commissioner, these regulations have substituted the term District Director. The substitution is purely an administrative one, and in no way effects the authority of or the powers granted and responsibilities imposed by the statute on that position.

[55 FR 28606, July 12, 1990]

RECORDS

§ 702.111 Employer's records.

Every employer shall maintain adequate records of injury sustained by employees while in his employ, and which shall also contain information of disease, other impairments or disabilities, or death relating to said injury. Such records shall be available for inspection by the OWCP or by any State authority. Records required by this section shall be retained by the employer for three years following the date of injury; this applies to records for lost-time and no-lost-time injuries.

(Approved by the Office of Management and Budget under control number 1215–0160)

(Pub. L. No. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[38 FR 26861, Sept. 26, 1973, as amended at 47 FR 145, Jan. 5, 1982; 50 FR 393, Jan. 3, 1985]

§ 702.112 Records of the OWCP.

All reports, records, or other documents filed with the OWCP with respect to claims are the records of the OWCP. The Director shall be the official custodian of those records maintained by the OWCP at its national office, and the district director shall be the official custodian of those records maintained at the headquarters office in each compensation district.

§ 702.113 Inspection of records of the OWCP.

Any party in interest may be permitted to examine the record of the case in which he is interested. The official custodian of the record sought to be inspected shall permit or deny inspection in accordance with the Department of Labor's regulations pertaining thereto (see 29 CFR part 70). The original record in any such case shall not be removed from the office of the custodian for such inspection. The custodian may, in his discretion, deny inspection of any record or part thereof which is of a character specified in 5 U.S.C. 552(b) if in his opinion such inspection may result in damage, harm, or harassment to the beneficiary or to any other person. For special provisions concerning release of information regarding injured employees undergoing vocational rehabilitation, see § 702.508.

§ 702.114 Copying of records of OWCP.

Any party in interest may request copies of records he has been permitted to inspect. Such requests shall be addressed to the official custodian of the records sought to be copied. The official custodian shall provide the requested copies under the terms and conditions specified in the Department of Labor's regulations relating thereto (see 29 CFR part 70).

FORMS

§ 702.121 Forms.

The Director may from time to time prescribe, and require the use of, forms for the reporting of any information required to be reported by the regulations in this subchapter, or by the Act or any of its extensions.

REPRESENTATION

§ 702.131 Representation of parties in interest.

(a) Claimants, employers and insurance carriers may be represented in any proceeding under the Act by an attorney or other person previously authorized in writing by such claimant, employer or carrier to so act.

(b) The Secretary shall annually publish a list of individuals who are disqualified from representing claimants under the Act. Individuals on this list are not authorized to represent claimants under the Act subject to the provision of section 31(b)(2)(C) of the Act, 33 U.S.C. 931(b)(2)(C), and they shall not have their representation fee approved as provided in section 28(e), 33 U.S.C. 928(e).

(c) Individuals shall be included on the list mentioned in (b) if the Secretary determines, after proceedings under §§ 702.432(b) through 702.434, that such individual:

(1) Has been convicted (without regard to pending appeal) of any crime in connection with the representation of a claimant under this Act or any workers' compensation statute;

(2) Has engaged in fraud in connection with the presentation of a claim under this or any workers' compensation statute, including, but not limited to, knowingly making false representations, concealing or attempting to conceal material facts with respect to a claim, or soliciting or otherwise procuring false testimony;

(3) Has been prohibited from representing claimants before any other workers' compensation agency for reasons of professional misconduct which are similar in nature to those which would be grounds for disqualification under this section; or

(4) Has accepted fees for representing claimants under the Act which were not approved, or which were in excess of the amount approved pursuant to section 28 of the Act, 33 U.S.C. 928.

[38 FR 26861, Sept. 26, 1973, as amended at 50 FR 394, Jan. 3, 1985]

§ 702.132 Fees for services.

(a) Any person seeking a fee for services performed on behalf of a claimant with respect to claims filed under the Act shall make application therefor to the district director, administrative law judge, Board, or court, as the case may be, before whom the services were performed (See 33 U.S.C. 928(c)). The application shall be filed and serviced upon the other parties within the time limits specified by such district director, administrative law judge, Board, or court. The application shall be supported by a complete statement of the extent and character of the necessary work done, described with particularity as to the professional status (e.g., attorney, paralegal, law clerk, or other person assisting an attorney) of each person performing such work, the normal billing rate for each such person, and the hours devoted by each such person to each category of work. Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded, and when the fee is to be assessed against the claimant, shall also take into account the financial circumstances of the claimant. No contract pertaining to the amount of a fee shall be recognized.

(b) No fee shall be approved for a representative whose name appears on the Secretary's list of disqualified representatives under § 702.131(b).

(c) Where fees are included in a settlement agreement submitted under § 702.241, et seq. approval of that agreement shall be deemed approval of attorney fees for purposes of this subsection for work performed before the Administrative Law Judge or district director approving the settlement.

[50 FR 394, Jan. 3, 1985]

§ 702.133 Unapproved fees; solicitation of claimants; penalties.

Under the provisions of section 28(e) of the Act, 33 U.S.C. 928(e), any person who receives any fees, other consideration, or any gratuity on account of services rendered as a representative of a claimant, unless such consideration or gratuity is approved under § 702.132, or who makes it a business to solicit employment for an attorney, or for himself in respect of any claim under the Act, shall upon conviction thereof, for each offense be punished by a fine of not more than $1,000 or by imprisonment for not more than 1 year, or by both fine and imprisonment.

§ 702.134 Payment of claimant's attorney's fees in disputed claims.

(a) If the employer or carrier declines to pay any compensation on or before

the 30th day after receiving written notice from the district director of a claim for compensation having been filed, on the ground that there is no liability for compensation within the provisions of this Act, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the person, administrative body or court before whom the service was performed, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final (Act, section 28(a)).

(b) If the employer or carrier pays or tenders payment of compensation without an award pursuant to §702.231 and section 14 (a) and (b) of this Act, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the district director, administrative law judge, or Board shall set the matter for an informal conference and following such conference the district director, administrative law judge, or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuses to accept such written recommendation, within 14 days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. The foregoing sentence shall not apply if the controversy relates to degree or length of disability, and if the employer or carrier offers to submit the case for evaluation by physicians employed or selected by the district director, as authorized by section 7(e) of the Act and §702.408, and offers to tender an amount of compensation based upon the degree or length of disability found by the independent medical report at such time as an evaluation of disability can be made. If the claimant is successful in review proceedings before the Board or court in any such case an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel in accord with the above provisions. In all other cases any claim for legal services shall not be assessed against the employer or carrier (see Act, section 28(b)).

§702.135 Payment of claimant's witness fees and mileage in disputed claims.

In cases where an attorney's fee is awarded against an employer or carrier there may be further assessed against such employer or carrier as costs, fees and mileage for necessary witnesses attending the hearing at the instance of claimant. Both the necessity for the witness and the reasonableness of the fees of expert witnesses must be approved by the hearing officer, the Board, or the court, as the case may be. The amounts awarded against an employer or carrier as attorney's fees, costs, fees and mileage for witnesses shall not in any respect affect or diminish the compensation payable under this Act (see Act, section 28 (d)).

INFORMATION AND ASSISTANCE FOR CLAIMANTS

§702.136 Requests for information and assistance.

(a) *General assistance.* The Director shall, upon request, provide persons covered by the Act with information and assistance relating to the Act's coverage and compensation and the procedures for obtaining such compensation including assistance in processing a claim.

(b) *Legal assistance to claimants.* The Secretary may, upon request, provide a claimant with legal assistance in processing a claim under the Act. Such assistance may be made available to a claimant in the discretion of the Solicitor of Labor or his designee at any

time prior to or during which the claim is being processed and shall be furnished without charge to the claimant. Legal representation of the claimant in adjudicatory proceedings may be furnished in cases in which the Secretary's interest in the case is not adverse to that of the claimant.

(c) *Other assistance.* The district directors and their staff, as designees of the Director, shall promptly and fully comply with the request of a claimant receiving compensation for information about, and assistance in obtaining, medical, manpower, and vocational rehabilitation services (see also subparts D and E of this part).

COMMUTATION OF PAYMENTS AND SPECIAL FUND

§ 702.142 Commutation of payments; aliens not residents or about to become nonresidents.

(a) Pursuant to section 9(g) of the Act, 33 U.S.C. 909(g), compensation paid to aliens not residents, or about to become nonresidents, of the United States or Canada shall be in the same amount as provided for residents except that dependents in any foreign country shall be limited to surviving spouse and child or children, or if there be no surviving spouse or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of 1 year prior to the date of injury, and except that the Director, OWCP, may, at his option, or upon the application of the insurance carrier he shall, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Director.

(b) Applications for commutation under this section shall be made in writing to the district director having jurisdiction, and forwarded by the district director to the Director, for final action.

(c) Applications for commutations shall be made effective, if approved by the Director, on the date received by the district director, or on a later date if shown to be appropriate on the application.

(d) Commutations shall not be made with respect to a person journeying abroad for a visit who has previously declared an intention to return and has stated a time for returning, nor shall any commutation be made except upon the basis of a compensation order fixing the right of the beneficiary to compensation.

[50 FR 394, Jan. 3, 1985]

§ 702.143 Establishment of special fund.

Congress, by section 44 of the Act, 33 U.S.C. 944, established in the U.S. Treasury a special fund, to be administered by the Secretary. The Treasurer of the United States is the custodian of such fund, and all monies and securities in such fund shall be held in trust by the Treasurer and shall not be money or property of the United States. The Treasurer shall make disbursements from such funds only upon the order of the Director, OWCP, as delegatee of the Secretary. The Act requires that the Treasurer give bond, in an amount to be fixed and with securities to be approved by the Secretary of the Treasury and the Comptroller General of the United States, conditioned upon the faithful performance of his duty as custodian of such fund.

§ 702.144 Purpose of the special fund.

This special fund was established to give effect to a congressional policy determination that, under certain circumstances, the employer of a particular employee should not be required to bear the entire burden of paying for the compensation benefits due that employee under the Act. Instead, a substantial portion of such burden should be borne by the industry generally. Section 702.145 describes this special circumstance under which the particular employer is relieved of some of his burden. Section 702.146 describes the manner and circumstances of the input into the fund.

§ 702.145 Use of the special fund.

(a) *Under section 10 of the Act.* This section provides for initial and subsequent annual adjustments in compensation and continuing payments to beneficiaries in cases of permanent

total disability or death which commenced or occurred prior to enactment of the 1972 Amendments to this Act (Pub. L. 92–576, approved Oct. 27, 1972). At the discretion of the Director, such payments may be paid directly by him to eligible beneficiaries as the obligation accrues, one-half from the special fund and one-half from appropriations, or he may require insurance carriers or self-insured employers already making payments to such beneficiaries to pay such additional compensation as the amended Act requires. In the latter case such carriers and self-insurers shall be reimbursed by the Director for such additional amounts paid, in the proportion of one-half the amount from the special fund and one-half the amount from appropriations. To obtain reimbursement, the carriers and self-insurers shall submit claims for payments made by them during previous periods at intervals of not less than 6 months. A form has been prescribed for such purpose and shall be used. No administrative claims service expense incurred by the carrier or self-insurer shall be included in the claim and no such expense shall be allowed. The amounts reimbursed to such carrier or self-insurer shall be limited to amounts actually due and previously paid to beneficiaries.

(b) Under section 8(f) of the Act (Second Injuries). In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of injury. If, following an injury falling within the provisions of section 8(c)(1)–(20), the employee with the pre-existing permanent partial disability becomes permanently and totally disabled after the second injury, but such total disability is found not to be due solely to his second injury, the employer (or carrier) shall be liable for compensation as provided by the provisions of section 8(c)(1)–(20) of the Act, 33 U.S.C. 908(c)(1)–(20) or for 104 weeks, whichever is greater. However, if the injury is a loss of hearing covered by section 8(c)(13), 33 U.S.C. 908(c)(13), the liability shall be the lesser of these periods. In all other cases of a second injury causing permanent total disability (or death), wherein it is found that such disability (or death) is not due solely to the second injury, and wherein the employee had a pre-existing permanent partial disability, the employer (or carrier) shall first pay compensation under section 8(b) or (e) of the Act, 33 U.S.C. 908(b) or (e), if any is payable thereunder, and shall then pay 104 weeks compensation for such total disability or death, and none otherwise. If the second injury results in permanent partial disability, and if such disability is compensable under section 8(c)(1)–(20) of the Act, 33 U.S.C. 908(c)(1)–(20), but the disability so compensable did not result solely from such second injury, and the disability so compensable is materially and substantially greater than that which would have resulted from the second injury alone, then the employer (or carrier) shall only be liable for the amount of compensation provided for in section 8(c)(1)–(20) that is attributable to such second injury, or for 104 weeks, whichever is greater. However, if the injury is a loss of hearing covered by section 8(c)(13), 33 U.S.C. 908(c)(13), the liability shall be the lesser of these periods. In all other cases wherein the employee is permanently and partially disabled following a second injury, and wherein such disability is not attributable solely to that second injury, and wherein such disability is materially and substantially greater than that which would have resulted from the second injury alone, and wherein such disability following the second injury is not compensable under section 8(c)(1)–(20) of the Act, then the employer (or carrier) shall be liable for such compensation as may be appropriate under section 8(b) or (e) of the Act, 33 U.S.C. 908(b) or (e), if any, to be followed by a payment of compensation for 104 weeks, and none other. The term ''compensation'' herein means money benefits only, and does not include medical benefits. The procedure for determining the extent of the employer's (or carrier's) liability under this paragraph shall be as provided for in the adjudication of claims in subpart C of this part 702. Thereafter, upon cessation of payments which the employer

is required to make under this paragraph, if any additional compensation is payable in the case, the district director shall forward such case to the Director for consideration of an award to the person or persons entitled thereto out of the special fund. Any such award from the special fund shall be by order of the Director or Acting Director.

(c) *Under sections 8(g) and 39(c)(2) of the Act.* These sections, 33 U.S.C. 908(g) and 939(c)(2), respectively, provide for vocational rehabilitation of disabled employees, and authorize, under appropriate circumstances, a maintenance allowance for the employee (not to exceed $25 a week) in additional to other compensation benefits otherwise payable for his injury-related disability. Awards under these sections are made from the special fund upon order of the Director or his designee. The district directors may be required to make investigations with respect to any case and forward to the Director their recommendations as to the propriety and need for such maintenance.

(d) *Under section 39(c)(2) of the Act.* In addition to the maintenance allowance for the employee discussed in paragraph (c) of this section, the Director is further authorized to use the fund in such amounts as may be necessary to procure the vocational training services.

(e) *Under section 7(e) of the Act.* This provision, 33 U.S.C. 907(e), authorizes payment by the Director from the special fund for special medical examinations, i.e., those obtained from impartial specialists to resolve disputes, when such special examinations are deemed necessary under that statutory provision. The Director has the discretionary power, however, to charge the cost of such examination to the insurance carrier or self-insured employer.

(f) *Under section 18(b) of the Act.* This section, 33 U.S.C. 918(b), provides a source for payment of compensation benefits in cases where the employer is insolvent, or other circumstances preclude the payment of benefits due in any case. In such situations, the district director shall forward the case to the Director for consideration of an award from the special fund, together with evidence with respect to the employer's insolvency or other reasons for nonpayment of benefits due. Benefits, as herein used, means medical care or supplies within the meaning of section 7 of the Act, 33 U.S.C. 907, and subpart D of this part 702, as well as monetary benefits. Upon receipt of the case, the Director shall promptly determine whether an award from the special fund is appropriate and advisable in the case, having due regard for all other current commitments from the special fund. If such an award is made, the employer shall be liable for the repayment into the fund of the amounts paid therefrom, as provided in 33 U.S.C. 918(b).

(The information collection requirements contained in paragraph (a) were approved by the Office of Management and Budget under control number 1215–0065. The information collection requirements contained in paragraph (b) were approved by the Office of Management and Budget under control number 1215–0073)

(Pub. L. No. 96–511)

[38 FR 26861, Sept. 26, 1973, as amended at 49 FR 18294, Apr. 30, 1984; 51 FR 4282, Feb. 3, 1986]

§ 702.146 Source of the special fund.

(a) All amounts collected as fines and penalties under the several provisions of the Act shall be paid into the special fund (33 U.S.C. 44(c)(3)).

(b) Whenever an employee dies under circumstances creating a liability on an employer to pay death benefits to the employee's beneficiaries, and whenever there are no such beneficiaries entitled to such payments, the employer shall pay $5,000 into the special fund (Act, section 44(c)(1)). In such cases, the compensation order entered in the case shall specifically find that there is such liability and that there are no beneficiaries entitled to death benefits, and shall order payment by the employer into the fund. Compensation orders shall be made and filed in accordance with the regulations in subpart C of this part 702, except that for this purpose the district director settling the case under § 702.315 shall formalize the memorandum of conference in a compensation order, and shall file such order as provided for in § 702.349.

(c) The Director annually shall assess an amount against insurance carriers

and self-insured employers authorized under the Act and part 703 of this subchapter to replenish the fund. That total amount to be charged all carriers and self-insurers to be assessed shall be based upon an estimate of the probable expenses of the fund during the calendar year. The assessment against each carrier and self-insurer shall be based upon (1) the ratio of the amount each paid during the prior calendar year for compensation in relation to the amount all such carriers of self-insurers paid during that period for compensation, and (2) the ratio of the amount of payments made by the special fund for all cases being paid under section 8(f) of the Act, 33 U.S.C. 908(f), during the preceding calendar year which are attributable to the carrier or self-insurer in relation to the total of such payments during such year attributable to all carriers and self-insurers. The resulting sum of the percentages from paragraphs (c) (1) and (2) of this section will be divided by two, and the resulting percentage multiplied by the probable expenses of the fund. The Director may, in his or her discretion, condition continuance or renewal of authorization under part 703 upon prompt payment of the assessment. However, no action suspending or revoking such authorization shall be taken without affording such carrier or self-insurer a hearing before the Director or his/her designee.

[38 FR 26861, Sept. 26, 1973, as amended at 50 FR 395, Jan. 3, 1985; 51 FR 4282, Feb. 3, 1986]

§ 702.147 Enforcement of special fund provisions.

(a) As provided in section 44(d)(1) of the Act, 33 U.S.C. 944(d)(1), for the purpose of making rules, regulations, and determinations under the special fund provisions in section 44 and for providing enforcement thereof, the Director may investigate and gather appropriate data from each carrier and self-insured employer, and may enter and inspect such places and records (and make such transcriptions of records), question such employees, and investigate such facts, conditions, practices, or other matters as he may deem necessary or appropriate. The Director may require the employer to have audits performed of claims activity relating to this Act. The Director may also require detailed reports of payments made under the Act, and of estimated future liabilities under the Act, from any or all carriers of self-insurers. The Director may require that such reports be certified and verified in whatever manner is considered appropriate.

(b) Pursuant to section 44(d)(3) of the Act, 33 U.S.C. 944(d)(3), for the purpose of any hearing or investigation related to determinations or the enforcement of the provisions of section 44 with respect to the special fund, the provisions of 15 U.S.C. 49 and 50 as amended (the Federal Trade Commission Act provisions relating to attendance of witnesses and the production of books, papers, and documents) are made applicable to the jurisdiction, powers, and duties of the Director, OWCP, as the Secretary's delegatee.

(c) Civil penalties and unpaid assessments shall be collected by civil suits brought by and in the name of the Secretary.

(Approved by the Office of Management and Budget under control number 1215–0160)

[38 FR 26861, Sept. 26, 1973, as amended at 50 FR 395, Jan. 3, 1985]

§ 702.148 Insurance carriers' and self-insured employers' responsibilities.

(a) Each carrier and self-insured employer shall make, keep, and preserve such records, and make such reports and provide such additional information as the Director prescribes or orders, which he considers necessary or appropriate to effectively carry out his responsibilities.

(b) Consistent with their greater direct liability stemming from the amended assessment formula, employers and insurance carriers are given the authority to monitor their claims in the special fund as outlined in paragraph (c) of this section. For purposes of monitoring these claims, employers and insurance carriers remain parties in interest to the claim and are allowed access to all records relating to the claim. Similarly, employers and insurance carriers can initiate proceeding to modify an award of compensation after the special fund has assumed the liability to pay benefits. It is intended that employers and insurance carriers have

neither a greater nor a lesser responsibility in this new role that they not have with regard to cases that remain their sole liability. (See § 702.373(d).)

(c) An employer or insurance carrier may conduct any reasonable investigation regarding cases placed into the special fund by the employer or insurance carrier. Such investigation may include, but shall not be limited to, a semi-annual request for earnings information pursuant to section 8(j) of the Act, 33 U.S.C. 908(j) (See § 702.285) periodic medical examinations, vocational rehabilitation evaluations, and requests for any additional information needed to effectively monitor such a case.

(Approved by the Office of Management and Budget under control number 1215–0118)

(Pub. L. No. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[38 FR 26861, Sept. 26, 1973, as amended at 47 FR 145, Jan. 5, 1982; 50 FR 395, Jan. 3, 1985]

LIENS ON COMPENSATION

§ 702.161 Liens against assets of insurance carriers and employers.

Where payments have been made from the special fund pursuant to section 18(b) of the Act, 33 U.S.C. 918(b) and § 704.145(f) the Secretary of Labor shall, for the benefit of the fund, be subrogated to all the rights of the person receiving such payments. The Secretary may institute proceedings under either section 18 or 21(d) of the Act, 33 U.S.C. 918 or 921(d), or both, to recover the amount expended by the fund or so much as in the judgement of the Secretary is possible, or the Secretary may settle or compromise any such claim.

[50 FR 395, Jan. 3, 1985]

§ 702.162 Liens on compensation authorized under special circumstances.

(a) Pursuant to section 17 of the Act, 33 U.S.C. 917, when a trust fund which complies with section 302(c) of the Labor-Management Relations Act of 1947, 29 U.S.C. 186(c) [LMRA], established pursuant to a collective bargaining agreement in effect between an employer and an employee entitled to compensation under this Act, has paid disability benefits to an employee which the employee is legally obligated to repay by reason of his entitlement to compensation under this Act, a lien shall be authorized on such compensation in favor of the trust fund for the amount of such payments.

(b) (1) An application for such a lien shall be filed on behalf of the trust fund with the district director for the compensation district where the claim for compensation has been filed, 20 CFR 702.101. Such application shall include a certified statement by an authorized official of the trust fund that:

(i) The trust fund is entitled to a lien in its favor by reason of its payment of disability payments to a claimant-employee (including his name therein);

(ii) The trust fund was created pursuant to a collective bargaining agreement covering the claimant-employee;

(iii) The trust fund complies with section 302(c) of the Labor-Management Relations Act of 1947, 29 U.S.C. 186(c);

(iv) The trust agreement contains a subrogation provision entitling the fund to reimbursement for disability benefits paid to the claimant-employee who is entitled to compensation under the Longshoremen's Act;

(2) The statement shall also state the amount paid to the named claimant-employee and whether such disability benefit payments are continuing to be paid.

(3) If the claimant has signed a statement acknowledging receipt of disability benefits from the trust fund and/or a statement recognizing the trust fund's entitlement to a lien against compensation payments which may be received under the Longshoremen's and Harbor Worker's Compensation Act as a result of his present claim and for which the fund is providing disability payments, such statement(s) shall also be included with or attached to the application.

(c) Upon receipt of this application, the district director shall, within a reasonable time, notify the claimant, the employer and/or its compensation insurance carrier that the request for a lien has been filed and each shall be provided with a copy of the application. If the claimant disputes the right of the trust fund to the lien or the

amount stated, if any, he shall, within 30 days after receipt of the application or such other longer period as the district director may set, notify the district director and he shall be given an opportunity to challenge the right of the trust fund to, or the amount of, the asserted lien; notice to either the employer or its compensation insurance carrier shall constitute notice to both of them.

(d) If the claim for compensation benefits is resolved without a formal hearing and if there is no dispute over the amount of the lien or the right of the trust fund to the lien, the district director may order and impose the lien and he shall notify all parties of the amount of the lien and manner in which it is to be paid.

(e) If the claimant's claim for compensation cannot be resolved informally, the district director shall transfer the case to the Office of the Chief Administrative Law Judge for a formal hearing, pursuant to section 19(d) of the Act, 33 U.S.C. 919(d), and 20 CFR 702.317. The district director shall also submit therewith the application for the lien and all documents relating thereto.

(f) If the administrative law judge issues a compensation order in favor of the claimant, such order shall establish a lien in favor of the trust fund if it is determined that the trust fund has satisfied all of the requirements of the Act and regulations.

(g) If the claim for compensation is not in dispute, but there is a dispute as to the right of the trust fund to a lien, or the amount of the lien, the district director shall transfer the matter together with all documents relating thereto to the Office of the Chief Administrative Law Judge for a formal hearing pursuant to section 19(d) of the Act, 33 U.S.C. 919(d), and 20 CFR 702.317.

(h) In the event that either the district director or the administrative law judge is not satisfied that the trust fund qualifies for a lien under section 17, the district director or administrative law judge may require further evidence including but not limited to the production of the collective bargaining agreement, trust agreement or portions thereof.

(i) Before any such lien is approved, if the trust fund has provided continued disability payments after the application for a lien has been filed, the trust fund shall submit a further certified statement showing the total amount paid to the claimant as disability payments. The claimant shall likewise be given an opportunity to contest the amount alleged in this subsequent statement.

(j) In approving a lien on compensation, the district director or administrative law judge shall not order an initial payment to the trust fund in excess of the amount of the past due compensation. The remaining amount to which the trust fund is entitled shall thereafter be deducted from the affected employee's subsequent compensation payments and paid to the trust fund, but any such payment to the trust fund shall not exceed 10 percent of the claimant-employee's biweekly compensation payments.

(Approved by the Office of Management and Budget under control number 1215–0160)

[42 FR 45301, Sept. 9, 1977, as amended at 50 FR 395, Jan. 3, 1985; 51 FR 4282, Feb. 3, 1986]

CERTIFICATION OF EXEMPTION

§ 702.171 Certification of exemption, general.

An employer may apply to the Director or his/her designee to certify a particular facility as one engaged in the building, repairing or dismantling of exclusively small vessels, as defined. Once certified, injuries sustained at that facility would not be covered under the Act except for injuries which occur over the navigable waters of the United States including any adjoining pier, wharf, dock, facility over land for launching vessels or for hauling, lifting or drydocking vessels. A facility otherwise covered under the Act remains covered until certification of exemption is issued; a certification will be granted only upon submission of a complete application (described in §702.174), and only for as long as a facility meets the requirements detailed in section 3(d) of the Act, 33 U.S.C. 903(d). This exemption from coverage is not intended to be used by employers whose facilities from time to time may

temporarily meet the criteria for qualification but only for facilities which work on exclusively small vessels, as defined.

[50 FR 396, Jan. 3, 1985]

§ 702.172 Certification; definitions.

For purposes of §§ 702.171 through 702.175 dealing with certification of small vessel facilities, the following definitions are applicable.

(a)(1) ''Small vessel'' means only those vessels described in section 3(d)(3) of the Act, 33 U.S.C. 903(d)(3), that is:

(i) A commercial barge which is under 900 lightship displacement tons (long); or

(ii) A commercial tugboat, towboat, crewboat, supply boat, fishing vessel or other work vessel which is under 1,600 tons gross.

(2) For these purposes: (i) One gross ton equals 100 cubic feet, as measured by the current formula contained in the Act of May 6, 1894 as amended through 1974 (46 U.S.C. 77); (ii) one long ton equals 2,240 lbs; and (iii) ''Commercial'' as it applies to ''vessel'' means any vessel engaged in commerce but does not include military vessels or Coast Guard vessels.

(b) ''Federal Maritime Subsidy'' means the construction differential subsidy (CDS) or operating differential subsidy under the Merchant Marine Act of 1936 (46 U.S.C. 1101 et seq.).

(c) *facility* means an operation of an employer at a particular contiguous geographic location.

[51 FR 4283, Feb. 3, 1986]

§ 702.173 Exemptions; requirements, limitations.

(a) Injuries at a facility otherwise covered by the Act are exempted only upon certification that the facility is: (1) Engaged in the building, repairing or dismantling of exclusively small commercial vessels; and (2) does not receive a Federal maritime subsidy.

(b) The exemption does not apply to: (1) Injuries at any facility which occur over the navigable waters of the United States or upon any adjoining pier, wharf, dock, facility over land for launching vessels or for hauling, lifting or drydocking vessels; or (2) where the employee at such facility is not subject to a State workers' compensation law.

[50 FR 396, Jan. 3, 1985]

§ 702.174 Exemptions; necessary information.

(a) *Application.* Before any facility is exempt from coverage under the Act, the facility must apply for and receive a certificate of exemption from the Director or his/her designee. The application must be made by the owner of the facility; where the owner is a partnership it shall be made by a partner and where a corporation by an officer of the corporation or the manager in charge of the facility for which an exemption is sought. The information submitted shall include the following:

(1) Name, location, physical description and a site plan or aerial photograph of the facility for which an exemption is sought.

(2) Description of the nature of the business.

(3) An affidavit (signed by a partner if the facility is owned by a partnership or an officer if owned by a corporation) vertifying and/or acknowledging that:

(i) the facility is, as of the date of the application, engaged in the business of building, repairing or dismantling exclusively small commercial vessels and that it does not then nor foreseeably will it engage in the building, repairing or dismantling of other than small vessels.

(ii) The facility does not receive any Federal maritime subsidy.

(iii) The signator has the duty to immediately inform the district director of any change in these or other conditions likely to result in a termination of an exemption.

(iv) the employer has secured appropriate compensation liability under a State workers' compensation law.

(v) Any false, relevant statements relating to the application or the failure to notify the district director of any changes in circumstances likely to result in termination of the exemption will be grounds for revocation of the exemption certificate and will subject the employer to all provisions of the Act, including all duties, responsibilities and penalties, retroactive to the date of application or date of change in circumstances, as appropriate.

(b) *Action by the Director.* The Director or his/her designee shall review the application within thirty (30) days of its receipt.

(1) Where the application is complete and shows that all requirements under §702.173 are met, the Director shall promptly notify the employer by certified mail, return receipt requested, that certification has been approved and will be effective on the date specified. The employer is required to post notice of the exemption at a conspicuous location.

(2) Where the application is incomplete or does not substantiate that all requirements of section 3(d) of the Act, 33 U.S.C. 903(d), have been met, or evidence shows the facility is not eligible for exemption, the Director shall issue a letter which details the reasons for the deficiency or the rejection. The employer/applicant may reapply for certification, correcting deficiencies and/or responding to the reasons for the Director's denial. The Director or his/her designee shall issue a new decision within a reasonable time of reapplication following denial. Such action will be the final administrative review and is not appealable to the Administrative Law Judge or the Benefits Review Board.

(c) The Director or another designated individual at any time has the right to enter on and inspect any facility seeking exemption for purposes of verifying information provided on the application form.

(d) *Action by the employer.* Immediately upon receipt of the certificate of exemption from coverage under the Act the employer shall post:

(1) A general notice in a conspicuous place that the Act does not cover injuries sustained at the facility in question, the basis of the exemption, the effective date of the exemption and grounds for termination of the exemption.

(2) A notice, where applicable, at the entrances to all areas to which the exemption does not apply.

(Approved by the Office of Management and Budget under control number 1215–0160)

[50 FR 396, Jan. 3, 1985, as amended at 51 FR 4283, Feb. 3, 1986]

§702.175 Effect of work on excluded vessels; reinstatement of certification.

(a) When a vessel other than a small commercial vessel, as defined in §702.172, enters a facility which has been certified as exempt from coverage, the exemption shall automatically terminate as of the date such a vessel enters the facility. The exemption shall also terminate on the date a contract for a Federal maritime subsidy is entered into, and, in the situation where the facility undertakes to build a vessel other than a small vessel, when the construction first takes on the characteristics of a vessel, i.e., when the keel is laid. All duties, obligations and requirements imposed by the Act, including the duty to secure compensation liability as required by sections 4 and 32 of the Act, 33 U.S.C. 904 and 932, and to keep records and forward reports, are effective immediately. The employer shall notify the Director or his/her designee immediately where this occurs.

(b) Where an exemption certification is terminated because of circumstances described in (a), the employer may apply for reinstatement of the exemption once the event resulting in termination of the exemption ends. The reapplication shall consist of a reaffirmation of the nature of the business, an explanation of the circumstances leading to the termination of exemption, and an affidavit by the appropriate person affirming that the circumstances prompting the termination no longer exists nor will they reoccur in the forseeable future and that the facility is engaged in building, repairing or dismantling exclusively small vessels. The Director or the Director's designee shall respond to the complete reapplication within ten working days of receipt.

[50 FR 397, Jan. 3, 1985, as amended at 51 FR 4283, Feb. 3, 1986]

Subpart B—Claims Procedures

EMPLOYER'S REPORTS

§702.201 Reports from employers of employee's injury or death.

(a) Within 10 days from the date of an employee's injury or death, or 10 days

from the date an employer has knowledge of an employee's injury or death, including any disease or death proximately caused by the employment, the employer shall furnish a report thereof to the district director for the compensation district in which the injury or death occurred, and shall thereafter furnish such additional or supplemental reports as the district director may request.

(b) No report shall be filed unless the injury causes the employee to lose one or more shifts from work. However, the employer shall keep a record containing the information specified in § 702.202. Compliance with the current OSHA injury record keeping requirements at 29 CFR part 1904 will satisfy the record keeping requirements of this section for no lost time injuries.

(Approved by the Office of Management and Budget under control number 1215–0160)

[38 FR 26861, Sept. 26, 1973, as amended at 50 FR 397, Jan. 3, 1985; 51 FR 4283, Feb. 3, 1986]

§ 702.202 Employer's report; form and contents.

The employer's report of an employee's injury or death shall be in writing and on a form prescribed by the Director for this purpose, and shall contain:

(a) The name, address and business of the employer;

(b) The name, address, occupation and Social Security Number (SSN) of the employee;

(c) The cause, nature, and other relevant circumstances of the injury or death;

(d) The year, month, day, and hour when, and the particular locality where, the injury or death occurred;

(e) Such other information as the Director may require.

(Approved by the Office of Management and Budget under control numbers 1215–0031 and 1215–0063)

[58 FR 68032, Dec. 23, 1993]

§ 702.203 Employer's report; how given.

The employer's report, an original and one copy, may be furnished by delivering it to the appropriate office of the district director, or by mailing it to said office.

§ 702.204 Employer's report; penalty for failure to furnish and or falsifying.

Any employer, insurance carrier, or self-insured employer who knowingly and willfully fails or refuses to send any report required by § 702.201, or who knowingly or willfully makes a false statement or misrepresentation in any report, shall be subject to a civil penalty not to exceed $10,000.00 for each such failure, refusal, false statement, or misrepresentation. *Provided, however,* that for any violations occurring on or after November 17, 1997 the maximum civil penalty may not exceed $11,000.00. The district director has the authority and responsibility for assessing a civil penalty under this section.

[62 FR 53956, Oct. 17, 1997]

§ 702.205 Employer's report; effect of failure to report upon time limitations.

Where the employer, or agent in charge of the business, or carrier has been given notice or has knowledge of an employee's injury or death, and fails, neglects, or refuses to file a report thereof as required by § 702.201, the time limitations provisions with respect to the filing of claims for compensation for disability or death (33 U.S.C. 913(a), and see § 702.221) shall not begin to run until such report shall have been furnished as required herein.

[38 FR 26861, Sept. 26, 1973, as amended at 50 FR 397, Jan. 3, 1985]

NOTICE

§ 702.211 Notice of employee's injury or death; designation of responsible official.

(a) In order to claim compensation under the Act, an employee or claimant must first give notice of the fact of an injury or death to the employer and also may give notice to the district director for the compensation district in which the injury or death occurred. Notice to the employer must be given to that individual whom the employer has designated to receive such notices. If no individual has been so designated notice may be given to: (1) The first line supervisor (including foreman, hatchboss or timekeeper), local plant manager or personnel office official; (2)

to any partner if the employer is a partnership; or (3) if the employer is a corporation, to any authorized agent, to an officer or to the person in charge of the business at the place where the injury occurred. In the case of a retired employee, the employee/claimant may submit the notice to any of the above persons, whether or not the employer has designated an official to receive such notice.

(b) In order to facilitate the filing of notices, each employer shall designate at least one individual responsible for receiving notices of injury or death; this requirement applies to all employers. The designation shall be by position and the employer shall provide the name and/or position, exact location and telephone number of the individual to all employees by the appropriate method described below.

(1) *Type of individual.* Designees must be a first line supervisor (including a foreman, hatchboss or timekeeper), local plant manager, personnel office official, company nurse or other individual traditionally entrusted with this duty, who is located full-time on the premises of the covered facility. The employer must designate at least one individual at each place of employment or one individual for each work crew where there is no fixed place of employment (in that case, the designation should always be the same position for all work crews).

(2) *How designated.* The name and/or title, the location and telephone number of the individual who is selected by the employer to receive all notices shall be given to the district director for the compensation district in which the facility is located; posting on the worksite in a conspicuous place shall fulfill this requirement. A redesignation shall be effected by a change in posting.

(3) *Publication.* Every employer shall post the name and/or position, the exact location and telephone number of the designated official. The posting shall be part of the general posting requirement, done on a form prescribed by the Director, and placed in a conspicuous location. Posting must be done at each worksite.

(4) *Effect of failure to designate.* Where an employer fails to properly designate and to properly publish the name and/or position of the individual authorized to receive notices of injury or death, such failure shall constitute satisfactory reasons for excusing the employee/claimant's failure to give notice as authorized by section 12(d)(3)(ii) of the Act, 33 U.S.C. 912(d)(3)(ii).

(Approved by the Office of Management and Budget under control number 1215–0160)

[50 FR 397, Jan. 3, 1985, as amended at 51 FR 4283, Feb. 3, 1986]

§ 702.212 Notice; when given; when given for certain occupational diseases.

(a) For other than occupational diseases described in (b), the employee must give notice within thirty (30) days of the date of the injury or death. For this purpose the date of injury or death is:

(1) The day on which a traumatic injury occurs;

(2) The date on which the employee or claimant is or by the exercise of reasonable diligence or by reason of medical advice, should have been aware of a relationship between the injury or death and the employment; or

(3) In the case of claims for loss of hearing, the date the employee receives an audiogram, with the accompanying report which indicates the employee has suffered a loss of hearing that is related to his or her employment. (See § 702.441).

(b) In the case of an occupational disease which does not immediately result in disability or death, notice must be given within one year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice, should have been aware, of the relationship between the employment, the disease and the death or disability. For purposes of these occupational diseases, therefore, the notice period does not begin to run until the employee is disabled, or in the case of a retired employee, until a permanent impairment exists.

(c) For purposes of workers whose coverage under this Act is dependent on denial of coverage under a State compensation program, as described in § 701.401, the time limitations set forth above do not begin to run until a final

decision denying State coverage is issued under the State compensation act.

(Approved by the Office of Management and Budget under control number 1215–0160)

[50 FR 397, Jan. 3, 1985, as amended at 51 FR 4283, Feb. 3, 1986]

§ 702.213 Notice; by whom given.

Notice shall be given by the injured employee or someone on his behalf, or in the case of death, by the deceased employee's beneficiary or someone on his behalf.

[38 FR 26861, Sept. 26, 1973. Redesignated at 50 FR 397, Jan. 3, 1985]

§ 702.214 Notice; form and content.

Notice shall be in writing on a form prescribed by the Director for this purpose; such form shall be made available to the employee or beneficiary by the employer. The notice shall be signed by the person authorized to give notice, and shall contain the name, address and Social Security Number (SSN) of the employee and, in death cases, also the SSN of the person seeking survivor benefits, and a statement of the time, place, nature and cause of the injury or death.

[58 FR 68032, Dec. 23, 1993]

§ 702.215 Notice; how given.

Notice shall be effected by delivering it—by hand or by mail at the address posted by the employer—to the individual designated to receive such notices. Notice when given to the district director, may be by hand or by mail on a form supplied by the Secretary, or orally in person or by telephone.

(Approved by the Office of Management and Budget under control number 1215–0160)

[50 FR 398, Jan. 3, 1985]

§ 702.216 Effect of failure to give notice.

Failure to give timely notice to the employer's designated official shall not bar any claim for compensation if: (a) The employer, carrier, or designated official had actual knowledge of the injury or death; or (b) the district director or ALJ determines the employer or carrier has not been prejudiced: or (c) the district director excuses failure to file notice. For purposes of this subsection, actual knowledge shall be deemed to exist if the employee's immediate supervisor was aware of the injury and/or in the case of a hearing loss, where the employer has furnished to the employee an audiogram and report which indicates a loss of hearing. Failure to give notice shall be excused by the district director if: a) Notice, while not given to the designated official, was given to an official of the employer or carrier, and no prejudice resulted; or b) for some other satisfactory reason, notice could not be given. Failure to properly designate and post the individual so designated shall be considered a satisfactory reason. In any event, such defense to a claim must be raised by the employer/carrier at the first hearing on the claim.

[51 FR 4283, Feb. 3, 1986]

§ 702.217 Penalty for false statement, misrepresentation.

(a) Any claimant or representative of a claimant who knowingly and willfully makes a false statement or representation for the purpose of obtaining a benefit or payment under this Act shall be guilty of a felony, and on conviction thereof shall be punished by a fine not to exceed $10,000, by imprisonment not to exceed five years, or by both.

(b) Any person including, but not limited to, an employer, its duly authorized agent or an employee of an insurance carrier, who knowingly and willingly makes a false statement or representation for the purpose of reducing, denying or terminating benefits to an injured employee, or his dependents pursuant to section 9, 33 U.S.C. 909, if the injury results in death, shall be punished by a fine not to exceed $10,000, by imprisonment not to exceed five years, or both.

[50 FR 398, Jan. 3, 1985]

CLAIMS

§ 702.221 Claims for compensation; time limitations.

(a) Claims for compensation for disability or death shall be in writing and filed with the district director for the

compensation district in which the injury or death occurred. The Social Security Number (SSN) of the injured employee and, in cases of death, the SSN of the person seeking survivor benefits shall also be set forth on each claim. Claims may be filed anytime after the seventh day of disability or anytime following the death of the employee. Except as provided below, the right to compensation is barred unless a claim is filed within one year of the injury or death, or (where payment is made without an award) within one year of the date on which the last compensation payment was made.

(b) In the case of a hearing loss claim, the time for filing a claim does not begin to run until the employee receives an audiogram with the accompanying report which indicates the employee has sustained a hearing loss that is related to his or her employment. (See § 702.441).

(Approved by the Office of Management and Budget under control number 1215–0160)

[50 FR 398, Jan. 3, 1985, as amended at 51 FR 4284, Feb. 3, 1986; 58 FR 68032, Dec. 23, 1993]

§ 702.222 Claims; exceptions to time limitations.

(a) Where a person entitled to compensation under the Act is mentally incompetent or a minor, the time limitation provision of § 702.221 shall not apply to a mentally incompetent person so long as such person has no guardian or other authorized representative, but § 702.221 shall be applicable from the date of appointment of such guardian or other representative. In the case of minor who has no guardian before he or she becomes of age, time begins to run from the date he or she becomes of age.

(b) Where a person brings a suit at law or in admiralty to recover damages in respect of an injury or death, or files a claim under a State workers' compensation act because such person is excluded from this Act's coverage by reason of section 2(3) or 3(d) of the Act (33 U.S.C. 902(3) or 903(d)), and recovery is denied because the person was an employee and defendant was an employer within the meaning of the Act, and such employer had secured compensation to such employee under the Act, the time limitation in § 702.221 shall not begin to run until the date of termination of such suit or proceeding.

(c) Notwithstanding the provisions in paragraph (a) of this section, where the claim is one based on disability or death due to an occupational disease which does not immediately result in death or disability, it must be filed within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice, should have been aware of the relationship between the employment, the disease and the death or disability, or within one year of the date of last payment of compensation, whichever is later. For purposes of occupational disease, therefore, the time limitation for filing a claim does not begin to run until the employee is disabled, or in the case of a retired employee, where a permanent impairment exists.

(d) The time limitations set forth above do not apply to claims filed under section 49 of the Act, 33 U.S.C. 949.

(Approved by the Office of Management and Budget under control number 1215–0160)

[50 FR 398, Jan. 3, 1985]

§ 702.223 Claims; time limitations; time to object.

Notwithstanding the requirements of § 702.221, failure to file a claim within the period prescribed in such section shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard.

[38 FR 26861, Sept. 26, 1973. Redesignated and amended at 50 FR 397, Jan. 3, 1985]

§ 702.224 Claims; notification of employer of filing by employee.

Within 10 days after the filing of a claim for compensation for injury or death under the Act, the district director shall give written notice thereof to the employer or carrier, served personally or by mail.

[38 FR 26861, Sept. 26, 1973. Redesignated at 50 FR 397, Jan. 3, 1985, as amended at 60 FR 51348, Oct. 2, 1995]

§ 702.225 Withdrawal of a claim.

(a) *Before adjudication of claim.* A claimant (or an individual who is authorized to execute a claim on his behalf) may withdraw his previously filed claim: *Provided,* That:

(1) He files with the district director with whom the claim was filed a written request stating the reasons for withdrawal;

(2) The claimant is alive at the time his request for withdrawal is filed;

(3) The district director approves the request for withdrawal as being for a proper purpose and in the claimant's best interest; and

(4) The request for withdrawal is filed, on or before the date the OWCP makes a determination on the claim.

(b) *After adjudication of claim.* A claim for benefits may be withdrawn by a written request filed after the date the OWCP makes a determination on the claim: *Provided,* That:

(1) The conditions enumerated in paragraphs (a) (1) through (3) of this section are met; and

(2) There is repayment of the amount of benefits previously paid because of the claim that is being withdrawn or it can be established to the satisfaction of the Office that repayment of any such amount is assured.

(c) *Effect of withdrawal of claim.* Where a request for withdrawal of a claim is filed and such request for withdrawal is approved, such withdrawal shall be without prejudice to the filing of another claim, subject to the time limitation provisions of section 13 of the Act and of the regulations in this part.

[38 FR 26861, Sept. 26, 1973. Redesignated at 50 FR 397, Jan. 3, 1985]

NONCONTROVERTED CLAIMS

§ 702.231 Noncontroverted claims; payment of compensation without an award.

Unless the employer controverts its liability to pay compensation under this Act, the employer or insurance carrier shall pay periodically, promptly and directly to the person entitled thereto benefits prescribed by the Act. For this purpose, where the employer furnishes to an employee a copy of an audiogram with a report thereon, which indicates the employee has sustained a hearing loss causally related to factors of that employment, the employer or insurance carrier shall pay appropriate compensation or at that time controvert the liability to pay compensation under this Act.

[50 FR 399, Jan. 3, 1985]

§ 702.232 Payments without an award; when; how paid.

The first installment of compensation shall become due by the fourteenth (14th) day after the employer has been notified, through the designated official or by any other means described in § 702.211 et seq., or has actual knowledge of the injury or death. All compensation due on that fourteenth (14th) day shall be paid then and appropriate compensation due thereafter must be paid in semi-monthly installments, unless the district director determines otherwise.

[50 FR 399, Jan. 3, 1985]

§ 702.233 Penalty for failure to pay without an award.

If any installment of compensation payable without an award is not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to 10 per centum thereof which shall be paid at the same time as, but in addition to, such installment unless the employer files notice of controversion in accordance with § 702.261, or unless such nonpayment is excused by the district director after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

§ 702.234 Report by employer of commencement and suspension of payments.

Immediately upon making the first payment of compensation, and upon the suspension of payments once begun, the employer shall notify the district director having jurisdiction over the place where the injury or death occurred of the commencement or suspension of payments, as the case may be.

§ 702.235 Report by employer of final payment of compensation.

(a) Within 16 days after the final payment of compensation has been made, the employer, the insurance carrier, or where the employer is self-insured, the employer shall notify the district director on a form prescribed by the Secretary, stating that such final payment has been made, the total amount of compensation paid, the name and address of the person(s) to whom payments were made, the date of the injury or death and the name of the injured or deceased employee, and the inclusive dates during which compensation was paid.

(b) A ''final payment of compensation'' for the purpose of applying the penalty provision of §702.236 shall be deemed any one of the following:

(1) The last payment of compensation made in accordance with a compensation order awarding disability or death benefits, issued by either a district director or an administrative law judge;

(2) The payment of an agreed settlement approved under section 8(i) (A) or (B), of the Act, 33 U.S.C. 908(i);

(3) The last payment made pursuant to an agreement reached by the parties through informal proceedings;

(4) Any other payment of compensation which anticipates no further payments under the Act.

(Approved by the Office of Management and Budget under control number 1215–0024)

(Pub. L. No. 96–511)

[42 FR 45302, Sept. 9, 1977, as amended at 49 FR 18294, Apr. 30, 1984; 50 FR 399, Jan. 3, 1985]

§ 702.236 Penalty for failure to report termination of payments.

Any employer failing to notify the district director that the final payment of compensation has been made as required by §702.235 shall be assessed a civil penalty in the amount of $100.00. *Provided, however,* that for any violation occurring on or after November 17, 1997 the civil penalty will be $110.00. The district director has the authority and responsibility for assessing a civil penalty under this section.

[62 FR 53956, Oct. 17, 1997]

AGREED SETTLEMENTS

§ 702.241 Definitions and supplementary information.

(a) As used hereinafter, the term *adjudicator* shall mean district director or administrative law judge (ALJ).

(b) If a settlement application is submitted to an adjudicator and the case is pending at the Office of Administrative Law Judges, the Benefits Review Board, or any Federal circuit court of appeals, the parties may request that the case be remanded to the adjudicator for consideration of the application. The thirty day period as described in paragraph (f) of this section begins when the remanded case is received by the adjudicator.

(c) If a settlement application is first submitted to an ALJ, the thirty day period mentioned in paragraph (f) of this section does not begin until five days before the date the formal hearing is set. This rule does not preclude the parties from submitting the application at any other time such as (1) after the case is referred for hearing, (2) at the hearing, or (3) after the hearing but before the ALJ issues a decision and order. Where a case is pending before the ALJ but not set for a hearing, the parties may request the case be remanded to the district director for consideration of the settlement.

(d) A settlement agreement between parties represented by counsel, which is deemed approved when not disapproved within thirty days, as described in paragraph (f) of this section, shall be considered to have been filed in the office of the district director on the thirtieth day for purposes of sections 14 and 21 of the Act, 33 U.S.C. 914 and 921.

(e) A fee for representation which is included in an agreement that is approved in the manner described in paragraph (d) of this section, shall also be considered approved within the meaning of section 28(e) of the Act, 33 U.S.C. 928(e).

(f) The thirty day period for consideration of a settlement agreement shall be calculated from the day after receipt unless the parties are advised otherwise by the adjudicator. (See §702.243(b)). If the last day of this period is a holiday or occurs during a

weekend, the next business day shall be considered the thirtieth day.

(g) An agreement among the parties to settle a claim is limited to the rights of the parties and to claims then in existence; settlement of disability compensation or medical benefits shall not be a settlement of survivor benefits nor shall the settlement affect, in any way, the right of survivors to file a claim for survivor's benefits.

(h) For purposes of this section and § 702.243 the term *counsel* means any attorney admitted to the bar of any State, territory or the District of Columbia.

[50 FR 399, Jan. 3, 1985, as amended at 51 FR 4284, Feb. 3, 1986]

§ 702.242 Information necessary for a complete settlement application.

(a) The settlement application shall be a self-sufficient document which can be evaluated without further reference to the administrative file. The application shall be in the form of a stipulation signed by all parties and shall contain a brief summary of the facts of the case to include: a description of the incident, a description of the nature of the injury to include the degree of impairment and/or disability, a description of the medical care rendered to date of settlement, and a summary of compensation paid and the compensation rate or, where benefits have not been paid, the claimant's average weekly wage.

(b) The settlement application shall contain the following:

(1) A full description of the terms of the settlement which clearly indicates, where appropriate, the amounts to be paid for compensation, medical benefits, survivor benefits and representative's fees which shall be itemized as required by § 702.132.

(2) The reason for the settlement, and the issues which are in dispute, if any.

(3) The claimant's date of birth and, in death claims, the names and birth dates of all dependents.

(4) Information on whether or not the claimant is working or is capable of working. This should include, but not be limited to, a description of the claimant's educational background and work history, as well as other factors which could impact, either favorably or unfavorably, on future employability.

(5) A current medical report which fully describes any injury related impairment as well as any unrelated conditions. This report shall indicate whether maximum medical improvement has been reached and whether further disability or medical treatment is anticipated. If the claimant has already reached maximum medical improvement, a medical report prepared at the time the employee's condition stabilized will satisfy the requirement for a current medical report. A medical report need not be submitted with agreements to settle survivor benefits unless the circumstances warrant it.

(6) A statement explaining how the settlement amount is considered adequate.

(7) If the settlement application covers medical benefits an itemization of the amount paid for medical expenses by year for the three years prior to the date of the application. An estimate of the claimant's need for future medical treatment as well as an estimate of the cost of such medical treatment shall also be submitted which indicates the inflation factor and/or the discount rate used, if any. The adjudicator may waive these requirements for good cause.

(8) Information on any collateral source available for the payment of medical expenses.

(Approved by the Office of Management and Budget under control number 1215–0160)

[50 FR 399, Jan. 3, 1985, as amended at 51 FR 4284, Feb. 3, 1986]

§ 702.243 Settlement application; how submitted, how approved, how disapproved, criteria.

(a) When the parties to a claim for compensation, including survivor benefits and medical benefits, agree to a settlement they shall submit a complete application to the adjudicator. The application shall contain all the information outlined in § 702.242 and shall be sent by certified mail, return receipt requested or submitted in person, or by any other delivery service with proof of delivery to the adjudicator. Failure to submit a complete application shall toll the thirty day period mentioned in section 8(i) of the

Act, 33 U.S.C. 908(i), until a complete application is received.

(b) The adjudicator shall consider the settlement application within thirty days and either approve or disapprove the application. The liability of an employer/insurance carrier is not discharged until the settlement is specifically approved by a compensation order issued by the adjudicator. However, if the parties are represented by counsel, the settlement shall be deemed approved unless specifically disapproved within thirty days after receipt of a complete application. This thirty day period does not begin until all the information described in §702.242 has been submitted. The adjudicator shall examine the settlement application within thirty days and shall immediately serve on all parties notice of any deficiency. This notice shall also indicate that the thirty day period will not commence until the deficiency is corrected.

(c) If the adjudicator disapproves a settlement application, the adjudicator shall serve on all parties a written statement or order containing the reasons for disapproval. This statement shall be served by certified mail within thirty days of receipt of a complete application (as described in §702.242.) if the parties are represented by counsel. If the disapproval was made by a district director, any party to the settlement may request a hearing before an ALJ as provided in sections 8 and 19 of the Act, 33 U.S.C. 908 and 919, or an amended application may be submitted to the district director. If, following the hearing, the ALJ disapproves the settlement, the parties may: (1) Submit a new application, (2) file an appeal with the Benefits Review Board as provided in section 21 of the Act, 33 U.S.C. 921, or (3) proceed with a hearing on the merits of the claim. If the application is initially disapproved by an ALJ, the parties may (1) submit a new application or (2) proceed with a hearing on the merits of the claim.

(d) The parties may submit a settlement application solely for compensation, or solely for medical benefits or for compensation and medical benefits combined.

(e) If either portion of a combined compensation and medical benefits settlement application is disapproved the entire application is disapproved unless the parties indicate on the face of the application that they agree to settle either portion independently.

(f) When presented with a settlement, the adjudicator shall review the application and determine whether, considering all of the circumstances, including, where appropriate, the probability of success if the case were formally litigated, the amount is adequate. The criteria for determining the adequacy of the settlement application shall include, but not be limited to:

(1) The claimant's age, education and work history;

(2) The degree of the claimant's disability or impairment;

(3) The availability of the type of work the claimant can do;

(4) The cost and necessity of future medical treatment (where the settlement includes medical benefits).

(g) In cases being paid pursuant to a final compensation order, where no substantive issues are in dispute, a settlement amount which does not equal the present value of future compensation payments commuted, computed at the discount rate specified below, shall be considered inadequate unless the parties to the settlement show that the amount is adequate. The probability of the death of the beneficiary before the expiration of the period during which he or she is entitled to compensation shall be determined according to the most current United States Life Table, as developed by the United States Department of Health and Human Services, which shall be updated from time to time. The discount rate shall be equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of 52 weeks U.S. Treasury Bills settled immediately prior to the date of the submission of the settlement application.

[50 FR 399, Jan. 3, 1985, as amended at 51 FR 4284, Feb. 3, 1986; 60 FR 51348, Oct. 2, 1995]

CONTROVERTED CLAIMS

§ 702.251 Employer's controversion of the right to compensation.

Where the employer controverts the right to compensation after notice or

knowledge of the injury or death, or after receipt of a written claim, he shall give notice thereof, stating the reasons for controverting the right to compensation, using the form prescribed by the Director. Such notice, or answer to the claim, shall be filed with the district director within 14 days from the date the employer receives notice or has knowledge of the injury or death. The original notice shall be sent to the district director having jurisdiction, and a copy thereof shall be given or mailed to the claimant.

(Approved by the Office of Management and Budget under control number 1215–0023)

(Pub. L. No. 96–511)

[38 FR 26861, Sept. 26, 1973, as amended at 49 FR 18294, Apr. 30, 1984]

§ 702.252 Action by district director upon receipt of notice of controversion.

Upon receiving the employer's notice of controversion, the district director shall forthwith commence proceedings for the adjudication of the claim in accordance with the procedures set forth in subpart C of this part.

CONTESTED CLAIMS

§ 702.261 Claimant's contest of actions taken by employer or carrier with respect to the claim.

Where the claimant contests an action by the employer or carrier reducing, suspending, or terminating benefits, including medical care, he should immediately notify the office of the district director having jurisdiction, in person or in writing, and set forth the facts pertinent to his complaint.

§ 702.262 Action by district director upon receipt of notice of contest.

Upon receipt of the claimant's notice of contest, the district director shall forthwith commence proceedings for adjudication of the claim in accordance with the procedures set forth in subpart C of this part.

DISCRIMINATION

§ 702.271 Discrimination; against employees who bring proceedings, prohibition and penalty.

(a)(1) No employer or its duly authorized agent may discharge or in any manner discriminate against an employee as to his/her employment because that employee: (i) Has claimed or attempted to claim compensation under this Act; or (ii) has testified or is about to testify in a proceeding under this Act. To discharge or refuse to employ a person who has been adjudicated to have filed a fraudulent claim for compensation or otherwise made a false statement or misrepresentation under section 31(a)(1) of the Act, 33 U.S.C. 931(a)(1), is not a violation of this section.

(2) Any employer who violates this section shall be liable to a penalty of not less that $1,000.00 or more than $5,000.00 to be paid (by the employer alone, and not by a carrier) to the district director for deposit in the special fund described in section 44 of the Act, 33 U.S.C. 944; and shall restore the employee to his or her employment along with all wages lost due to the discrimination unless the employee has ceased to be qualified to perform the duties of employment. *Provided however,* that for any violation occurring on or after November 17, 1997 the employer shall be liable to a penalty of not less than $1,100.00 or more than $5,500.00.

(b) When a district director receives a complaint from an employee alleging discrimination as defined under section 49, he or she shall notify the employer, and within five working days, initiate specific inquiry to determine all the facts and circumstances pertaining thereto. This may be accomplished by interviewing the employee, employer representatives and other parties who may have information about the matter. Interviews may be conducted by written correspondence, telephone or personal interview.

(c) If circumstances warrant, the district director may also conduct an informal conference on the issue as described in §§ 702.312 through 702.314.

(d) Any employee discriminated against is entitled to be restored to his employment and to be compensated by the employer for any loss of wages arising out of such discrimination provided that the employee is qualified to perform the duties of the employment. If it is determined that the employee has been discriminated against, the district director shall also determine whether the employee is qualified to perform the duties of the employment. The district director may use medical evidence submitted by the parties or he may arrange to have the employee examined by a physician selected by the district director. The cost of the medical examination arranged for by the district director may be charged to the special fund established by section 44, 33 U.S.C. 944.

[42 FR 45302, Sept. 9, 1977, as amended at 50 FR 400, Jan. 3, 1985; 62 FR 53956, Oct. 17, 1997]

§ 702.272 Informal recommendation by district director.

(a) If the district director determines that the employee has been discharged or suffered discrimination and is able to resume his or her duties, the district director will recommend that the employer reinstate the employee and/or make such restitution as is indicated by the circumstances of the case, including compensation for any wage loss suffered as the result of the discharge or discrimination. The district director may also assess the employer an appropriate penalty, as determined under authority vested in the district director by the Act. If the district director determines that no violation occurred he shall notify the partries of his findings and the reasons for recommending that the complaint be denied. If the employer and employee accept the district director's recommendation, it will be incorporated in an order and mailed to each party within 10 days.

(b) If the parties do not agree to the recommendation, the district director shall, within 10 days after receipt of the rejection, prepare a memorandum summarizing the disagreement, mail a copy to all interested parties, and shall within 14 days thereafter refer the case to the Office of the Chief Administrative Law Judge for hearing pursuant to § 702.317.

[42 FR 45302, Sept. 9, 1977]

§ 702.273 Adjudication by Office of the Chief Administrative Law Judge.

The Office of Administrative Law Judges is responsible for final determinations of all disputed issues connected with the discrimination complaint, including the amount of penalty to be assessed, and shall proceed with a formal hearing as described in §§ 702.331 to 702.394.

[42 FR 45302, Sept. 9, 1977]

§ 702.274 Employer's refusal to pay penalty.

In the event the employer refuses to pay the penalty assessed, the district director shall refer the complete administrative file to the Associate Director, Division of Longshore and Harbor Workers' Compensation, for subsequent transmittal to the Associate Solicitor for Employee Benefits, with the request that appropriate legal action be taken to recover the penalty.

[42 FR 45302, Sept. 9, 1977]

THIRD PARTY

§ 702.281 Third party action.

(a) Every person claiming benefits under this Act (or the representative) shall promptly notify the employer and the district director when:

(1) A claim is made that someone other than the employer or person or persons in its employ, is liable in damages to the claimant because of the injury or death and identify such party by name and address.

(2) Legal action is instituted by the claimant or the representative against some person or party other than the employer or a person or persons in his employ, on the ground that such other person is liable in damages to the claimant on account of the compensable injury and/or death; specify the amount of damages claimed and identify the person or party by name and address.

(3) Any settlement, compromise or any adjudication of such claim has

been effected and report the terms, conditions and amounts of such resolution of claim.

(b) Where the claim or legal action instituted against a third party results in a settlement agreement which is for an amount less than the compensation to which a person would be entitled under this Act, the person (or the person's representative) must obtain the prior, written approval of the settlement from the employer and the employer's carrier before the settlement is executed. Failure to do so relieves the employer and/or carrier of liability for compensation described in section 33(f) of Act, 33 U.S.C. 933(f) and for medical benefits otherwise due under section 7 of the Act, 33 U.S.C. 907, regardless of whether the employer or carrier has made payments of acknowledged entitlement to benefits under the Act. The approval shall be on a form provided by the Director and filed, within thirty days after the settlement is entered into, with the district director who has jurisdiction in the district where the injury occurred.

[42 FR 45303, Sept. 9, 1977, as amended at 50 FR 400, Jan. 3, 1985; 51 FR 4284, Feb. 3, 1986]

REPORT OF EARNINGS

§ 702.285 Report of earnings.

(a) An employer, carrier or the Director (for those cases being paid from the Special Fund) may require an employee to whom it is paying compensation to submit a report on earnings from employment or self-employment. This report may not be required any more frequently than semi-annually. The report shall be made on a form prescribed by the Director and shall include all earnings from employment and self-employment and the periods for which the earnings apply. The employee must return the complete report on earnings even where he or she has no earnings to report.

(b) For these purposes the term ''earnings'' is defined as all monies received from any employment and includes but is not limited to wages, salaries, tips, sales commissions, fees for services provided, piecework and all revenue received from self-employment even if the business or enterprise operated at a loss of if the profits were reinvested.

(Approved by the Office of Management and Budget under control number 1215–0160)

[50 FR 400, Jan. 3, 1985]

§ 702.286 Report of earnings; forfeiture of compensation.

(a) Any employee who fails to submit the report on earnings from employment or self-employment under § 702.285 or, who knowingly and willingly omits or understates any part of such earnings, shall upon a determination by the district director forfeit all right to compensation with respect to any period during which the employee was required to file such a report. The employee must return the completed report on earnings (even where he or she reports no earnings) within thirty (30) days of the date of receipt; this period may be extended for good cause, by the district director, in determining whether a violation of this requirement has occurred.

(b) Any employer or carrier who believes that a violation of paragraph (a) of this section has occurred may file a charge with the district director. The allegation shall be accompanied by evidence which includes a copy of the report, with proof of service requesting the information from the employee and clearly stating the dates for which the employee was required to report income. Where the employer/carrier is alleging an omission or understatement of earnings, it shall, in addition, present evidence of earnings by the employee during that period, including copies of checks, affidavits from employers who paid the employee earnings, receipts of income from self-employment or any other evidence showing earnings not reported or underreported for the period in question. Where the district director finds the evidence sufficient to support the charge he or she shall convene an informal conference as described in subpart C and shall issue a compensation order affiming or denying the charge and setting forth the amount of compensation for the specified period. If there is a conflict over any issue relating to this matter any party may request a formal hearing before an Administrative Law Judge as described in subpart C.

(c) Compensation forfeited under paragraph (b) of this section, if already paid, shall be recovered by a deduction from the compensation payable to the employee if any, on such schedule as determined by the district director. The district director's discretion in such cases extends only to rescheduling repayment by crediting future compensation and not to whether and in what amounts compensation is forfeited. For this purpose, the district director shall consider the employee's essential expenses for living, income from whatever source, and assets, including cash, savings and checking accounts, stocks, bonds, and other securities.

[50 FR 400, Jan. 3, 1985]

Subpart C—Adjudication Procedures

GENERAL

§ 702.301 Scope of this subpart.

The regulations in this subpart govern the adjudication of claims in which the employer has filed a notice of controversion under §702.251, or the employee has filed notice of contest under §702.261. In the vast majority of cases, the problem giving rise to the controversy results from misunderstandings, clerical or mechanical errors, or mistakes of fact or law. Such problems seldom require resolution through formal hearings, with the attendant production of expert witnesses. Accordingly, by §702.311 et seq., the district directors are empowered to amicably and promptly resolve such problems by informal procedures. Where there is a genuine dispute of fact or law which cannot be so disposed of informally, resort must be had to the formal hearing procedures as set forth beginning at §702.331. Supplementary compensation orders, modifications, and interlocutory matters are governed by regulations beginning with §702.371. Thereafter, appeals from compensation orders are discussed beginning with §702.391 (the regulations of the Benefits Review Board are set forth in full in part 802 of this title).

ACTION BY DISTRICT DIRECTORS

§ 702.311 Handling of claims matters by district directors; informal conferences.

The district director is empowered to resolve disputes with respect to claims in a manner designed to protect the rights of the parties and also to resolve such disputes at the earliest practicable date. This will generally be accomplished by informal discussions by telephone or by conferences at the district director's office. Some cases will be handled by written correspondence. The regulations governing informal conferences at the district director's office with all parties present are set forth below. When handling claims by telephone, or at the office with only one of the parties, the district director and his staff shall make certain that a full written record be made of the matters discussed and that such record be placed in the administrative file. When claims are handled by correspondence, copies of all communications shall constitute the administrative file.

§ 702.312 Informal conferences; called by and held before whom.

Informal conferences shall be called by the district director or his designee assigned or reassigned the case and held before that same person, unless such person is absent or unavailable. When so assigned, the designee shall perform the duties set forth below assigned to the district director, except that a compenstion order following an agreement shall be issued only by a person so designated by the Director to perform such duty.

[42 FR 45303, Sept. 9, 1977]

§ 702.313 Informal conferences; how called; when called.

Informal conferences may be called upon not less than 10 days' notice to the parties, unless the parties agree to meet at an earlier date. The notice may be given by telephone, but shall be confirmed by use of a written notice on a form prescribed by the Director. The notice shall indicate the date, time and place of the conference, and shall also specify the matters to be discussed. For good cause shown conferences may be rescheduled. A copy of such notice

shall be placed in the administrative file.

§ 702.314 Informal conferences; how conducted; where held.

(a) No stenographic report shall be taken at informal conferences and no witnesses shall be called. The district director shall guide the discussion toward the achievement of the purpose of such conference, recommending courses of action where there are disputed issues, and giving the parties the benefit of his experience and specialized knowledge in the field of workmen's compensation.

(b) Conferences generally shall be held at the district director's office. However, such conferences may be held at any place which, in the opinion of the district director, will be of greater convenience to the parties or to their representatives.

§ 702.315 Conclusion of conference; agreement on all matters with respect to the claim.

(a) Following an informal conference at which agreement is reached on all issues, the district director shall (within 10 days after conclusion of the conference), embody the agreement in a memorandum or within 30 days issue a formal compensation order, to be filed and mailed in accordance with § 702.349. If either party requests that a formal compensation order be issued the district director shall, within 30 days of such request, prepare, file, and serve such order in accordance with § 702.349. Where the problem was of such nature that it was resolved by telephone discussion or by exchange of written correspondence, the parties shall be notified by the same means that agreement was reached and the district director shall prepare a memorandum or order setting forth the terms agreed upon. In either instance, when the employer or carrier has agreed to pay, reinstate or increase monetary compensation benefits, or to restore or appropriately change medical care benefits, such action shall be commenced immediately upon becoming aware of the agreement, and without awaiting receipt of the memorandum or the formal compensation order.

(b) Where there are several conferences or discussions, the provisions of paragraph (a) of this section do not apply until the last conference. The district director shall, however, prepare and place in his administrative file a short, succinct memorandum of each preceding conference or discussion.

[38 FR 26861, Sept. 26, 1973, as amended at 42 FR 45303, Sept. 9, 1977]

§ 702.316 Conclusion of conference; no agreement on all matters with respect to the claim.

When it becomes apparent during the course of the informal conference that agreement on all issues cannot be reached, the district director shall bring the conference to a close, shall evaluate all evidence available to him or her, and after such evaluation shall prepare a memorandum of conference setting forth all outstanding issues, such facts or allegations as appear material and his or her recommendations and rationale for resolution of such issues. Copies of this memorandum shall then be sent to each of the parties or their representatives, who shall then have 14 days within which to signify in writing to the district director whether they agree or disagree with his or her recommendations. If they agree, the district director shall proceed as in § 702.315(a). If they disagree (Caution: See § 702.134), then the district director may schedule such further conference or conferences as, in his or her opinion, may bring about agreement; if he or she is satisfied that any further conference would be unproductive, or if any party has requested a hearing, the district director shall prepare the case for transfer to the Office of the Chief Administrative Law Judge (See § 702.317, §§ 702.331–702.351).

[42 FR 42551, Aug. 23, 1977, as amended at 60 FR 51348, Oct. 2, 1995]

§ 702.317 Preparation and transfer of the case for hearing.

A case is prepared for transfer in the following manner:

(a) The district director shall furnish each of the parties or their representatives with a copy of a prehearing statement form.

(b) Each party shall, within 21 days after receipt of such form, complete it and return it to the district director and serve copies on all other parties. Extensions of time for good cause may be granted by the district director.

(c) Upon receipt of the completed forms, the district director, after checking them for completeness and after any further conferences that, in his or her opinion, are warranted, shall transmit them to the Office of the Chief Administrative Law Judge by letter of transmittal together with all available evidence which the parties intend to submit at the hearing (exclusive of X-rays, slides and other materials not suitable for mailing which may be offered into evidence at the time of hearing); the materials transmitted shall not include any recommendations expressed or memoranda prepared by the district director pursuant to § 702.316.

(d) If the completed pre-hearing statement forms raise new or additional issues not previously considered by the district director or indicate that material evidence will be submitted that could reasonably have been made available to the district director before he or she prepared the last memorandum of conference, the district director shall transfer the case to the Office of the Chief Administrative Law Judge only after having considered such issues or evaluated such evidence or both and having issued an additional memorandum of conference in conformance with § 702.316.

(e) If a party fails to complete or return his or her pre-hearing statement form within the time allowed, the district director may, at his or her discretion, transmit the case without that party's form. However, such transmittal shall include a statement from the district director setting forth the circumstanes causing the failure to include the form, and such party's failure to submit a pre-hearing statement form may, subject to rebuttal at the formal hearing, be considered by the administrative law judge, to the extent intransigence is relevant, in subsequent rulings on motions which may be made in the course of the formal hearing.

(Approved by the Office of Management and Budget under control number 1215–0085)

(Pub. L. No. 96–511)

[42 FR 42551, Aug. 23, 1977, as amended at 49 FR 18295, Apr. 30, 1984]

§ 702.318 The record; what constitutes; nontransferability of the administrative file.

For the purpose of any further proceedings under the Act, the formal record of proceedings shall consist of the hearing record made before the administrative law judge (see § 702.344). When transferring the case for hearing pursuant to § 702.317, the district director shall not transfer the administrative file under any circumstances.

§ 702.319 Obtaining documents from the administrative file for reintroduction at formal hearings.

Whenever any party considers any document in the administrative file essential to any further proceedings under the Act, it is the responsibility of such party to obtain such document from the district director and reintroduce it for the record before the administrative law judge. The type of document that may be obtained shall be limited to documents previously submitted to the district director, including documents or forms with respect to notices, claims, controversions, contests, progress reports, medical services or supplies, etc. The work products of the district director or his staff shall not be subject to retrieval. The procedure for obtaining documents shall be for the requesting party to inform the district director in writing of the documents he wishes to obtain, specifying them with particularity. Upon receipt, the district director shall cause copies of the requested documents to be made and then:

(a) Place the copies in the file together with the letter of request, and (b) promptly forward the originals to the requesting party. The handling of multiple requests for the same document shall be within the discretion of the district director and with the cooperation of the requesting parties.

SPECIAL FUND

§ 702.321 Procedures for determining applicability of section 8(f) of the Act.

(a) *Application: filing, service, contents.* (1) An employer or insurance carrier which seeks to invoke the provisions of section 8(f) of the Act must request limitation of its liability and file, in duplicate, with the district director a fully documented application. A fully documented application shall contain the following information: (i) A specific description of the pre-existing condition relied upon as constituting an existing permanent partial disability; (ii) the reasons for believing that the claimant's permanent disability after the injury would be less were it not for the pre-existing permanent partial disability or that the death would not have ensued but for that disability. These reasons must be supported by medical evidence as specified in paragraph (a)(1)(iv) of this section; (iii) the basis for the assertion that the pre-existing condition relied upon was manifest in the employer; and (iv) documentary medical evidence relied upon in support of the request for section 8(f) relief. This medical evidence shall include, but not be limited to, a current medical report establishing the extent of all impairments and the date of maximum medical improvement. If the claimant has already reached maximum medical improvement, a report prepared at that time will satisfy the requirement for a current medical report. If the current disability is total, the medical report must explain why the disability is not due solely to the second injury. If the current disability is partial, the medical report must explain why the disability is not due solely to the second injury and why the resulting disability is materially and substantially greater than that which would have resulted from the subsequent injury alone. If the injury is loss of hearing, the pre-existing hearing loss must be documented by an audiogram which complies with the requirements of § 702.441. If the claim is for survivor's benefits, the medical report must establish that the death was not due solely to the second injury. Any other evidence considered necessary for consideration of the request for section 8(f) relief must be submitted when requested by the district director or Director.

(2) If claim is being paid by the special fund and the claimant dies, an employer need not reapply for section 8(f) relief. However, survivor benefits will not be paid until it has been established that the death was due to the accepted injury and the eligible survivors have been identified. The district director will issue a compensation order after a claim has been filed and entitlement of the survivors has been verified. Since the employer remains a party in interest to the claim, a compensation order will not be issued without the agreement of the employer.

(b) *Application: Time for filing.* (1) A request for section 8(f) relief should be made as soon as the permanency of the claimant's condition becomes known or is an issue in dispute. This could be when benefits are first paid for permanent disability, or at an informal conference held to discuss the permanency of the claimant's condition. Where the claim is for death benefits, the request should be made as soon as possible after the date of death. Along with the request for section 8(f) relief, the applicant must also submit all the supporting documentation required by this section, described in paragraph (a), of this section. Where possible, this documentation should accompany the request, but may be submitted separately, in which case the district director shall, at the time of the request, fix a date for submission of the fully documented application. The date shall be fixed as follows:

(i) Where notice is given to all parties that permanency shall be an issue at an informal conference, the fully documented application must be submitted at or before the conference. For these purposes, notice shall mean when the issues of permanency is noted on the form LS–141, Notice of Informal Conference. All parties are required to list issue reasonably anticipated to be discussed at the conference when the initial request for a conference is made and to notify all parties of additional issues which arise during the period before the conference is actually held.

(ii) Where the issue of permanency is first raised at the informal conference and could not have reasonably been anticipated by the parties prior to the conference, the district director shall adjourn the conference and establish the date by which the fully documented application must be submitted and so notify the employer/carrier. The date shall be set by the district director after reviewing the circumstances of the case.

(2) At the request of the employer or insurance carrier, and for good cause, the district director, at his/her discretion, may grant an extension of the date for submission of the fully documented application. In fixing the date for submission of the application under circumstances other than described above or in considering any request for an extension of the date for submitting the application, the district director shall consider all the circumstances of the case, including but not limited to: Whether the claimant is being paid compensation and the hardship to the claimant of delaying referral of the case to the Office of Administrative Law Judges (OALJ); the complexity of the issues and the availability of medical and other evidence to the employer; the length of time the employer was or should have been aware that permanency is an issue; and, the reasons listed in support of the request. If the employer/carrier requested a specific date, the reasons for selection of that date will also be considered. Neither the date selected for submission of the fully documented application nor any extension therefrom can go beyond the date the case is referred to the OALJ for formal hearing.

(3) Where the claimant's condition has not reached maximum medical improvement and no claim for permanency is raised by the date the case is referred to the OALJ, an application need not be submitted to the district director to preserve the employer's right to later seek relief under section 8(f) of the Act. In all other cases, failure to submit a fully documented application by the date established by the district director shall be an absolute defense to the liability of the special fund. This defense is an affirmative defense which must be raised and pleaded by the Director. The absolute defense will not be raised where permanency was not an issue before the district director. In all other cases, where permanency has been raised, the failure of an employer to submit a timely and fully documented application for section 8(f) relief shall not prevent the district director, at his/her discretion, from considering the claim for compensation and transmitting the case for formal hearing. The failure of an employer to present a timely and fully documented application for section 8(f) relief may be excused only where the employer could not have reasonably anticipated the liability of the special fund prior to the consideration of the claim by the district director. Relief under section 8(f) is not available to an employer who fails to comply with section 32(a) of the Act, 33 U.S.C. 932(a).

(c) *Application: Approval, disapproval.* If all the evidence required by paragraph (a) was submitted with the application for section 8(f) relief and the facts warrant relief under this section, the district director shall award such relief after concurrence by the Associate Director, DLHWC, or his or her designee. If the district director or the Associate Director or his or her designee finds that the facts do not warrant relief under section 8(f) the district director shall advise the employer of the grounds for the denial. The application for section 8(f) relief may then be considered by an administrative law judge. When a case is transmitted to the Office of Administrative Law Judges the district director shall also attach a copy of the application for section 8(f) relief submitted by the employer, and notwithstanding § 702.317(c), the district director's denial of the application.

(Approved by the Office of Management and Budget under control number 1215–0160)

[51 FR 4285, Feb. 3, 1986]

FORMAL HEARINGS

§ 702.331 Formal hearings; procedure initiating.

Formal hearings are initiated by transmitting to the Office of the Chief Administrative Law Judge the prehearing statement forms, the available evidence which the parties intend to

submit at the formal hearing, and the letter of transmittal from the district director as provided in § 702.316 and § 702.317.

[42 FR 42552, Aug. 23, 1977]

§ 702.332 Formal hearings; how conducted.

Formal hearings shall be conducted by the administrative law judge assigned the case by the Office of the Chief Administrative Law Judge in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. 554 et seq. All hearings shall be transcribed.

§ 702.333 Formal hearings; parties.

(a) The necessary parties for a formal hearing are the claimant and the employer or insurance carrier, and the administrative law judge assigned the case.

(b) The Solicitor of Labor or his designee may appear and participate in any formal hearing held pursuant to these regulations on behalf of the Director as an interested party.

§ 702.334 Formal hearings; representatives of parties.

The claimant and the employer or carrier may be represented by persons of their choice.

§ 702.335 Formal hearings; notice.

On a form prescribed for this purpose, the Office of the Chief Administrative Law Judge shall notify the parties (See § 702.333) of the place and time of the formal hearing not less than 30 days in advance thereof.

[42 FR 42552, Aug. 23, 1977]

§ 702.336 Formal hearings; new issues.

(a) If, during the course of the formal hearing, the evidence presented warrants consideration of an issue or issues not previously considered, the hearing may be expanded to include the new issue. If in the opinion of the administrative law judge the new issue requires additional time for preparation, the parties shall be given a reasonable time within which to prepare for it. If the new issue arises from evidence that has not been considered by the district director, and such evidence is likely to resolve the case without the need for a formal hearing, the administrative law judge may remand the case to the district director for his or her evaluation and recommendation pursuant to, § 702.316.

(b) At any time prior to the filing of the compensation order in the case, the administrative law judge may in his discretion, upon the application of a party or upon his own motion, give notice that he will consider any new issue. The parties shall be given not less than 10 days' notice of the hearing on such new issue. The parties may stipulate that the issue may be heard at an earlier time and shall proceed to a hearing on the new issue in the same manner as on an issue initially considered.

[38 FR 26861, Sept. 26, 1973, as amended at 42 FR 42552, Aug. 23, 1977]

§ 702.337 Formal hearings; change of time or place for hearings; postponements.

(a) Except for good cause shown, hearings shall be held at convenient locations not more than 75 miles from the claimant's residence.

(b) Once a formal hearing has been scheduled, continuances shall not be granted except in cases of extreme hardship or where attendance of a party or his or her representative is mandated at a previously scheduled judicial proceeding. Unless the ground for the request arises thereafter, requests for continuances must be received by the Chief Administrative Law Judge at least 10 days before the scheduled hearing date, must be served upon the other parties and must specify the extreme hardship or previously scheduled judicial proceeding claimed.

(c) The Chief Administrative Law Judge or the administrative law judge assigned to the case may change the time and place of the hearing, or temporarily adjourn a hearing, on his own motion or for good cause shown by a party. The parties shall be given not less than 10 days' notice of the new time and place of the hearing, unless they agree to such change without notice.

[42 FR 42552, Aug. 23, 1977]

§ 702.338 Formal hearings; general procedures.

All hearings shall be attended by the parties or their representatives and such other persons as the administrative law judge deems necessary and proper. The administrative law judge shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters. If the administrative law judge believes that there is relevant and material evidence available which has not been presented at the hearing, he may adjourn the hearing or, at any time, prior to the filing of the compensation order, reopen the hearing for the receipt of such evidence. The order in which evidence and allegations shall be presented and the procedures at the hearings generally, except as these regulations otherwise expressly provide, shall be in the discretion of the administrative law judge and of such nature as to afford the parties a reasonable opportunity for a fair hearing.

§ 702.339 Formal hearings; evidence.

In making an investigation or inquiry or conducting a hearing, the administrative law judge shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by 5 U.S.C. 554 and these regulations; but may make such investigation or inquiry or conduct such hearing in such a manner as to best ascertain the rights of the parties.

§ 702.340 Formal hearings; witnesses.

(a) Witnesses at the hearing shall testify under oath or affirmation. The administrative law judge may examine the witnesses and shall allow the parties or their representatives to do so.

(b) No person shall be required to attend as a witness in any proceeding before an administrative law judge at a place more than 100 miles from his place of residence, unless his lawful mileage and fees for one day's attendance shall be paid or tendered to him in advance of the hearing date.

§ 702.341 Formal hearings; depositions; interrogatories.

The testimony of any witness, including any party represented by counsel, may be taken by deposition or interrogatory according to the Federal Rules of Civil Procedure as supplemented by local rules of practice for the Federal district court for the judicial district in which the case is pending. However, such depositions or interrogatories must be completed within reasonable times to be fixed by the Chief Administrative Law Judge or the administrative law judge assigned to the case.

[42 FR 42552, Aug. 23, 1977]

§ 702.342 Formal hearings; witness fees.

Witnesses summoned in a formal hearing before an administrative law judge or whose depositions are taken shall receive the same fees and mileage as witnesses in courts of the United States (33 U.S.C. 925).

§ 702.343 Formal hearings; oral argument and written allegations.

Any party upon request shall be allowed a reasonable time for presentation of oral argument and shall be permitted to file a pre-hearing brief or other written statement of fact or law. A copy of any such pre-hearing brief or other written statement shall be filed with the Chief Administrative Law Judge or the administrative law judge assigned to the case before or during the proceeding at which evidence is submitted to the administrative law judge and shall be served upon each other party. Post-hearing briefs will not be permitted except at the request of the administrative law judge or upon averment on the record of a party that the case presents a specific novel or difficult legal or factual issue (or issues) that cannot be adequately addressed in oral summation. When permitted, any such brief shall be limited to the issue or issues specified by the administrative law judge or by the party in his or her averment and shall be due from any party desiring to address such issue or issues within 15 days of the conclusion of the proceeding at which evidence is submitted

to the administrative law judge. Enlargement of the time for filing such briefs shall be granted only if the administrative law judge is persuaded that the brief will be helpful to him or her and that the enlargement granted will not delay decision of the case.

[42 FR 42552, Aug. 23, 1977]

§ 702.344 Formal hearings; record of hearing.

All formal hearings shall be open to the public and shall be stenographically reported. All evidence upon which the administrative law judge relies for his final decision shall be contained in the transcript of testimony either directly or by appropriate reference. All medical reports, exhibits, and any other pertinent document or record, in whole or in material part, shall be incorporated into the record either by reference or as an appendix.

§ 702.345 Formal hearings; consolidated issues; consolidated cases.

(a) When one or more additional issues are raised by the administrative law judge pursuant to § 702.336, such issues may, in the discretion of the administrative law judge, be consolidated for hearing and decision with other issues pending before him.

(b) When two or more cases are transferred for formal hearings and have common questions of law or which arose out of a common accident, the Chief Administrative Law Judge may consolidate such cases for hearing.

§ 702.346 Formal hearings; waiver of right to appear.

If all parties waive their right to appear before the administrative law judge or to present evidence or argument personally or by representative, it shall not be necessary for the administrative law judge to give notice of and conduct an oral hearing. A waiver of the right to appear and present evidence and allegations as to facts and law shall be made in writing and filed with the Chief Administrative Law Judge or the administrative law judge. Where such a waiver has been filed by all parties, and they do not appear before the administrative law judge personally or by representative, the administrative law judge shall make a record of the relevant written evidence submitted by the parties, together with any pleadings they may submit with respect to the issues in the case. Such documents shall be considered as all of the evidence in the case and the decision shall be based on them.

§ 702.347 Formal hearings; termination.

(a) Formal hearings are normally terminated upon the conclusion of the proceeding at which evidence is submitted to the administrative law judge.

(b) In exceptional cases the Chief Administrative Law Judge or the administrative law judge assigned to the case may, in his or her discretion, extend the time for official termination of the hearing.

[42 FR 42552, Aug. 23, 1977]

§ 702.348 Formal hearings; preparation of final decision and order; content.

Within 20 days after the official termination of the hearing as defined by § 702.347, the administrative law judge shall have prepared a final decision and order, in the form of a compensation order, with respect to the claim, making an award to the claimant or rejecting the claim. The compensation order shall contain appropriate findings of facts and conclusions of law with respect thereto, and shall be concluded with one or more paragraphs containing the order of the administrative law judge, his signature, and the date of issuance.

§ 702.349 Formal hearings; filing and mailing of compensation orders; disposition of transcripts.

The administrative law judge shall, within 20 days after the official termination of the hearing, deliver by mail, or otherwise, to the office of the district director having original jurisdiction, the transcript of the hearing, other documents or pleadings filed with him with respect to the claim, together with his signed compensation order. Upon receipt thereof, the district director, being the official custodian of all records with respect to such claims within his jurisdiction, shall formally date and file the transcript, pleadings, and compensation order (original) in his office. Such filing shall

be accomplished by the close of business on the next succeeding working day, and the district director shall, on the same day as the filing was accomplished, send by certified mail a copy of the compensation order to the parties and to representatives of the parties, if any. Appended to each such copy shall be a paragraph entitled ''proof of service'' containing the certification of the district director that the copies were mailed on the date stated, to each of the parties and their representatives, as shown in such paragraph.

§ 702.350 Finality of compensation orders.

Compensation orders shall become effective when filed in the office of the district director, and unless proceedings for suspension or setting aside of such orders are instituted within 30 days of such filing, shall become final at the expiration of the 30th day after such filing, as provided in section 21 of the Act 33 U.S.C. 921. If any compensation payable under the terms of such order is not paid within 10 days after it becomes due, section 14(f) of the Act requires that there be added to such unpaid compensation an amount equal to 20 percent thereof which shall be paid at the same time as, but in addition to, such compensation unless review of the compensation order is had as provided in such section 21 and an order staying payment has been issued by the Benefits Review Board or the reviewing court.

§ 702.351 Withdrawal of controversion of issues set for formal hearing; effect.

Whenever a party withdraws his controversion of the issues set for a formal hearing, the administrative law judge shall halt the proceedings upon receipt from said party of a signed statement to that effect and forthwith notify the district director who shall then proceed to dispose of the case as provided for in § 702.315.

INTERLOCUTORY MATTERS, SUPPLEMENTARY ORDERS, AND MODIFICATIONS

§ 702.371 Interlocutory matters.

Compensation orders shall not be made or filed with respect to interlocutory matters of a procedural nature arising during the pendency of a compensation case.

§ 702.372 Supplementary compensation orders.

(a) In any case in which the employer or insurance carrier is in default in the payment of compensation due under any award of compensation, for a period of 30 days after the compensation is due and payable, the person to whom such compensation is payable may, within 1 year after such default, apply in writing to the district director for a supplementary compensation order declaring the amount of the default. Upon receipt of such application, the district director shall institute proceedings with respect to such application as if such application were an original claim for compensation, and the matter shall be disposed of as provided for in § 702.315, or if agreement on the issue is not reached, then as in § 702.316 et seq.

(b) If, after disposition of the application as provided for in paragraph (a) of this section, a supplementary compensation order is entered declaring the amount of the default, which amount may be the whole of the award notwithstanding that only one or more installments is in default, a copy of such supplementary order shall be forthwith sent by certified mail to each of the parties and their representatives. Thereafter, the applicant may obtain and file with the clerk of the Federal district court for the judicial district where the injury occurred or the district in which the employed has his principal place of business or maintains an office, a certified copy of said order and may seek enforcement thereof as provided for by section 18 of the Act, 33 U.S.C. 918.

§ 702.373 Modification of awards.

(a) Upon his/her own initiative, or upon application of any party in interest (including an employer or carrier which has been granted relief under section 8(f) of the Act, 33 U.S.C. 908(f)), the district director may review any compensation case (including a case under which payments are made pursuant to section 44(i) of the Act, 33 U.S.C. 944(i)) in accordance with the procedure in subpart C of this part, and after such review of the case under § 702.315, or review at formal hearings under the regulations governing formal hearings in subpart C of this part, file a new compensation order terminating, continuing, reinstating, increasing or decreasing such compensation, or awarding compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made retroactive from the date of injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the district director or the administrative law judge. Settlements cannot be modified.

(b) Review of a compensation case under this section may be made at any time prior to 1 year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to 1 year after the rejection of a claim.

(c) Review of a compensation case may be had only for the reason that there is a change in conditions or that there was a mistake in the determination of facts.

(d) If the investigation, described in § 702.148(c), discloses a change in conditions and the employer or insurance carrier intends to pursue modification of the award of compensation the district director and claimant shall be notified through an informal conference. At the conclusion of the informal conference the district director shall issue a recommendation either for or against the modification. This recommendation shall also be sent to the Associate Director, Division of Longshoremen's and Harbor Workers' Compensation (DLHWC) for a determination on whether or not to participate in the modification proceeding on behalf of the special fund. Lack of concurrence of the Associate Director, DLHWC or lack of participation by a representative of the special fund shall not be a bar to the modification proceeding.

[38 FR 26861, Sept. 26, 1973, as amended at 50 FR 401, Jan. 3, 1985]

APPEALS

§ 702.391 Appeals; where.

Appeals may be taken to the Benefits Review Board, U.S. Department of Labor, Washington, D.C. 20210, by filing a notice of appeals with the office of the district director for the compensation district in which the decision or order appealed from was filed and by submitting to the Board a petition for review of such decision or order, in accordance with the provisions of part 802 of this title 20.

§ 702.392 Appeals; what may be appealed.

An appeal raising a substantial question of law or fact may be taken from a decision with respect to a claim under the Act. Such appeals may be taken from compensation orders when they have been filed as provided for in § 702.349.

§ 702.393 Appeals; time limitations.

The notice of appeal (see § 702.391) shall be filed with the district director within 30 days of the filing of the decision or order complained of, as defined and described in §§ 802.205 and 802.206 of this title. A petition for review of the decision or order is required to be filed within 30 days after receipt of the Board's acknowledgment of the notice of appeal, as provided in § 802.210 of this title.

§ 702.394 Appeals; procedure.

The procedure for appeals to the Benefits Review Board shall be as provided by the Board in its Rules of Practice and Procedure, set forth in part 802 of this title.

Subpart D—Medical Care and Supervision

§ 702.401 Medical care defined.

(a) Medical care shall include medical, surgical, and other attendance or treatment, nursing and hospital services, laboratory, X-ray and other technical services, medicines, crutches, or other apparatus and prosthetic devices, and any other medical service or supply, including the reasonable and necessary cost of travel incident thereto, which is recognized as appropriate by the medical profession for the care and treatment of the injury or disease.

(b) An employee may rely on treatment by prayer or spiritual means alone, in accordance with the tenets and practice of a recognized church or religious denomination, by an accredited practitioner of such recognized church or religious denomination, and nursing services rendered in accordance with such tenets and practice without loss or diminution of compensation or benefits under the Act. For purposes of this section, a recognized church or religious denomination shall be any religious organization: (1) That is recognized by the Social Security Administration for purposes of reimbursements for treatment under Medicare and Medicaid or (2) that is recognized by the Internal Revenue Service for purposes of tax exempt status.

[38 FR 26861, Sept. 26, 1973, as amended at 50 FR 402, Jan. 3, 1985]

§ 702.402 Employer's duty to furnish; duration.

It is the duty of the employer to furnish appropriate medical care (as defined in § 702.401(a)) for the employee's injury, and for such period as the nature of the injury or the process of recovery may require.

[50 FR 402, Jan. 3, 1985]

§ 702.403 Employee's right to choose physician; limitations.

The employee shall have the right to choose his/her attending physician from among those authorized by the Director, OWCP, to furnish such care and treatment, except those physicians included on the Secretary's list of debarred physicians. In determining the choice of a physician, consideration must be given to availability, the employee's condition and the method and means of transportation. Generally 25 miles from the place of injury, or the employee's home is a reasonable distance to travel, but other pertinent factors must also be taken into consideration.

[50 FR 402, Jan. 3, 1985]

§ 702.404 Physician defined.

The term *physician* includes doctors of medicine (MD), surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. The term includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation shown by X-ray or clinical findings. Physicians defined in this part may interpret their own X-rays. All physicians in these categories are authorized by the Director to render medical care under the Act. Naturopaths, faith healers, and other practitioners of the healing arts which are not listed herein are not included within the term ''physician'' as used in this part.

[42 FR 45303, Sept. 9, 1977]

§ 702.405 Selection of physician; emergencies.

Whenever the nature of the injury is such that immediate medical care is required and the injured employee is unable to select a physician, the employer shall select a physician. Thereafter the employee may change physicians when he is able to make a selection. Such changes shall be made upon obtaining written authorization from the employer or, if consent is withheld, from the district director. The Director will direct reimbursement of medical claims for services rendered by physicians or health care providers who are on the list of those excluded from providing care under the Act, if such services were rendered in an emergency. (See §§ 702.417 and 702.435(b)).

[38 FR 26861, Sept. 26, 1973, as amended at 50 FR 402, Jan. 3, 1985]

§ 702.406 Change of physicians; nonemergencies.

(a) Whenever the employee has made his initial, free choice of an attending physician, he may not thereafter change physicians without the prior written consent of the employer (or carrier) or the district director. Such consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for, and appropriate to, the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change.

(b) The district director for the appropriate compensation district may order a change of physicians or hospitals when such a change is found to be necessary or desirable or where the fees charged exceed those prevailing within the community for the same or similar services or exceed the provider's customary charges.

[38 FR 26861, Sept. 26, 1973, as amended at 50 FR 402, Jan. 3, 1985]

§ 702.407 Supervision of medical care.

The Director, OWCP, through the district directors and their designees, shall actively supervise the medical care of an injured employee covered by the Act. Such supervision shall include:

(a) The requirement that periodic reports on the medical care being rendered be filed in the office of the district director, the frequency thereof being determined by order of the district director or sound judgment of the attending physician as the nature of the injury may dictate;

(b) The determination of the necessity, character and sufficiency of any medical care furnished or to be furnished the employee, including whether the charges made by any medical care provider exceed those permitted under the Act;

(c) The determination of whether a change of physicians, hospitals or other persons or locales providing treatment should be made or is necessary;

(d) The further evaluation of medical questions arising in any case under the Act, with respect to the nature and extent of the covered injury, and the medical care required therefor.

[38 FR 26861, Sept. 26, 1973, as amended at 50 FR 402, Jan. 3, 1985]

§ 702.408 Evaluation of medical questions; impartial specialists.

In any case in which medical questions arise with respect to the appropriate diagnosis, extent, effect of, appropriate treatment, and the duration of any such care or treatment, for an injury covered by the Act, the Director, OWCP, through the district directors having jurisdiction, shall have the power to evaluate such questions by appointing one or more especially qualified physicians to examine the employee, or in the case of death to make such inquiry as may be appropriate to the facts and circumstances of the case. The physician or physicians, including appropriate consultants, should report their findings with respect to the questions raised as expeditiously as possible. Upon receipt of such report, action appropriate therewith shall be taken.

§ 702.409 Evaluation of medical questions; results disputed.

Any party who is dissatisfied with such report may request a review or reexamination of the employee by one or more different physicians employed by or selected by the Director, and such review or reexamination shall be granted unless it is found that it is clearly unwarranted. Such review shall be completed within 2 weeks from the date ordered unless it is impossible to complete the review and render a report thereon within such time period. Upon receipt of the report of this additional review and reexamination, such action as may be appropriate shall forthwith be taken.

§ 702.410 Duties of employees with respect to special examinations.

(a) For any special examination required of an employee by §§ 702.408 and 702.409, the employee shall submit to such examination at such place as is designated in the order to report, but the place so selected shall be reasonably convenient for the employee.

(b) Where an employee fails to submit to an examination required by

§§ 702.408 and 702.409, the district director or administrative law judge may order that no compensation otherwise payable shall be paid for any period during which the employee refuses to submit to such examination unless circumstances justified the refusal.

(c) Where an employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the district director or administrative law judge may by order suspend the payment of further compensation during such time as the refusal continues. Except that refusal to submit to medical treatment because of adherence to the tenets of a recognized church or religious denomination as described in § 702.401(b) shall not cause the suspension of compensation.

[42 FR 45303, Sept. 9, 1977, as amended at 50 FR 402, Jan. 3, 1985; 51 FR 4286, Feb. 3, 1986]

§ 702.411 Special examinations; nature of impartiality of specialists.

(a) The special examinations required by § 702.408 shall be accomplished in a manner designed to preclude prejudgment by the impartial examiner. No physician previously connected with the case shall be present, nor may any other physician selected by the employer, carrier, or employee be present. The impartial examiner may be made aware, by any party or by the OWCP, of the opinions, reports, or conclusions of any prior examining physician with respect to the nature and extent of the impairment, its cause, or its effect upon the wage-earning capacity of the injured employee, if the district director determines that, for good cause, such opinions, reports, or conclusions shall be made available. Upon request, any party shall be given a copy of all materials made available to the impartial examiner.

(b) The impartiality of the specialists shall not be considered to have been compromised if the district director deems it advisable to, and does, apprise the specialist by memorandum of those undisputed facts pertaining to the nature of the employee's employment, of the nature of the injury, of the post-injury employment activity, if any, and of any other facts which are not disputed and are deemed pertinent to the type of injury and/or the type of examination being conducted.

(c) No physician selected to perform impartial examinations shall be, or shall have been for a period of 2 years prior to the examination, an employee of an insurance carrier or self-insured employer, or who has accepted or participated in any fee from an insurance carrier or self-insured employer, unless the parties in interest agree thereto.

[38 FR 26861, Sept. 26, 1973, as amended at 42 FR 45303, Sept. 9, 1977]

§ 702.412 Special examinations; costs chargeable to employer or carrier.

(a) The Director or his designee ordering the special examination shall have the power, in the exercise of his discretion, to charge the cost of the examination or review to the employer, to the insurance carrier, or to the special fund established by section 44 of the Act, 33 U.S.C. 944.

(b) The Director or his designee may also order the employer or the insurance carrier to provide the employee with the services of an attendant, where the district director considers such services necessary, because the employee is totally blind, has lost the use of both hands, or both feet or is paralyzed and unable to walk, or because of other disability making the employee so helpless as to require constant attendance in the discretion of the district director. Fees payable for such services shall be in accord with the provisions of § 702.413.

[42 FR 45303, Sept. 9, 1977]

§ 702.413 Fees for medical services; prevailing community charges.

All fees charged by medical care providers for persons covered by this Act shall be limited to such charges for the same or similar care (including supplies) as prevails in the community in which the medical care provider is located and shall not exceed the customary charges of the medical care provider for the same or similar services. Where a dispute arises concerning the amount of a medical bill, the Director shall determine the prevailing community rate using the OWCP Medical Fee Schedule (as described in 20 CFR 10.411) to the extent appropriate,

and where not appropriate, may use other state or federal fee schedules. The opinion of the Director that a charge by a medical care provider disputed under the provisions of section 702.414 exceeds the charge which prevails in the community in which said medical care provider is located shall constitute sufficient evidence to warrant further proceedings pursuant to section 702.414 and to permit the Director to direct the claimant to select another medical provider for care to the claimant.

[60 FR 51348, Oct. 2, 1995]

§ 702.414 Fees for medical services; unresolved disputes on prevailing charges.

(a) The Director may, upon written complaint of an interested party, or upon the Director's own initiative, investigate any medical care provider or any fee for medical treatment, services, or supplies that appears to exceed prevailing community charges for similar treatment, services or supplies or the provider's customary charges. The OWCP medical fee schedule (see section 702.413) shall be used by the Director, where appropriate, to determine the prevailing community charges for a medical procedure by a physician or hospital (to the extent such procedure is covered by the OWCP fee schedule). The Director's investigation may initially be conducted informally through contact of the medical care provider by the district director. If this informal investigation is unsuccessful further proceedings may be undertaken. These proceedings may include, but not be limited to: an informal conference involving all interested parties; agency interrogatories to the pertinent medical care provider; and issuance of subpoenas duces tecum for documents having a bearing on the dispute.

(1) A claim by the provider that the OWCP fee schedule does not represent the prevailing community rate will be considered only where the following circumstances are presented:

(i) where the actual procedure performed was incorrectly identified by medical procedure code;

(ii) that the presence of a severe or concomitant medical condition made treatment especially difficult;

(iii) the provider possessed unusual qualifications (board certification in a specialty is not sufficient evidence in itself of unusual qualifications); or

(iv) the provider or service is not one covered by the OWCP fee schedule as described by 20 CFR 10.411(d)(1).

(2) The circumstances listed in paragraph (a)(1) of this section are the only ones which will justify reevaluation of the amount calculated under the OWCP fee schedule.

(b) The failure of any medical care provider to present any evidence required by the Director pursuant to this section without good cause shall not prevent the Director from making findings of fact.

(c) After any proceeding under this section the Director shall make specific findings on whether the fee exceeded the prevailing community charges (as established by the OWCP fee schedule, where appropriate) or the provider's customary charges and provide notice of these findings to the affected parties.

(d) The Director may suspend any such proceedings if after receipt of the written complaint the affected parties agree to withdraw the controversy from agency consideration on the basis that such controversy has been resolved by the affected parties. Such suspension, however, shall be at the discretion of the Director.

[51 FR 4286, Feb. 3, 1986, as amended at 60 FR 51348, Oct. 2, 1995]

§ 702.415 Fees for medical services; unresolved disputes on charges; procedure.

After issuance of specific findings of fact and proposed action by the Director as provided in § 702.414 any affected provider employer or other interested party has the right to seek a hearing pursuant to section 556 of title 5, United States Code. Upon written request for such a hearing, the matter shall be referred by the District Director to the OALJ for formal hearing in accordance with the procedures in subpart C of this part. If no such request for a hearing is filed with the district director within thirty (30) days the findings issued pursuant to § 702.414 shall be final.

[51 FR 4286, Feb. 3, 1986]

§ 702.416 Fees for medical services; disputes; hearings; necessary parties.

At formal hearings held pursuant to § 702.415, the necessary parties shall be the person whose fee or cost charge is in question and the Director, or their representatives. The employer or carrier may also be represented, and other parties, or associations having an interest in the proceedings, may be heard, in the discretion of the administrative law judge.

§ 702.417 Fees for medical services; disputes; effect of adverse decision.

If the final decision and order upholds the finding of the Director that the fee or charge in dispute was not in accordance with prevailing community charges or the provider's customary charges, the person claiming such fee or cost charge shall be given thirty (30) days after filing of such decision and order to make the necessary adjustment. If such person still refuses to make the required readjustment, such person shall not be authorized to conduct any further treatments or examinations (if a physician) or to provide any other services or supplies (if by other than a physician). Any fee or cost charge subsequently incurred for services performed or supplies furnished shall not be a reimbursable medical expense under this subpart. This prohibition shall apply notwithstanding the fact that the services performed or supplies furnished were in all other respects necessary and appropriate within the provision of these regulations. However, the Director may direct reimbursement of medical claims for services rendered if such services were rendered in an emergency (see § 702.435(b)). At the termination of the proceedings provided for in this section the district director shall determine whether further proceedings under § 702.432 should be initiated.

[50 FR 403, Jan. 3, 1985]

MEDICAL PROCEDURES

§ 702.418 Procedure for requesting medical care; employee's duty to notify employer.

(a) As soon as practicable, but within 30 days after occurrence of an injury covered by the Act, or within 30 days after an employee becomes aware, or in the exercise of reasonable diligence should be aware, of the relationship between an injury or disease and his employment, the injured employee or someone on his behalf shall give written notice thereof to the district director having jurisdiction over the place where the injury occurred and to the employer. If a form has been prescribed for such purpose it shall be used, if available and practicable under the circumstances. Notices filed under subpart B of this part, if on the form prescribed by the Director for such purpose, satisfy the written notice requirements of this subpart.

(b) In the case of an occupational disease which does not immediately result in a disability or death, such notice shall be given within one year after the employee becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. Notice shall be given: (1) To the district director in the compensation district in which the injury or death occurred, and (2) to the employer.

(Approved by the Office of Management and Budget under control number 1215–0160)

[50 FR 403, Jan. 3, 1985]

§ 702.419 Action by employer upon acquiring knowledge or being given notice of injury.

Whenever an employer acquires knowledge of an employee's injury, through receipt of a written notice or otherwise, said employer shall forthwith authorize, in writing, appropriate medical care. If a form is prescribed for this purpose it shall be used whenever practicable. Authorization shall also be given in cases where an employee's initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change.

[50 FR 403, Jan. 3, 1985]

§ 702.420 Issuance of authorization; binding effect upon insurance carrier.

The issuance of an authorization for treatment by the employer shall bind his insurance carrier to furnish and pay for such care and services.

§ 702.421 Effect of failure to obtain initial authorization.

An employee shall not be entitled to recover for medical services and supplies unless:

(a) The employer shall have refused or neglected a request to furnish such services and the employee has complied with sections 7 (b) and (c) of the Act, 33 U.S.C. 907 (b) and (c) and these regulations; or

(b) The nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide or authorize same.

[50 FR 403, Jan. 3, 1985]

§ 702.422 Effect of failure to report on medical care after initial authorization.

(a) Notwithstanding that medical care is properly obtained in accordance with these regulations, a finding by the Director that a medical care provider has failed to comply with the reporting requirements of the Act shall operate as a mandatory revocation of authorization of such medical care provider. The effect of a final finding to this effect operates to release the employer/carrier from liability of the expenses of such care. In addition to this, when such a finding is made by the Director, the claimant receiving treatment will be directed by the district director to seek authorization for medical care from another source.

(b) For good cause shown, the Director may excuse the failure to comply with the reporting requirements of the Act and further, may make an award for the reasonable value of such medical care.

[50 FR 403, Jan. 3, 1985]

DEBARMENT OF PHYSICIANS AND OTHER PROVIDERS OF MEDICAL SERVICES AND SUPPLIERS AND CLAIMS REPRESENTATIVES

§ 702.431 Grounds for debarment.

A physician or health care provider shall be debarred if it is found, after appropriate investigation as described in § 702.414 and proceedings under §§ 702.432 and 702.433, that such physician or health care provider has:

(a) Knowingly and willfully made, or caused to be made, any false statement or misrepresentation of a material fact for use in a claim for compensation or claim for reimbursement of medical expenses under this Act;

(b) Knowingly and willfully submitted, or caused to be submitted, a bill or request for payment under this Act containing a charge which the Director finds to be substantially in excess of the charge for the service, appliance, or supply prevailing within the community or in excess of the provider's customary charges, unless the Director finds there is good cause for the bill or request containing the charge;

(c) Knowingly and willfully furnished a service, appliance, or supply which is determined by the Director to be substantially in excess of the need of the recipient thereof or to be of a quality which substantially fails to meet professionally recognized standards;

(d) Been convicted under any criminal statute, without regard to pending appeal thereof, for fraudulent activities in connection with federal or state program for which payments are made to physicians or providers of similar services, appliances, or supplies; or has otherwise been excluded from participation in such program.

(e) The fact that a physician or health care provider has been convicted of a crime previously described in (d), or excluded or suspended, or has resigned in lieu of exclusion or suspension, from participation in any program as described in (d), shall be a prima facie finding of fact for purposes of section 7(j)(2) of the Act, 33 U.S.C. 907(j)(2).

[50 FR 404, Jan. 3, 1985]

§ 702.432 Debarment process.

(a) *Pertaining to health care providers.* Upon receipt of information indicating that a physician or health care provider has engaged in activities enumerated in subparagraphs (a) through (c) of § 702.431, the Director, through the Director's designees, may evaluate the information (as described in § 702.414) to ascertain whether proceedings should be initiated against the physician or health care provider to remove authorization to render medical care or service under the Longshore and Harbor Workers' Compensation Act.

(b) *Pertaining to health care providers and claims representatives.* If after appropriate investigation the Director determines that proceedings should be initiated, written notice thereof sent certified mail, return receipt requested, shall be provided to the physician, health care provider or claims representative containing the following:

(1) A concise statement of the grounds upon which debarment will be based;

(2) A summary of the information upon which the director has relied in reaching an initial decision that debarment proceedings should be initiated;

(3) An invitation to the physician, health care provider or claims representative to: (i) Resign voluntarily from participation in the program without admitting or denying the allegations presented in the written notice; or (ii) request a decision on debarment to be based upon the existing agency record and any other information the physician, health care provider or claims representative may wish to provide;

(4) A notice of the physician's, health care provider's or claims representative's right, in the event of an adverse ruling by the Director, to request a formal hearing before an administrative law judge;

(5) A notice that should the physician, health care provider or claims representative fail to provide written answer to the written notice described in this section within thirty (30) days of receipt, the Director may deem the allegations made therein to be true and may order exclusion of the physician, health care provider or claims representative without conducting any further proceedings; and

(6) The name and address of the district director who shall be responsible for receiving the answer from the physician, health care provider or claims representative.

(c) Should the physician, health care provider or claims representative fail to file a written answer to the notice described in this section within thirty (30) days of receipt thereof, the Director may deem the allegations made therein to be true and may order debarment of the physician, health care provider or claims representative.

(d) The physician, health care provider or claims representative may inspect or request copies of information in the agency records at any time prior to the Director's decision.

(e) The Director shall issue a decision in writing, and shall send a copy of the decision to the physician, health care provider or claims representative by certified mail, return receipt requested. The decision shall advise the physician, health care provider or claims representative of the right to request, within thirty (30) days of the date of an adverse decision, a formal hearing before an administrative law judge under the procedures set forth herein. The filing of such a request for hearing within the time specified shall operate to stay the effectiveness of the decision to debar.

[50 FR 404, Jan. 3, 1985]

§ 702.433 Requests for hearing.

(a) A request for hearing shall be sent to the district director and contain a concise notice of the issues on which the physician, health care provider or claims representative desires to give evidence at the hearing with identification of witnesses and documents to be submitted at the hearing.

(b) If a request for hearing is timely received by the district director, the matter shall be referred to the Chief Administrative Law Judge who shall assign it for hearing with the assigned administrative law judge issuing a notice of hearing for the conduct of the hearing. A copy of the hearing notice shall be served on the physician, health care provider or claims representative

by certified mail, return receipt requested.

(c) If a request for hearing contains identification of witnesses or documents not previously considered by the Director, the Director may make application to the assigned administrative law judge for an offer of proof from the physician, health care provider or claims representative for the purpose of discovery prior to hearing. If the offer of proof indicates injection of new issues or new material evidence not previously considered by the Director, the Director may request a remand order for purposes of reconsideration of the decision made pursuant to § 702.432 of these regulations.

(d) The parties may make application for the issuance of subpoenas upon a showing of good cause therefore to the administrative law judge.

(e) The administrative law judge shall issue a recommended decision after the termination of the hearing. The recommended decision shall contain appropriate findings, conclusions and a recommended order and be forwarded, together with the record of the hearing, to the Administrative Review Board for a final decision. The recommended decision shall be served upon all parties to the proceeding.

(f) Based upon a review of the record and the recommended decision of the administrative law judge, the Administrative Review Board shall issue a final decision.

[50 FR 404, Jan. 3, 1985, as amended at 55 FR 28606, July 12, 1990; 61 FR 19984, May 3, 1996]

§ 702.434 Judicial review.

(a) Any physician, health care provider or claims representative, after any final decision of the Administrative Review Board made after a hearing to which such person was a party, irrespective of the amount of controversy, may obtain a review of such decision by a civil action commenced within sixty (60) days after the mailing to him or her of notice of such decision, but the pendency of such review shall not operate as a stay upon the effect of such decision. Such action shall be brought in the Court of Appeals of the United States for the judicial circuit in which the plaintiff resides or has his or her principal place of business, or the Court of Appeals for the District of Columbia pursuant to section 7(j)(4) of the Act, 33 U.S.C. 907(j)(4).

(b) As part of the Administrative Review Board answer, he or she shall file a certified copy of the transcript of the record of the hearing, including all evidence submitted in connection therewith.

(c) The findings of fact of the Administrative Review Board, if based on substantial evidence in the record as a whole, shall be conclusive.

[50 FR 405, Jan. 3, 1985, as amended at 55 FR 28606, July 12, 1990; 61 FR 19984, May 3, 1996]

§ 702.435 Effects of debarment.

(a) The Director shall give notice of the debarment of a physician, hospital, or provider of medical support services or supplies to:

(1) All OWCP district offices;

(2) The Health Care Financing Administration;

(3) The State or Local authority responsible for licensing or certifying the debarred party;

(4) The employers and authorized insurers under the Act by means of an annual bulletin sent to them by the Director; and

(5) The general public by posting in the district office in the jurisdiction where the debarred party maintains a place of business.

If a claims representative is debarred, the Director shall give notice to those groups listed in paragraphs (a) (1), (3), (4), and (5) of this section.

(b) Notwithstanding any debarment under this subpart, the Director shall not refuse a claimant reimbursement for any otherwise reimbursable medical expense if the treatment, service or supply was rendered by debarred provider in an emergency situation. However, such claimant will be directed by the Director to select a duly qualified provider upon the earliest opportunity.

[50 FR 405, Jan. 3, 1985]

§ 702.436 Reinstatement.

(a) If a physician or health care provider has been debarred or pursuant to § 702.431(d) or if a claims representative has been debarred pursuant to § 702.131(c) (1) or (3) the person debarred

will be automatically reinstated upon notice to the Director that the conviction or exclusion has been reversed or withdrawn. However, such reinstatement will not preclude the Director from instituting debarment proceedings based upon the subject matter involved.

(b) A physician, health care provider or claims representative otherwise debarred by the Director may apply for reinstatement to participate in the program by application to the Director after three years from the date of entry of the order of exclusion. Such application for reinstatement shall be addressed to the Associate Director for the Longshore program, and shall contain a statement of the basis of the application along with any supporting documentation.

(c) The Director may further investigate the merits of the reinstatement application by requiring special reporting procedures from the applicant for a probationary period not to exceed six months to be monitored by the district office where the provider maintains a place of business.

(d) At the end of aforesaid probationary period, the Director may order full reinstatement of the physician, health care provider or claims representative if such reinstatement is clearly consistent with the program goal to protect itself against fraud and abuse and, further, if the physician, health care provider or claims representative has given reasonable assurances that the basis for the debarment will not be repeated.

[50 FR 405, Jan. 3, 1985]

HEARING LOSS CLAIMS

§ 702.441 Claims for loss of hearing.

(a) Claims for hearing loss pending on or filed after September 28, 1984 (the date of enactment of Pub. L. 98–426) shall be adjudicated with respect to the determination of the degree of hearing impairment in accordance with these regulations.

(b) An audiogram shall be presumptive evidence of the amount of hearing loss on the date administered if the following requirements are met:

(1) The audiogram was administered by a licensed or certified audiologist, by a physician certified by the American Board of Otolaryngology, or by a technician, under an audiologist's or physician's supervision, certified by the Council of Accreditation on Occupational Hearing Conservation, or by any other person considered qualified by a hearing conservation program authorized pursuant to 29 CFR 1910.95(g)(3) promulgated under the Occupational Safety and Health Act of 1970 (29 U.S.C. 667). Thus, either a professional or trained technician may conduct audiometric testing. However, to be acceptable under this subsection, a licensed or certified audiologist or otolaryngologist, as defined, must ultimately interpret and certify the results of the audiogram. The accompanying report must set forth the testing standards used and describe the method of evaluating the hearing loss as well as providing an evaluation of the reliability of the test results.

(2) The employee was provided the audiogram and a report thereon at the time it was administered or within thirty (30) days thereafter.

(3) No one produces a contrary audiogram of equal probative value (meaning one performed using the standards described herein) made at the same time. ''Same time'' means within thirty (30) days thereof where noise exposure continues or within six (6) months where exposure to excessive noise levels does not continue. Audiometric tests performed prior to the enactment of Public Law 98–426 will be considered presumptively valid if the employer complied with the procedures in this section for administering audiograms.

(c) In determining the amount of preemployment hearing loss, an audiogram must be submitted which was performed prior to employment or within thirty (30) days of the date of the first employment-related noise exposure. Audiograms performed after December 27, 1984 must comply with the standards described in paragraph (d) of this section.

(d) In determining the loss of hearing under the Act, the evaluators shall use the criteria for measuring and calculating hearing impairment as published and modified from time-to-time by the American Medical Association in the *Guides to the Evaluation of Permanent*

Impairment, using the most currently revised edition of this publication. In addition, the audiometer used for testing the individual's threshold of hearing must be calibrated according to current American National Standard Specifications for Audiometers. Audiometer testing procedures required by hearing conservation programs pursuant to the Occupational Safety and Health Act of 1970 should be followed (as described at 29 CFR 1910.95 and appendices).

(Approved by the Office of Management and Budget under control number 1215–0160)

[50 FR 405, Jan. 3, 1985]

Subpart E—Vocational Rehabilitation

§ 702.501 Vocational rehabilitation; objective.

The objective of vocational rehabilitation is the return of permanently disabled persons to gainful employment commensurate with their physical or mental impairments, or both, through a program of reevaluation or redirection of their abilities, or retraining in another occupation, or selective job placement assistance.

§ 702.502 Vocational rehabilitation; action by district directors.

All injury cases which are likely to result in, or have resulted in, permanent disability, and which are of a character likely to require review by a vocational rehabilitation adviser on the staff of the Director, shall promptly be referred to such adviser by the district director or his designee having charge of the case. A form has been prescribed for such purpose and shall be used. Medical data and other pertinent information shall accompany the referral.

(Approved by the Office of Management and Budget under control number 1215–0051)

(Pub. L. No. 96–511)

[38 FR 26861, Sept. 26, 1973, as amended at 49 FR 18294, Apr. 30, 1984]

§ 702.503 Vocational rehabilitation; action by adviser.

The vocational rehabilitation adviser, upon receipt of the referral, shall promptly consider the feasibility of a vocational referral or request for cooperative services from available resources or facilities, to include counseling, vocational survey, selective job placement assistance, and retraining. Public or private agencies may be utilized in arranging necessary vocational rehabilitation services under the Federal Vocational Rehabilitation Act, 29 U.S.C. 31 et seq.

§ 702.504 Vocational rehabilitation; referrals to State Employment Agencies.

Vocational rehabilitation advisers will arrange referral procedures with State Employment Service units within their assigned geographical districts for the purpose of securing employment counseling, job classification, and selective placement assistance. Referrals shall be made to State Employment Offices based upon the following:

(a) Vocational rehabilitation advisers will screen cases so as to refer only those disabled employees who are considered to have employment potential;

(b) Only employees will be referred who have permanent, compensable disabilities resulting in a significant vocational handicap and loss of wage earning capacity;

(c) Disabled employees, whose initial referral to former private employers did not result in a job reassignment or in a job retention, shall be referred for employment counseling and/or selective placement unless retraining services consideration is requested;

(d) The vocational rehabilitation advisers shall arrange for employees' referrals if it is ascertained that they may benefit from registering with the State Employment Service;

(e) Referrals will be made to appropriate State Employment Offices by letter, including all necessary information and a request for a report on the services provided the employee when he registers;

(f) The injured employee shall be advised of available job counseling services and informed that he is being referred for employment and selective placement;

(g) A followup shall be made within 60 days on all referrals to assure uniform reporting by State agencies on cases referred for a vocational survey.

§ 702.505 Vocational rehabilitation; referrals to other public and private agencies.

Referrals to such other public and private agencies providing assistance to disabled persons such as public welfare agencies, Public Health Services facilities, social services units of the Veterans Administration, the Social Security Administration, and other such agencies, shall be made by the vocational rehabilitation adviser, where appropriate, on an individual basis when requested by disabled employees. Such referrals do not provide for a service cost reimbursement by the Department of Labor.

§ 702.506 Vocational rehabilitation; training.

Vocational rehabilitation training shall be planned in anticipation of a short, realistic, attainable vocational objective terminating in remunerable employment, and in restoring wage-earning capacity or increasing it materially. The following procedures shall apply in arranging for or providing training:

(a) The vocational rehabilitation adviser shall arrange for and develop all vocational training programs.

(b) Training programs shall be developed to meet the varying needs of eligible beneficiaries, and may include courses at colleges, technical schools, training at rehabilitation centers, on-the-job training, or tutorial courses. The courses shall be pertinent to the occupation for which the employee is being trained.

(c) Training may be terminated if the injured employee fails to cooperate with the Department of Labor or with the agency supervising his course of training. The employee shall be counseled before training is terminated.

(d) Reports shall be required at periodic intervals on all persons in approved training programs.

§ 702.507 Vocational rehabilitation; maintenance allowance.

(a) An injured employee who, as a result of injury, is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the Director is being rendered fit to engage in a remunerative occupation, shall be paid additional compensation necessary for this maintenance, not exceeding $25 a week. The expense shall be paid out of the special fund established in section 44 of the Act, 33 U.S.C. 944. The maximum maintenance allowance shall not be provided on an automatic basis, but shall be based on the recommendation of a State agency that a claimant is unable to meet additional costs by reason of being in training.

(b) When required by reason of personal illness or hardship, limited periods of absence from training may be allowed without terminating the maintenance allowance. A maintenance allowance shall be terminated when it is shown to the satisfaction of the Director that a trainee is not complying reasonably with the terms of the training plan or is absenting himself without good cause from training so as to materially interfere with the accomplishment of the training objective.

§ 702.508 Vocational rehabilitation; confidentiality of information.

The following safeguards will be observed to protect the confidential character of information released regarding an individual undergoing rehabilitation:

(a) Information will be released to other agencies from which an injured employee has requested services only if such agencies have established regulations assuring that such information will be considered confidential and will be used only for the purpose for which it is provided;

(b) Interested persons and agencies have been advised that any information concerning rehabilitation program employees is to be held confidential;

(c) A rehabilitation employee's written consent is secured for release of information regarding disability to a person, agency, or establishment seeking

the information for purposes other than the approved rehabilitation planning with such employee.

Subpart F—Occupational Disease Which Does Not Immediately Result in Death or Disability

SOURCE: 50 FR 406, Jan. 3, 1985, unless otherwise noted.

§ 702.601 Definitions.

(a) *Time of injury.* For purposes of this subpart and with respect to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.

(b) *Disability.* With regard to an occupational disease for which the time of injury, as defined in § 702.601(a), occurs after the employee was retired, disability shall mean permanent impairment as determined according to the *Guides to the Evaluation of Permanent Impairment* which is prepared and modified from time-to-time by the American Medical Association, using the most currently revised edition of this publication. If this guide does not evaluate the impairment, other professionally recognized standards may be utilized. The disability described in this paragraph shall be limited to permanent partial disability. For that reason they are not subject to adjustments under section 10(f) of the Act, 33 U.S.C. 910(f).

(c) *Retirement.* For purposes of this subpart, retirement shall mean that the claimant, or decedent in cases involving survivor's benefits, has voluntarily withdrawn from the workforce and that there is no realistic expectation that such person will return to the workforce.

[50 FR 406, Jan. 3, 1985, as amended at 51 FR 4286, Feb. 3, 1986]

§ 702.602 Notice and claims.

(a) *Time for giving notice of injury or death.* Refer to § 702.207.

(b) *Time for filing of claims.* Refer to § 702.212.

§ 702.603 Determining the payrate for compensating occupational disease claims which become manifest after retirement.

(a) If the time of injury occurs within the first year after the employee has retired, the payrate for compensation purposes shall be one fifty-second part of the employee's average annual earnings during the fifty-two week period preceding retirement.

(b) If the time of injury occurs more than one year after the employee has retired the payrate for compensation purposes shall be the national average weekly wage, determined according to section 6(b)(3) of the Act, 33 U.S.C. 906(b)(3), at the time of injury.

§ 702.604 Determining the amount of compensation for occupational disease claims which become manifest after retirement.

(a) If the claim is for disability benefits and the time of injury occurs after the employee has retired, compensation shall be 66⅔ percent of the payrate, as determined under § 702.603, times the disability, as determined according to § 702.601(b).

(b) If the claim is for death benefits and the time of injury occurs after the decedent has retired, compensation shall be the percent specified in section 9 of the Act, 33 U.S.C. 909, times the payrate determined according to § 702.603. Total weekly death benefits shall not exceed one fifty-second part of the decedent's average annual earnings during the fifty-two week period preceding retirement, such benefits shall be subject to the limitation provided for in section 6(b)(1) of the Act, 33 U.S.C. 906(b)(1).

[50 FR 406, Jan. 3, 1985, as amended at 51 FR 4286, Feb. 3, 1986]

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AUTHORITY: 5 U.S.C. 301, 8171 et seq., Reorganization Plan No. 6 of 1950, 15 FR 3174, 3 CFR. 1949–1953, Comp. p. 1004, 64 Stat. 1263; 33 U.S.C. 939; 36 D.C. Code 501 et seq., 42 U.S.C. 1651 et seq., 43 U.S.C. 1331. Secretary's Order 1–93, 58 FR 21190.

SOURCE: 38 FR 26873, Sept. 26, 1973, unless otherwise noted.

§ 703.001 Scope of part.

This part 703 contains the regulations of the OWCP governing the authorization of insurance carriers, the authorization of self-insurers, and the issuance of certificates of compliance. Such provisions are required by the LHWCA, but in almost every instance apply, and hereby are applied, to the extensions of the LHWCA. In those few instances where a separate provision is required, tailored to meet the specific requirements of one of the extended acts, such separate provisions are placed in the succeeding parts of this subchapter.

§ 703.002 Forms.

Any information required by the regulations in this part to be submitted to the OWCP shall be submitted on such forms as the Director may deem appropriate and may authorize from time to time for such purpose.

§ 703.003 Failure to secure coverage; penalties.

(a) Each employer is required to secure coverage under this Act either through an authorized insurance carrier or by becoming an authoried self-insurer. An employer who fails to secure coverage by either manner described in section 32(a), (1) or (2) of the Act, 33 U.S.C. 932(a), is subject, upon conviction, to a fine of not more than $10,000, or by imprisonment for not more than one year, or both.

(1) Where the employer is a corporation: the president, secretary and treasurer each will also be subject to this fine and/or imprisonment, in addition to the fine against the corporation and each is personally liable, jointly with the corporation, for all compensation or other benefits payable under the Act during the time failure to secure coverage continues.

(b) Any employer who willingly and knowingly transfers, sells, encumbers, assigns or in any manner disposes of, conceals, secretes, or destroys any property belonging to the employer after an employee sustains an injury covered by this Act, with the intention to avoid payment to that employee or his/her dependents of compensation under this Act shall be guilty of a misdemeanor and punished upon conviction by a fine of not more than $10,000 and/or imprisonment for one year.

(1) Where the employer is a corporation: the president, secretary and treasurer are also each liable to imprisonment and, along with the corporation, jointly liable for the fine.

[50 FR 406, Jan. 3, 1985]

AUTHORIZATION OF INSURANCE CARRIERS

§ 703.101 Types of companies which may be authorized by the OWCP.

The OWCP will consider for the granting of authority to write insurance under the Longshoremen's and Harbor Workers' Compensation Act and its extensions the application of any stock company, mutual company or association, or any other person or fund, while authorized under the laws of the United States or for any State to insure workmen's compensation. The term ''carrier'' as used in this part means any person or fund duly authorized to insure workmen's compensation benefits under said Act, or its extensions.

§ 703.102 Applications for authority to write insurance; how filed; evidence to be submitted; other requirements.

An application for authority to write insurance under this Act shall be made in writing, signed by an officer of the applicant duly authorized to make such application, and transmitted to the Office of Workmen's Compensation Programs, U.S. Department of Labor, Washington, DC 20210. Such application shall be accompanied by full and complete information regarding the history and experience of such applicant in the writing of workmen's compensation insurance, together with evidence that it has authority in its charter or form of organization to write such insurance, and evidence that the applicant is currently authorized to insure workmen's compensation liability under the laws of the United States or of any State. The statements of fact in each application and in the supporting evidence shall be verified by the oath of the officer of the applicant who signs such application. Each applicant shall state in its application the area or areas, in which it intends to do business. In connection with any such application the following shall be submitted, the Office reserving the right to call for such additional information as it may deem necessary in any particular case:

(a) A copy of the last annual report made by the applicant to the insurance department or other authority of the State in which it is incorporated, or the State in which its principal business is done.

(b) A certified copy from the proper State authorities of the paper purporting to show the action taken upon such report, or such other evidence as the applicant desires to submit in respect of such report, which may obviate delay caused by an inquiry of the OWCP of the State authorities relative to the standing and responsibility of the applicant.

(c) A full and complete statement of its financial condition, if not otherwise shown, and, if a stock company, shall show specifically its capital stock and surplus.

(d) A copy of its charter or other formal outline of its organization, its rules, its bylaws, and other documents, writings, or agreements by and under which it does business, and such other evidence as it may deem proper to make a full exposition of its affairs and financial condition.

[38 FR 26873, Sept. 26, 1973; 50 FR 406, Jan. 3, 1985]

§ 703.103 Stock companies holding Treasury certificates of authority.

A stock company furnishing evidence that it is authorized to write workmen's compensation insurance under the laws of the United States or of any State, which holds a certificate of authority from the Secretary of the Treasury as an acceptable surety on Federal bonds, unless requested to do so, need not transmit to the Office with its application copies of such financial reports as are on file in the Department of the Treasury. The acceptance by that Department of such a company will be considered by the Office in conjunction with the application of such company, provided there has been compliance with the other requirements of the regulations in this part.

§ 703.104 Applicants currently authorized to write insurance under the extensions of the LHWCA.

Any applicant currently authorized by the Office to write insurance under any extension of the LHWCA need not support its application under the LHWCA or any other LHWCA extension with the evidence required by the regulations in this part, except the form of policy and endorsement which it proposes to use, unless specifically requested by the Office, but instead its application may refer to the fact that it has been so authorized.

§ 703.105 Copies of forms of policies to be submitted with application.

With each application for authority to write insurance there shall be submitted for the approval of the Office copies of the forms of policies which the applicant proposes to issue in writing insurance under the LHWCA, or its extensions, to which shall be attached the appropriate endorsement to be used in connection therewith.

§ 703.106 Certificate of authority to write insurance.

No corporation, company, association, person, or fund shall write insurance under this Act without first having received from the OWCP a certificate of authority to write such insurance. Any such certificate issued by the Office, after application therefor in accordance with these regulations, may authorize the applicant to write such insurance in a limited territory as determined by the Office. Any such certificate may be suspended or revoked by the Office prior to its expiration for good cause shown, but no suspension or revocation shall affect the liability of any carrier already incurred. Good cause shall include, without limitation, the failure to maintain in such limited territory a regular business office with full authority to act on all matters falling within the Act, and the failure to promptly and properly perform the carrier's responsibilities under the Act and these regulations, with special emphasis upon lack of promptness in making payments when due, upon failure to furnish appropriate medical care, and upon attempts to offer to, or urge upon, claimants inequitable settlements. A hearing may be requested by the aggrieved party and shall be held before the Director or his representative prior to the taking of any adverse action under this section.

§ 703.108 Period of authority to write insurance.

Effective with the end of the authorization period July 1, 1983, through June 30, 1984, annual reauthorization of authority to write insurance coverage under the Act is no longer necessary. Beginning July 1, 1984, and thereafter, newly issued Certificates of Authority will show no expiration date. Certificates of Authority will remain in force for so long as the carrier complies with the requirements of the OWCP.

[50 FR 406, Jan. 3, 1985]

§ 703.109 Longshoremen's endorsement; see succeeding parts for endorsements for extensions.

(a) The following form of endorsement application to the standard workmen's compensation and employer's liability policy, shall be used, if required by the OWCP, with the form of policy approved by the Office for use by an authorized carrier:

For attachment to Policy No. ———,

The obligations of the policy include the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq., and all laws amendatory thereof or supplementary thereto which may be or become effective while this policy is in force.

The company will be subject to the provisions of 33 U.S.C. 935. Insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the company from payment of compensation and other benefits lawfully due for disability or death sustained by an employe during the life of the policy.

The company agrees to abide by all the provisions of this Act, and all lawful rules, regulations, orders, and decisions of the Office of Workmen's Compensation Programs, U.S. Department of Labor, unless and until set aside, modified, or reversed by appropriate appellate authority as provided for by said Act.

This endorsement shall not be cancelled prior to the date specified in this policy for its expiration until at least 30 days have elapsed after a notice of cancellation has been sent to the District Director and to this employer.

All terms, conditions, requirements, and obligations, expressed in this policy or in any other endorsement attached thereto which are not inconsistent with or inapplicable to the provisions of this endorsement are hereby made a part of this endorsement as fully and completely as if wholly written herein.

§ 703.110 Other forms of endorsements and policies.

Where the form of endorsement prescribed by § 703.109 is not appropriate when used in conjunction with a form of policy approved for use by the Office no modification thereof shall be used unless specifically approved by the Office. Where the form of policy is designed to include therein the obligations of the insurer under said Act without the use of the appropriate endorsements, the policy shall contain the provisions required to be included in any of the endorsements. Such a policy, however, shall not be used until expressly approved by the Office.

§ 703.111 Submission of new forms of policies for approval; other endorsements.

No new forms of policies or modification of existing forms of policies shall be used by an insurer authorized by the Office under the regulations in this part to write insurance under said Act except after submission to and approval by the Office. No endorsement altering any provisions of a policy approved by the Office shall be used except after submission to and approval by the Office.

§ 703.112 Terms of policies.

A policy or contract of insurance shall be issued for the term of not less than 1 year from the date that it becomes effective, but if such insurance be not needed except for a particular contract or operation, the term of the policy may be limited to the period of such contract or operation.

§ 703.113 Marine insurance contracts.

A longshoremen's policy, or the longshoremen's endorsement provided for by § 703.109 for attachment to a marine policy, may specify the particular vessel or vessels in respect of which the policy applies and the address of the employer at the home port thereof. The report of the issuance of a policy or endorsement required by § 703.116 to be made by the carrier shall be made to the district director for the compensation district in which the home port of such vessel or vessels is located, and such report shall show the name and address of the owner as well as the name or names of such vessel or vessels.

§ 703.114 Notice of cancellation.

Cancellation of a contract or policy of insurance issued under authority of said Act shall not become effective otherwise than as provided by 33 U.S.C. 936(b); and notice of a proposed cancellation shall be given to the district director and to the employer in accordance with the provisions of 33 U.S.C. 912(c), 30 days before such cancellation is intended to be effective.

§ 703.115 Discharge by the carrier of obligations and duties of employer.

Every obligation and duty in respect of payment of compensation, the providing of medical and other treatment and care, the payment or furnishing of any other benefit required by said Act and in respect of the carrying out of the administrative procedure required or imposed by said Act or the regulations in this part upon an employer shall be discharged and carried out by the carrier except that the prescribed report of injury or death shall be sent by the employer to the district director and to the insurance carrier as required by 33 U.S.C. 930. Such carrier shall be jointly responsible with the

employer for the submission of all reports, notices, forms, and other administrative papers required by the district director or the Office in the administration of said Act to be submitted by the employer, but any form or paper so submitted where required therein shall contain in addition to the name and address of the carrier, the full name and address of the employer on whose behalf it is submitted. Notice to or knowledge of an employer of the occurrence of the injury or death shall be notice to or knowledge of such carrier. Jurisdiction of the employer by a district director, the Office, or appropriate appellate authority under said Act shall be jurisdiction of such carrier. Any requirement under any compensation order, finding, or decision shall be binding upon such carrier in the same manner and to the same extent as upon the employer.

§ 703.116 Report by carrier of issuance of policy or endorsement.

Each carrier shall report to the district director assigned to a compensation district each policy and endorsement issued by it to an employer who carries on operations in such compensation district. The report shall be made in such manner and on such form as the district or the Office may require.

§ 703.117 Report; by whom sent.

The report of issuance of a policy and endorsement provided for in §703.116 shall be sent by the home office of the carrier, except that any carrier may authorize its agency or agencies in any compensation district to make such reports to the district director, provided the carrier shall notify the district director in such district of the agencies so duly authorized.

§ 703.118 Agreement to be bound by report.

Every applicant for authority to write insurance under the provisions of this Act, shall be deemed to have included in its application an agreement that the acceptance by the district director of a report of the issuance of a policy of insurance, as provided for by §703.116, shall bind the carrier to full liability for the obligations under this Act of the employer named in said report, and every certificate of authority to write insurance under this Act shall be deemed to have been issued by the Office upon consideration of the carrier's agreement to become so bound. It shall be no defense to this agreement that the carrier failed or delayed to issue the policy to the employer covered by this report.

[50 FR 406, Jan. 3, 1985]

§ 703.119 Report by employer operating temporarily in another compensation district.

Where an employer having operations in one compensation district contemplates engaging in work subject to the Act in another compensation district, his carrier may submit to the district director of such latter district a report pursuant to §703.116 containing the address of the employer in the first mentioned district with the additional notation ''No present address in ——— compensation district. Certificate requested when address given.''

§ 703.120 Name of one employer only shall be given in each report.

A separate report of the issuance of a policy and endorsement, provided for by §703.116, shall be made for each employer covered by a policy. If a policy is issued insuring more than one employer, a separate report for each employer so covered shall be sent to the district director concerned, with the name of only one employer on each such report.

AUTHORIZATION OF SELF-INSURERS

§ 703.301 Employers who may be authorized as self-insurers.

The Office will consider for the granting of authority to secure by self-insurance the payment of compensation under the Longshoremen's and Harbor Workers' Compensation Act, or its extensions, any employer who, pursuant to the regulations in this part, furnishes to the Office satisfactory proof of such employer's ability to pay compensation directly, and who agrees to immediately cancel any existing

policy as of the time of the OWCP's approval of the employer to be self-insured, or who does not become otherwise insured under this Act. The succeeding regulations relating to self-insurers require the deposit of security in the form either of an indemnity bond or negotiable securities (at the option of the employer) of a kind and in an amount determined by the Office, and prescribe the conditions under which such deposit shall be made. The term ''self-insurer'' as used in these regulations means any employer securing compensation in accordance with the provisions of 33 U.S.C. 932(a)(2) and with these regulations.

[39 FR 14922, Apr. 29, 1974]

§ 703.302 Application for authority to become a self-insurer; how filed; information to be submitted; other requirements.

Application for authority to become a self-insurer may be made by any employer desiring such privilege and shall be addressed to the OWCP and be made on a form provided by the Office. Such application shall contain:

(a) A statement of the employer's payroll report for the preceding 12 months; (b) a statement of the average number of employees engaged in employment within the purview of the LHWCA or any of its extensions for the preceding 12 months; (c) a statement of the number of injuries to such employees resulting in disability of more than 7 days' duration, or in death, during each of 3 years next preceding the date of the application; (d) a certified financial report for each of the three years preceding the application; (e) a description of the facilities maintained or the arrangements made for the medical and hospital care of injured employees; and (f) a statement describing the provisions and maximum amount of any excess or catastrophic insurance. The Office may in its discretion require the applicant to submit such further information or such evidence as the Office may deem necessary to have in order to enable it to give adequate consideration to such application. Such application shall be signed by the applicant over his typewritten name and if the applicant is not an individual, by an officer of the applicant duly authorized to make such application over his typewritten name and official designation and shall be sworn to by him. If the applicant is a corporation, the corporate seal shall be affixed. The application shall be filed with the OWCP national office in Washington, DC. The regulations in this part shall be binding upon each applicant hereunder and the applicant's consent to be bound by all requirements of the said regulations shall be deemed to be included in and a part of the application, as fully as though written therein.

(Approved by the Office of Management and Budget under control number 1215–0160)

(Pub. L. No. 96–511)

[38 FR 26873, Sept. 26, 1973, as amended at 50 FR 406, Jan. 3, 1985]

§ 703.303 Decision upon application of employer; deposit of negotiable securities or indemnity bond.

The decision of the Office to grant an application of an employer for authority to pay compensation under said Act as a self-insurer will be transmitted to the applicant on a form prescribed by the Office. Such grant shall be conditioned upon a deposit of security in the form of an indemnity bond or of negotiable securities in an amount fixed by the Office, and the execution and filing of an agreement and undertaking in the form prescribed by the Office, as required by § 703.304.

§ 703.304 Filing of agreement and undertaking.

The applicant for the privilege of self-insurance shall as a condition subsequent to receiving authorization to act as a self-insurer, execute and file with the Office and agreement and undertaking in a form prescribed and provided by the Office in whch the applicant shall agree: (a) To pay when due, as required by the provisions of said Act, all compensation payable on account of injury or death of any of its employees injured within the purview of said Act; (b) in such cases to furnish medical, surgical, hospital, and other attendence, treatment and care as required by the provisions of said Act; (c) to deposit with the Office an indemnity bond in the amount which the Office

shall fix, or to deposit negotiable securities as provided for by the regulations in this part in the amount which the Office shall fix, accordingly as elected in the application; (d) to authorize the Office to sell such negotiable securities so deposited or any part thereof and from the proceeds thereof to pay such compensation, medical, and other expenses and any accrued penalties imposed by law as it may find to be due and payable; and (e) to obtain and maintain, if required by the Office, excess or catastrophic insurance, in amounts to be determined by the Office.

[50 FR 407, Jan. 3, 1985]

§ 703.305 Decision upon application of employer; furnishing of indemnity bond or deposit of negotiable securities required.

The applicant for the privilege of self-insurance, as a condition subsequent to receiving authorization to act as self-insurer, shall give security for the payment of compensation and the discharge of all other obligations under the said Act, in the amount fixed by the Office, which may be in the form of an indemnity bond with sureties satisfactory to the Office, or of a deposit of negotiable securities as provided in the regulations in this part. The amount of such security so to be fixed and required by the Office shall be such as the Office shall deem to be necessary and sufficient to secure the performance by the applicant of all obligations imposed upon him as an employer by the Act. In fixing the amount of such security the Office will take into account the financial standing of the employer, the nature of the work in which he is engaged, the hazard of the work in which the employees are employed, the payroll exposure, and the accident experience as shown in the application and the Office's records, and any other facts which the Office may deem pertinent. Additional security may be required at any time in the discretion of the Office. The indemnity bond which is required by these regulations shall be in such form, and shall contain such provisions, as the Office may prescribe: *Provided,* That only surety companies approved by the United States Treasury Department under the laws of the United States and the rules and regulations governing bonding companies may act as sureties on such indemnity bonds.

[50 FR 407, Jan. 3, 1985]

§ 703.306 Kinds of negotiable securities which may be deposited; conditions of deposit; acceptance of deposits.

An applicant for the privilege of self-insurance electing to deposit negotiable securities to secure his obligations under said Act in the amount fixed by the Office under the regulations in this part shall deposit any negotiable securities acceptable as security for the deposit of public monies of the United States under regulations issued by the Secretary of the Treasury. The approval, valuation, acceptance, and custody of such securities is hereby committed to the several Federal Reserve Banks and the Treasurer of the United States when authorized under the regulations in this part to receive deposits of such securities.

[50 FR 407, Jan. 3, 1985]

§ 703.307 Deposits of negotiable securities with Federal Reserve banks or the Treasurer of the United States; authority to sell such securities; interest thereon.

Deposits of securities provided for by the regulations in this part shall be made with any Federal Reserve bank or any branch of a Federal Reserve bank designated by the Office, or the Treasurer of the United States, and shall be held subject to the order of the Office with power in the Office, in its discretion in the event of default by the said self-insurer, to collect the interest and the principal as they may become due, to sell the securities or any of them as may be required to discharge the obligations of the self-insurer under said Act and to apply the proceeds to the payment of any compensation or medical expense for which the self-insurer may be liable. The Office may, however, whenever it deems it unnecessary to resort to such securities for the payment of compensation, authorize the self-insurer to collect interest on the securities deposited by him.

§ 703.308 Substitution and withdrawal of negotiable securities.

No substitution or withdrawal of negotiable securities deposited by a self-insurer shall be made except upon authorization by the Office. A self-insurer discontinuing business, or discontinuing operations within the purview of said Act, or providing security for the payment of compensation by insurance under the provisions of said Act may apply to the Office for the withdrawal of securities deposited under the regulations in this part. With such application shall be filed a sworn statement setting forth:

(a) A list of all outstanding cases in each compensation district in which compensation is being paid, with the names of the employees and other beneficiaries, giving a description of causes of injury or death, and a statement of the amount of compensation paid; (b) a similar list of all pending cases in which no compensation has as yet been paid; and (c) a similar list of all cases in which injury or death has occurred within 1 year prior to such application or in which the last payment of compensation was made within 1 year prior to such application. In such cases withdrawals may be authorized by the Office of such securities as in the opinion of the Office may not be necessary to provide adequate security for the payment of outstanding and potential liabilities of such self-insurer under said Act.

§ 703.309 Increase or reduction in the amount of indemnity bond or negotiable securities.

Whenever in the opinion of the Office the principal sum of the indemnity bond filed or the amount of negotiable securities deposited by a self-insurer is insufficient to afford adequate security for the payment of compensation and medical expenses under said Act, the self-insurer shall, upon demand by the Office, file such additional indemnity bond or deposit under the regulations in this part such additional amount of negotiable securities as the Office may require. At any time upon application of a self-insurer, or on the initiative of the Office, when in its opinion the facts warrant, the principal sum of an indemnity bond required to be given or the amount of negotiable securities required to be deposited may be reduced. A self-insurer seeking such reduction shall furnish such information as the Office may request relative to his current affairs, the nature and hazard of the work of his employees, the amount of the payroll of his employees engaged in maritime employment within the purview of the said Act, his financial condition, his accident experience, and such other evidence as may be deemed material, including a record of payments of compensation made by him.

§ 703.310 Reports required of self-insurers; examination of accounts of self-insurer.

At such times as the Office may require or prescribe, each self-insurer shall submit such of the following reports as may be requested:

(a) A certified financial statement of the self-insurer's assets and liabilities, or a balance sheet.

(b) A sworn statement showing by classifications the payroll of employees of the self-insurer who are engaged in employment within the purview of the LHWCA or any of its extensions.

(c) A sworn statement covering the 6 months' period preceding the date of such report, listing by compensation districts all death and injury cases which have occurred during such period, together with a report of the status of all outstanding claims, showing the particulars of each case.

Whenever it deems it to be necessary, the Office may inspect or examine the books of account, records, and other papers of a self-insurer for the purpose of verifying any financial statement submitted to the Office by self-insurer or verifying any information furnished to the Office in any report required by this section, or any other section of the regulations in this part, and such self-insurer shall permit the Office or its duly authorized representative to make such an inspection or examination as the Office shall require. In lieu of this requirement the Office may in its discretion accept an adequate report of a certified public accountant.

(Approved by the Office of Management and Budget under control number 1215–0033)

(Pub. L. No. 96–511)

[38 FR 26873, Sept. 26, 1973, as amended at 49 FR 18294, Apr. 30, 1984; 50 FR 407, Jan. 3, 1985]

§ 703.311 Period of authorization as self-insurer.

(a) Effective with the end of the authorization period July 1, 1983, through June 30, 1984, annual reauthorization of the self-insurance privilege is no longer necessary. Beginning July 1, 1984, and thereafter, newly approved and renewed self-insurance authorizations will remain in effect for so long as the self-insurer complies with the requirements of the OWCP.

(b) A self-insurer who currently has on file an indemnity bond, will receive from the office, on or about May 10 of each year, a bond form for execution in contemplation of the continuance of the self-insurance authorization, and the submission of such bond duly executed in the amount indicated by the office will be deemed and treated as a condition of the continuing authorization.

[50 FR 407, Jan. 3, 1985]

§ 703.312 Revocation of privilege of self-insurance.

The Office may for good cause shown suspend or revoke the authorization of any self-insurer. Failure by a self-insurer to comply with any provision or requirement of law or of the regulations in this part, or with any lawful order or communication of the Office, or the failure or insolvency of the surety on his indemnity bond, or impairment of financial responsibility of such self-insurer, shall be deemed good cause for such suspension or revocation.

ISSUANCE OF CERTIFICATES OF COMPLIANCE

§ 703.501 Issuance of certificates of compliance.

Every employer who has secured the payment of compensation as required by 33 U.S.C. 932 and by the regulations in this part may request a certificate from the district director in the compensation district in which he has operations, and for which a certificate is required by 33 U.S.C. 937, showing that such employer has secured the payment of compensation. Only one such certificate will be issued to an employer in a compensation district, and it will be valid only during the period for which such employer has secured such payment. An employer so desiring may have photocopies of such a certificate made for use in different places within the compensation district. Two forms of such certificates have been provided by the Office, one form for use where the employer has obtained insurance generally under these regulations, and one for use where the employer has been authorized as a self-insurer.

§ 703.502 Same; employer operating temporarily in another compensation district.

A district director receiving a report of the issuance of a policy of insurance with the notation authorized by § 703.119, will file such report until he receives from the insured employer named therein a request for certificate of compliance, giving the address of the employer within the compensation district of such district director. Upon receipt of such a request the district director will send the proper certificate of compliance to such employer at such address.

§ 703.503 Return of certificates of compliance.

Upon the termination by expiration, cancellation or otherwise, of a policy of insurance issued under the provisions of law and these regulations, or the revocation or termination of the privilege of self-insurance granted by the Office, all certificates of compliance issued on the basis of such insurance or self-insurance shall be void and shall be returned by the employer to the district director issuing them with a statement of the reason for such return. An employer holding certificate of compliance under an insurance policy which has expired, pending renewal of such insurance need not return such certificate of compliance if such expired insurance is promptly replaced. An employer who has secured renewal of insurance upon the expiration of policy under said Act or whose self-insurance thereunder is reauthorized without a break in the continuity thereof

need not return an expired certificate of compliance.

PART 704—SPECIAL PROVISIONS FOR LHWCA EXTENSIONS

Sec.
704.001 Extensions covered by this part.
704.002 Scope of part.

DEFENSE BASE ACT

704.101 Administration; compensation districts.
704.102 Commutation of payments to aliens and nonresidents.
704.103 Removal of certain minimums when computing or paying compensation.
704.151 DBA endorsement.

DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION ACT

704.201 Administration; compensation districts.
704.251 DCCA endorsement.

OUTER CONTINENTAL SHELF LANDS ACT

704.301 Administration; compensation districts.
704.351 OCSLA endorsement.

NONAPPROPRIATED FUND INSTRUMENTALITIES ACT

704.401 Administration; compensation districts.
704.451 NFIA endorsement.

AUTHORITY: 5 U.S.C. 301; Reorg. Plan No. 6 of 1950, 15 FR 3174, 64 Stat. 1263; 33 U.S.C. 939; 36 D.C. Code 501 *et seq.*; 42 U.S.C. 1651 *et seq.*; 43 U.S.C. 1331; 5 U.S.C. 6171 *et seq.*; Secretary's Order 1–89; Employment Standards Order No. 90–02.

SOURCE: 38 FR 26877, Sept. 26, 1973, unless otherwise noted.

§ 704.001 Extensions covered by this part.

(a) Defense Base Act (DBA).

(b) District of Columbia Workmen's Compensation Act (DCCA).

(c) Outer Continental Shelf Lands Act (OCSLA).

(d) Nonappropriated Fund Instrumentalities Act (NFIA).

§ 704.002 Scope of part.

The regulations governing the administration of the LHWCA as set forth in parts 702 and 703 of this subchapter govern the administration of the LHWCA extensions (see § 704.001) in nearly every respect, and are not repeated in this part 704. Such special provisions as are necessary to the proper administration of each of the extensions are set forth in this part. To the extent of any inconsistency between regulations in parts 702 and 703 of this subchapter and those in this part, the latter supersedes those in parts 702 and 703 of this subchapter.

DEFENSE BASE ACT

§ 704.101 Administration; compensation districts.

For the purpose of administration of this Act areas assigned to the compensation districts established for administration of the Longshoremen's and Harbor Workers' Compensation Act as set forth in part 702 of this subchapter shall be extended in the following manner to include:

(a) Canada, east of the 75th degree west longitude, Newfoundland, and Greenland are assigned to District No. 1.

(b) Canada, west of the 75th degree and east of the 110th degree west longitude, is assigned to District No. 10.

(c) Canada, west of the 110th degree west longitude, and all areas in the Pacific Ocean north of the 45th degree north latitude are assigned to District No. 14.

(d) All areas west of the continents of North and South America (except coastal islands) to the 60th degree east longitude, except for Iran, are assigned to District No. 15.

(e) Mexico, Central and South America (including coastal islands); areas east of the continents of North and South America to the 60th degree east longitude, including Iran, and any other areas or locations not covered under any other district office, are assigned to District No. 2.

§ 704.102 Commutation of payments to aliens and nonresidents.

Authority to commute payments to aliens and nonnationals who are not residents of the United States and Canada, section 2(b) of the Defense Base Act, 42 U.S.C. 1652(b), though separately stated in this Act, is identical in language to section 9(g) of the Longshoremen's Act. Thus, except for the different statutory citation, the

LHWCA regulation at §702.142 of this subchapter shall apply.

§ 704.103 Removal of certain minimums when computing or paying compensation.

The minimum limitation on weekly compensation for disability established by section 6 of the LHWCA, 33 U.S.C. 906, and the minimum limit on the average weekly wages on which death benefits are to be computed under section 9 of the LHWCA, 33 U.S.C. 909, shall not apply in computing compensation and death benefits under this Act; section 2(a), 42 U.S.C. 1652(a).

§ 704.151 DBA endorsement.

The following form of endorsement applicable to the standard workmen's compensation and employers' liability policy shall be used, if required by the OWCP, with the form of policy approved by the Office for use by an authorized carrier:

For attachment to Policy No. ——,

The obligations of the policy include the Longshoremen's and Harbor Workers' Compensation Act, as extended by the provisions of the Defense Base Act, and all laws amendatory thereof or supplementary thereto which may be or become effective while this policy is in force.

The Company will be subject to the provisions of 33 U.S.C. 935. Insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the Company from payment of compensation and other benefits lawfully due for disability or death sustained by an employee during the life of the policy.

The Company agrees to abide by all the provisions of said Acts and all lawful rules, regulations, orders, and decisions of the Office of Workmen's Compensation Programs, Department of Labor, unless and until set aside, modified, or reversed by appropriate appellate authority as provided for by said Acts.

This endorsement shall not be canceled prior to the date specified in this policy for its expiration until at least 30 days have elapsed after a notice of cancellation has been sent to the District Director and to this employer.

All terms, conditions, requirements, and obligations expressed in this policy or in any other endorsement attached thereto which are not inconsistent with or inapplicable to the provisions of this endorsement are hereby made a part of this endorsement as fully and completely as if wholly written herein.

DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION ACT

§ 704.201 Administration; compensation districts.

For the purpose of administration of this Act, the District of Columbia shall be the compensation district and is designated as District No. 40.

§ 704.251 DCCA endorsement.

The following form of endorsement applicable to the standard workmen's compensation and employer's liability policy shall be used, if required by the OWCP, with the form of policy approved by the Office for use by an authorized carrier:

For attachment to Policy No. ——,

The obligations of the policy include the District of Columbia Workmen's Compensation Act, and the applicable provisions of the Longshoremen's and Harbor Workers' Compensation Act, and all laws amendatory of either of said Acts or supplementary thereto which may be or become effective while this policy is in force.

The company will be subject to the provisions of 33 U.S.C. 935. Insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the company from payment of compensation and other benefits lawfully due for disability or death sustained by an employee during the life of the policy.

The company agrees to abide by all the provisions of said District of Columbia Workmen's Compensation Act and all lawful rules, regulations, orders, and decisions of the Office of Workmen's Compensation Programs, Department of Labor, unless and until set aside, modified, or reversed by appropriate appellate authority as provided for by said Act.

This endorsement shall not be canceled prior to the date specified in this policy for its expiration until at least 30 days have elapsed after a notice of cancellation has been sent to the District Director for the District of Columbia and to this employer.

All terms, conditions, requirements, and obligations expressed in this policy or in any other endorsement attached thereto which are not inconsistent with or inapplicable to the provisions of this endorsement are hereby made a part of this endorsement as fully and completely as if wholly written herein.

OUTER CONTINENTAL SHELF LANDS ACT

§ 704.301 Administration; compensation districts.

For the purpose of administration of this Act, the compensation districts established under the Longshoremen's and Harbor Workers' Compensation Act as set forth in part 702 of this subchapter shall administer this Act, and their jurisdiction for this purpose is extended, where appropriate, to include those parts of the Outer Continental Shelf adjacent to the State or States in such districts having adjacent shelf areas.

§ 704.351 OCSLA endorsement.

The following form of endorsement applicable to the standard workmen's compensation and employer's liability policy shall be used, if required by the OWCP, with the form of policy approved by the Office for use by an authorized carrier:

For attachment to Policy No. ———,

The obligations of the policy include the Longshoremen's and Harbor Workers' Compensation Act, as extended by the Outer Continental Shelf Lands Act, and all the laws amendatory thereof or supplementary thereto which may be or become effective while this policy is in force.

The company will be subject to the provisions of 33 U.S.C. 935. Insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the company from payment of compensation and other benefits lawfully due for disability or death sustained by an employee during the life of the policy.

The company agrees to abide by all the provisions of said laws and all the lawful rules, regulations, orders and decisions of the Office of Workmen's Compensation Programs, Department of Labor, until set aside, modified, or reversed by appropriate appellate authority as provided for by said Acts.

This endorsement shall not be canceled prior to the date specified in this policy for its expiration until at least 30 days have elapsed after a notice of cancellation has been sent to the District Director and to his employer.

All terms, conditions, requirements, and obligations expressed in this policy or in any other endorsement attached thereto which are not inconsistent with or inapplicable to the provisions of this endorsement are hereby made a part of this endorsement as fully and completely as if wholly written herein.

NONAPPROPRIATED FUND INSTRUMENTALITIES ACT

§ 704.401 Administration; compensation districts.

For the purpose of administration of this Act within the continental United States, Hawaii, and Alaska, the compensation districts established for administration of the Longshoremen's and Harbor Workers' Compensation Act as set forth in part 702 of this subchapter are established as the administrative districts under this Act. For the purpose of administration of this Act outside the continental United States, Alaska, and Hawaii, the compensation districts established for such overseas administration of the Defense Base Act as set forth in § 704.101 are established as the administrative districts under this Act.

§ 704.451 NFIA endorsement.

The following form of endorsement applicable to the standard workmen's compensation and employer's liability policy shall be used, if required by the OWCP, with the form of policy approved by the Office for use by an authorized carrier:

For attachment to Policy No. ———,

The obligations of the policy include the Longshoremen's and Harbor Workers' Compensation Act, as extended by the Nonappropriated Fund Instrumentalities Act, and all of the laws amendatory thereof or supplementary thereto which may be or become effective while this policy is in force.

The company will be subject to the provisions of 33 U.S.C 935. Insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the company from payment of compensation and other benefits lawfully due for disability or death sustained by an employee during the life of the policy.

The company agrees to abide by all the provisions of said Acts and all the lawful rules, regulations, orders, and decisions of the Office of Workmen's Compensation Programs, Department of Labor, unless and until set aside, modified, or reversed by appropriate appellate authority as provided for by said Acts.

This endorsement shall not be canceled prior to the date specified in this policy for its expiration until at least 30 days have elapsed after a notice of cancellation has been sent to the District Director and to the within named employer.

All terms, conditions, requirements, and obligations expressed in this policy or in any

other endorsement attached thereto which are not inconsistent with or inapplicable to the provisions of this endorsement are hereby made a part of this endorsement as fully and completely as if wholly written herein.

SUBCHAPTER B—FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969, AS AMENDED

PART 718—STANDARDS FOR DETERMINING COAL MINERS' TOTAL DISABILITY OR DEATH DUE TO PNEUMOCONIOSIS

Subpart A—General

Sec.
718.1 Statutory provisions.
718.2 Applicability of this part.
718.3 Scope and intent of this part.
718.4 Definitions and use of terms.

Subpart B—Criteria for the Development of Medical Evidence

718.101 General.
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718.105 Arterial blood-gas studies.
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Subpart C—Determining Entitlement to Benefits

718.201 Definition of pneumoconiosis.
718.202 Determining the existence of pneumoconiosis.
718.203 Establishing relationship of pneumoconiosis to coal mine employment.
718.204 Total disability defined; criteria for determining total disability.
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718.301 Establishing length of employment as a miner.
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APPENDIX A TO PART 718—STANDARDS FOR ADMINISTRATION AND INTERPRETATION OF CHEST ROENTGENOGRAMS (X-RAYS)
APPENDIX B TO PART 718—STANDARDS FOR ADMINISTRATION AND INTERPRETATION OF PULMONARY FUNCTION TESTS. TABLES B1, B2, B3, B4, B5, B6
APPENDIX C TO PART 718—BLOOD GAS TABLES

AUTHORITY: 5 U.S.C. 301, Reorganization Plan No. 6 of 1950, 15 FR 3174, 30 U.S.C. 901 et seq., 902(f), 925, 932, 934, 936, 945; 33 U.S.C. 901 et seq., Secretary's Order 7–87, 52 FR 48466, Employment Standards Order No. 90–02.

SOURCE: 45 FR 13678, Feb. 29, 1980, unless otherwise noted.

Subpart A—General

§ 718.1 Statutory Provisions.

(a) Under title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, the Federal Mine Safety and Health Amendments Act of 1977, the Black Lung Benefits Reform Act of 1977, the Black Lung Benefits Revenue Act of 1977, the Black Lung Benefits Amendments of 1981, and the Black Lung Benefits Revenue Act of 1981, benefits are provided to miners who are totally disabled due to pneumoconiosis and to certain survivors of a miner who died due to or while totally or partially disabled by pneumoconiosis. However, unless the miner was found entitled to benefits as a result of a claim filed prior to January 1, 1982, benefits are payable on survivors' claims filed on or after January 1, 1982, only when the miner's death was due to pneumoconiosis, except where the survivor's entitlement is established pursuant to §718.306 of this part on a claim filed prior to June 30, 1982. Before the enactment of the Black Lung Benefits Reform Act of 1977, the authority for establishing standards of eligibility for miners and their survivors was placed with the Secretary of Health, Education, and Welfare. These standards were set forth by the Secretary of Health, Education, and Welfare in subpart D of part 410 of this title, and adopted by the Secretary of Labor for application to all claims filed with the

Secretary of Labor (see 20 CFR 718.2, 1978). Amendments made to section 402(f) of the Act by the Black Lung Benefits Reform Act of 1977 authorize the Secretary of Labor to establish criteria for determining total or partial disability or death due to pneumoconiosis to be applied in the processing and adjudication of claims filed under part C of title IV of the Act. Section 402(f) of the Act further authorizes the Secretary of Labor, in consultation with the National Institute for Occupational Safety and Health, to establish criteria for all appropriate medical tests administered in connection with a claim for benefits. Section 413(b) of the Act authorizes the Secretary of Labor to establish criteria for the techniques to be used to take chest roentgenograms (X-rays) in connection with a claim for benefits under the Act.

(b) The Black Lung Benefits Reform Act of 1977 provided that with respect to a claim filed on or before the effective date of this part, that is filed prior to April 1, 1980, or reviewed under section 435 of the Act, the standards to be applied in the adjudication of such claim shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, with the Social Security Administration, whether or not the final disposition of the claim occurs after March 31, 1980. All such claims shall be reviewed under the criteria set forth in part 727 of this title.

[48 FR 24287, May 31, 1983]

§ 718.2 Applicability of this part.

This part is applicable to the adjudication of all claims filed after March 31, 1980, and considered by the Secretary of Labor under section 422 of the Act and part 725 of this subchapter. If a claim subject to the provisions of section 435 of the Act and subpart C of part 727 of this subchapter cannot be approved under that subpart, such claim may be approved, if appropriate, under the provisions contained in this part. The provisions of this part shall, to the extent appropriate, be construed together in the adjudication of all claims.

[48 FR 24287, May 31, 1983]

§ 718.3 Scope and intent of this part.

(a) This part sets forth the standards to be applied in determining whether a coal miner is or was totally, or in the case of a claim subject to § 718.306 partially, disabled due to pneumoconiosis or died due to pneumoconiosis. It also specifies the procedures and requirements to be followed in conducting medical examinations and in administering various tests relevant to such determinations.

(b) This part is designed to interpret the presumptions contained in section 411(c) of the Act, evidentiary standards and criteria contained in section 413(b) of the Act and definitional requirements and standards contained in section 402(f) of the Act within a coherent framework for the adjudication of claims. It is intended that these enumerated provisions of the Act be construed as provided in this part.

(c) In enacting title IV of the Act, Congress intended that claimants be given the benefit of all reasonable doubt as to the existence of total or partial disability or death due to pneumoconiosis. This part shall be construed and applied in that spirit and is designed to reflect that intent. However, no claim shall be approved unless the record considered as a whole, in light of any applicable presumptions, provides a reasonable basis for determining that the criteria for eligibility under the Act and this part have been met.

§ 718.4 Definitions and use of terms.

Except as is otherwise provided by this part, the definitions and usages of terms contained in § 725.101 of subpart A of part 725 of this title, as amended from time to time, shall be applicable to this part.

Subpart B—Criteria for the Development of Medical Evidence

§ 718.101 General.

The Office of Workers' Compensation Programs (hereinafter OWCP or the Office) shall develop the medical evidence necessary for a determination with respect to each claimant's entitlement to benefits. Each miner who files a claim

for benefits under the Act shall be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation including, but not limited to, a chest roentgenogram (X-ray), physical examination, pulmonary function tests and a blood-gas study.

§ 718.102 Chest roentgenograms (X-rays).

(a) A chest roentgenogram (X-ray) shall be of suitable quality for proper classification of pneumoconiosis and shall conform to the standards for administration and interpretation of chest X-rays as described in Appendix A.

(b) A chest X-ray to establish the existence of pneumoconiosis shall be classified as Category 1, 2, 3, A, B, or C, according to the International Labour Organization Union Internationale Contra Cancer/Cincinnati (1971) International Classification of Radiographs of the Pneumoconioses (ILO–U/C 1971), or subsequent revisions thereof. A chest X-ray classified as Category Z under the ILO Classification (1958) or Short Form (1968) shall be reclassified as Category O or Category 1 as appropriate, and only the latter accepted as evidence of pneumoconiosis. A chest X-ray classified under any of the foregoing classifications as Category O, including sub-categories 0/–, 0/0, or 0/1 under the UICC/Cincinnati (1968) Classification or the ILO–U/C 1971 Classification does not constitute evidence of pneumoconiosis.

(c) A description and interpretation of the findings in terms of the classifications described in paragraph (b) of this section shall be submitted by the examining physician along with the film. The report shall specify the name and qualifications of the person who took the film and the name and qualifications of the physician interpreting the film. If the physician interpreting the film is a Board-certified or Board-eligible radiologist or a certified ''B'' reader (see § 718.202), he or she shall so indicate. The report shall further specify that the film was interpreted in compliance with this paragraph.

(d) The original film on which the X-ray report is based shall be supplied to the Office, unless prohibited by law, in which event the report shall be considered as evidence only if the original film is otherwise available to the Office and other parties. Where the chest X-ray of a deceased miner has been lost, destroyed or is otherwise unavailable, a report of a chest X-ray submitted by any party shall be considered in connection with the claim.

(e) No chest X-ray shall constitute evidence of the presence or absence of pneumoconiosis unless it is in substantial compliance with the requirements of this section and Appendix A, except that in the case of a deceased miner where the only available X-ray is of sufficient quality for determining the presence or absence of pneumoconiosis and such X-ray was interpreted by a Board-certified or Board-eligible radiologist or a certified ''B'' reader (see § 718.208) such X-ray shall be considered and shall be accorded such weight and probative value as is appropriate in light of all of the evidence applicable to the individual case. It shall be presumed, in the absence of evidence to the contrary, that the requirements of Appendix A have been met.

(Approved by the Office of Management and Budget under control number 1215–0090)

(Pub. L. No. 96–511)

[45 FR 13678, Feb. 29, 1980, as amended at 48 FR 24287, May 31, 1983; 49 FR 18295, Apr. 30, 1984]

§ 718.103 Pulmonary function tests.

(a) Any report of pulmonary function tests submitted in connection with a claim for benefits shall record the results of the forced expiratory volume in one second (FEV_1) and either the forced vital capacity (FVC) or the maximum voluntary ventilation (MVV) or both. If the MVV is reported, the results of such test shall be obtained independently rather than calculated from the results of the FEV_1. Such tests shall be administered and reported in accordance with the standards for the administration and interpretation of pulmonary function tests as described in Appendix B. It shall be presumed, in the absence of evidence to the contrary, that these requirements have been met.

(b) All pulmonary function test results submitted in connection with a

claim for benefits shall be accompained by three tracings of each test performed, unless the results of two tracings of the MVV are within 5% of each other, in which case two tracings for that test shall be sufficient. Pulmonary function test results submitted in connection with a claim for benefits shall also include a statement signed by the physician or technician conducting the test setting forth the following:

(1) Date and time of test;

(2) Name, DOL claim number, age, height, and weight of claimant at the time of the test;

(3) Name of technician;

(4) Name and signature of physician supervising the test;

(5) Claimant's ability to understand the instructions, ability to follow directions and degree of cooperation in performing the tests. If the claimant is unable to complete the test, the person executing the report shall set forth the reasons for such failure;

(6) Paper speed of the instrument used;

(7) Name of the instrument used;

(8) Whether a bronchodilator was administered. If a bronchodilator is administered, the physician's report must detail values obtained both before and after administration of the bronchodilator and explain the significance of the results obtained; and

(9) That the requirements of paragraphs (b) and (c) of this section have been complied with.

(c) No results of pulmonary function tests shall constitute evidence of a respiratory or pulmonary impairment unless such tests are conducted and reported in substantial compliance with this section and Appendix B. Special consideration shall be given in the case of a deceased miner where, in the opinion of the adjudication officer, the only available tests demonstrate technically valid results obtained with good cooperation of the miner.

(The information collection requirements contained in paragraph (b) were approved by the Office of Management and Budget under control number 1215–0090)

(Pub. L. No. 96–511)

[45 FR 13678, Feb. 29, 1980, as amended at 49 FR 18295, Apr. 30, 1984]

§ 718.104 Report of physical examinations.

A report of any physical examination conducted in connection with a claim shall include the miner's medical and employment history. A medical report form supplied by the Office or a report containing substantially the same information shall be completed for all findings. In addition to the chest X-ray and pulmonary function tests, the physician shall use his or her judgment in the selection of other procedures such as electrocardiogram, blood-gas studies, and other blood analyses in his or her evaluation of the miner. All manifestations of chronic respiratory disease shall be noted. Any pertinent findings not specifically listed on the form shall be added by the examining physician. If heart disease secondary to lung disease is found, all symptoms and significant findings shall be noted.

(Approved by the Office of Management and Budget under control number 1215–0090)

(Pub. L. No. 96–511)

[45 FR 13678, Feb. 29, 1980, as amended at 49 FR 18295, Apr. 30, 1984]

§ 718.105 Arterial blood-gas studies.

(a) Blood-gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. No blood-gas study shall be performed if medically contraindicated.

(b) A blood-gas study shall initially be administered at rest and in a sitting position. If the results of the blood-gas test at rest do not satisfy the requirements of Appendix C, an exercise blood-gas test shall be offered to the miner unless medically contraindicated. If an exercise blood-gas test is administered, blood shall be drawn during exercise.

(c) Any report of a blood-gas study submitted in connection with a claim shall specify:

(1) Date and time of test;

(2) Altitude and barometric pressure at which the test was conducted;

(3) Name and DOL claim number of the claimant;

(4) Name of technician;

(5) Name and signature of physician supervising the study;

(6) The recorded values for $_{p}CO_2$, $_{p}O_2$, and pH, which have been collected simultaneously (specify values at rest and, if performed, during exercise);

(7) Duration and type of exercise;

(8) Pulse rate at the time the blood sample was drawn;

(9) Time between drawing of sample and analysis of sample; and

(10) Whether equipment was calibrated before and after each test.

(Approved by the Office of Management and Budget under control number 1215–0090)

(Pub. L. No. 96–511)

[45 FR 13678, Feb. 29, 1980, as amended at 49 FR 18295, Apr. 30, 1984]

§ 718.106 Autopsy; biopsy.

(a) A report of an autopsy or biopsy submitted in connection with a claim shall include a detailed gross macroscopic and microscopic description of the lungs or visualized portion of a lung. If a surgical procedure has been performed to obtain a portion of a lung, the evidence shall include a copy of the surgical note and the pathology report of the gross and microscopic examination of the surgical specimen. If an autopsy has been performed, a complete copy of the autopsy report shall be submitted to the Office.

(b) No report of an autopsy or biopsy submitted in connection with a claim shall be considered unless the report complies with the requirements of this section, except that in the case of a miner who died prior to March 31, 1980, such reports shall be considered even when the reports are not in substantial compliance with the requirements of this section. Such nonconforming reports concerning miners who died prior to March 31, 1980, shall be accorded such weight and probative value as is appropriate in light of all of the evidence applicable to the individual case.

(c) A negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis. However, where positive findings are obtained on biopsy, the results will constitute evidence of the presence of pneumoconiosis.

[45 FR 13678, Feb. 29, 1980, as amended at 48 FR 24288, May 31, 1983]

§ 718.107 Other medical evidence.

The results of any medically acceptable test or procedure reported by a physician not addressed in this subpart which test or procedure tends to demonstrate the presence or absence of pneumoconiosis or the sequelae of pneumoconiosis or the presence or absence of a respiratory or pulmonary impairment, may be submitted in connection with a claim and shall be given appropriate consideration.

Subpart C—Determining Entitlement to Benefits

§ 718.201 Definition of pneumoconiosis.

For the purpose of the Act, *pneumoconiosis* means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. For purposes of this definition, a disease ''arising out of coal mine employment'' includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

§ 718.202 Determining the existence of pneumoconiosis.

(a) A finding of the existence of pneumoconiosis may be made as follows:

(1) A chest X-ray conducted and classified in accordance with § 718.102 may form the basis for a finding of the existence of pneumoconiosis. Except as otherwise provided in this section, where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays.

(i) In all claims filed before January 1, 1982, where there is other evidence of pulmonary or respiratory impairment, a Board-certified or Board-eligible radiologist's interpretation of a chest X-

ray shall be accepted by the Office if the X-ray is in compliance with the requirements of §718.102 and if such X-ray has been taken by a radiologist or qualified radiologic technologist or technician and there is no evidence that the claim has been fraudulently represented. However, these limitations shall not apply to any claim filed on or after January 1, 1982.

(ii) The following definitions shall apply when making a finding in accordance with this paragraph.

(A) The term *other evidence* means medical tests such as blood-gas studies, pulmonary function studies or physicial examinations or medical histories which establish the presence of a chronic pulmonary, respiratory or cardio-pulmonary condition, and in the case of a deceased miner, in the absence of medical evidence to the contrary, affidavits of persons with knowledge of the miner's physical condition.

(B) *Pulmonary or respiratory impairment* means inability of the human respiratory apparatus to perform in a normal manner one or more of the three components of respiration, namely, ventilation, perfusion and diffusion.

(C) *Board-certified* means certification in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association.

(D) *Board-eligible* means the successful completion of a formal accredited residency program in radiology or diagnostic roentgenology.

(E) *Certified 'B' reader* or *'B' reader* means a physician who has demonstrated proficiency in evaluating chest roentgenograms for roentgenographic quality and in the use of the ILO–U/C classification for interpreting chest roentgenograms for pneumoconiosis and other diseases by taking and passing a specially designed proficiency examination given on behalf of or by the Appalachian Laboratory for Occupational Safety and Health. See 42 CFR 37.51(b)(2).

(F) *Qualified radiologic technologist or technician* means an individual who is either certified as a registered technologist by the American Registry of Radiologic Technologists or licensed as a radiologic technologist by a state licensing board.

(2) A biopsy or autopsy conducted and reported in compliance with §718.106 may be the basis for a finding of the existence of pneumoconiosis. A finding in an autopsy of anthracotic pigmentation, however, shall not be sufficient, by itself, to establish the existence of pneumoconiosis. A report of autopsy shall be accepted unless there is evidence that the report is not accurate or that the claim has been fraudulently represented.

(3) If the presumptions described in §§718.304, 718.305 or §718.306 are applicable, it shall be presumed that the miner is or was suffering from pneumoconiosis.

(4) A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in §718.201. Any such finding shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

(b) No claim for benefits shall be denied solely on the basis of a negative chest X-ray.

(c) A determination of the existence of pneumoconiosis shall not be made solely on the basis of a living miner's statements or testimony. Nor shall such a determination be made upon a claim involving a deceased miner filed on or after January 1, 1982, solely based upon the affidavit(s) (or equivalent sworn testimony) of the claimant and/or his or her dependents who would be eligible for augmentation of the claimant's benefits if the claim were approved.

[45 FR 13678, Feb. 29, 1980, as amended at 48 FR 24288, May 31, 1983]

§718.203 Establishing relationship of pneumoconiosis to coal mine employment.

(a) In order for a claimant to be found eligible for benefits under the Act, it must be determined that the miner's pneumoconiosis arose at least in part out of coal mine employment.

The provisions in this section set forth the criteria to be applied in making such a determination.

(b) If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment.

(c) If a miner who is suffering or suffered from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship.

§ 718.204 Total disability defined; criteria for determining total disability.

(a) *General.* Benefits are provided under the Act for or on behalf of miners who are totally disabled due to pneumoconiosis, or who were totally disabled due to pneumoconiosis at the time of death. The standards of this section shall be applied to determine whether a miner is or was ''totally disabled'' for the purpose of the Act.

(b) *Total disability defined.* A miner shall be considered totally disabled if the irrebuttable presumption in § 718.304 applies. If the irrebuttable presumption described in § 718.304 does not apply, a miner shall be considered totally disabled if pneumoconiosis as defined in § 718.201 prevents or prevented the miner:

(1) From performing his or her usual coal mine work; and

(2) From engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time.

(c) *Criteria.* In the absence of contrary probative evidence, evidence which meets the standards of either paragraphs (c)(1), (2), (3), (4) or (5) of this section shall establish a miner's total disability:

(1) Pulmonary function tests showing values equal to or less than those listed in Table B1 (Males) or Table B2 (Females) in appendix B to this part for an individual of the miner's age, sex, and height for the FEV_1 test; if, in addition, such tests also reveal the values specified in either paragraph (c)(1) (i) or (ii) or (iii) of this section:

(i) Values equal to or less than those listed in Table B3 (Males) or Table B4 (Females) in appendix B of this part, for an individual of the miner's age, sex, and height for the FVC test, or

(ii) Values equal to or less than those listed in Table B5 (Males) or Table B6 (Females) in appendix B to this part, for an individual of the miner's age, sex, and height for the MVV test, or

(iii) A percentage of 55 or less when the results of the FEV_1 test are divided by the results of the FVC test (FEV_1/FVC equal to or less than 55%), or

(2) Arterial blood-gas tests show the values listed in Appendix C to this part, or

(3) The miner has pneumoconiosis and has been shown by the medical evidence to be suffering from cor pulmonale with right sided congestive heart failure, or

(4) Where total disability cannot be established under paragraphs (c)(1), (c)(2) or (c)(3) of this section, or where pulmonary function tests and/or blood-gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment as described in paragraph (b) of this section, or

(5) In a case involving a deceased miner in which the claim was filed prior to January 1, 1982, where there is no medical or other relevant evidence, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition shall be sufficient to establish total (or under § 718.306 partial) disability. On a survivor's claim filed on or after January 1, 1982, but prior to June 30, 1982, where entitlement is sought to be established in accordance with § 718.306, where there is no medical or other relevant evidence, affidavits (or equivalent

sworn testimony) from persons knowledgeable of the miner's physical condition shall be sufficient to establish total or partial disability; however, such a determination shall not be based solely upon the affidavits or testimony of the claimant and/or his or her dependents who would be eligible for augmentation of the claimant's benefits if the claim were approved. Except as provided in §718.305, proof that the miner suffers or suffered from a totally disabling respiratory or pulmonary impairment as defined in paragraphs (c)(1), (2), (4) and (5) of this section shall not, by itself, be sufficient to establish that the miner's impairment is or was due to pneumoconiosis.

(d) In determining total disability, the following shall apply to statements made by miners about their condition:

(1) Statements made before death by a deceased miner about his or her physical condition are relevant and shall be considered in making a determination as to whether the miner was totally disabled at the time of death.

(2) In the case of a living miner's claim, a finding of total disability shall not be made solely on the miner's statements or testimony.

(e) In determining total disability to perform usual coal mine work, the following shall apply in evaluating the miner's employment activities:

(1) In the case of a deceased miner, employment in a mine at the time of death shall not be conclusive evidence that the miner was not totally disabled. To disprove total disability, it must be shown that at the time the miner died, there were no changed circumstances of employment indicative of his or her reduced ability to perform his or her usual coal mine work.

(2) In the case of a living miner, proof of current employment in a coal mine shall not be conclusive evidence that the miner is not totally disabled unless it can be shown that there are no changed circumstances of employment indicative of his or her reduced ability to perform his or her usual coal mine work.

(3) Changed circumstances of employment indicative of a miner's reduced ability to perform his or her usual coal mine work may include but are not limited to:

(i) The miner's reduced ability to perform his or her customary duties without help; or

(ii) The miner's reduced ability to perform his or her customary duties at his or her usual levels of rapidity, continuity or efficiency; or

(iii) The miner's transfer by request or assignment to less vigorous duties or to duties in a less dusty part of the mine.

(f) No miner who is engaged in coal mine employment shall (except as provided in §718.304) be entitled to any benefit under this part while so employed. Any miner who has been determined to be eligible for benefits shall be entitled to benefits only if the miner's employment terminates within one year after the date such determination becomes final.

[45 FR 13678, Feb. 29, 1980, as amended at 48 FR 24288, May 31, 1983]

§718.205 Death due to pneumoconiosis.

(a) Benefits are provided to eligible survivors of a miner whose death was due to pneumoconiosis.

(b) For the purpose of adjudicating survivors' claims filed prior to January 1, 1982, death will be considered due to pneumoconiosis if any of the following criteria is met:

(1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or

(2) Where death was due to multiple causes including pneumoconiosis and it is not medically feasible to distinguish which disease caused death or the extent to which pneumoconiosis contributed to the cause of death, or

(3) Where the presumption set forth at §718.304 is applicable, or

(4) Where either of the presumptions set forth at §718.303 or §718.305 is applicable and has not been rebutted.

(5) Death shall be considered to be due to pneumoconiosis where the cause of death is significantly related to or aggravated by pneumoconiosis.

(c) For the purpose of adjudicating survivors' claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if any of the following criteria is met:

(1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or

(2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or

(3) Where the presumption set forth at § 718.304 is applicable.

(4) However, survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.

(d) To minimize the hardships to potentially entitled survivors due to the disruption of benefits upon the miner's death, survivors' claims filed on or after January 1, 1982, shall be adjudicated on an expedited basis in accordance with the following procedures. The initial burden is upon the claimant, with the assistance of the district director, to develop evidence which meets the requirements of paragraph (c) of this section. Where the initial medical evidence appears to establish that death was due to pneumoconiosis, the survivor will receive benefits unless the weight of the evidence as subsequently developed by the Department or the responsible operator establishes that the miner's death was not due to pneumoconiosis as defined above. However, no such benefits shall be found payable before the party responsible for the payment of such benefits shall have had a reasonable opportunity for the development of rebuttal evidence. See §§ 725.412–725.415 concerning the operator's opportunity to develop evidence prior to an initial determination and §§ 718.307 and 718.403 on the burden of proof.

[45 FR 13678, Feb. 29, 1980, as amended at 48 FR 24288, May 31, 1983]

§ 718.206 Effect of findings by persons or agencies.

Decisions, statements, reports, opinions, or the like, of agencies, organizations, physicians or other individuals, about the existence, cause, and extent of a miner's disability, or the cause of a miner's death, are admissible. If properly submitted, such evidence shall be considered and given the weight to which it is entitled as evidence under all the facts before the adjudication officer in the claim.

Subpart D—Presumptions Applicable to Eligibility Determinations

§ 718.301 Establishing length of employment as a miner.

(a) The presumptions set forth in §§ 718.302, 718.303, 718.305 and 718.306 apply only if a miner has been employed in one or more coal mines for specified periods. Regular employment may be established on the basis of any evidence presented, including the testimony of a claimant or other witnesses, and shall not be contingent upon a finding of a specific number of days of employment within a given period.

(b) For the purposes of the presumptions described in this subpart, a year of employment means a period of one year, or partial periods totalling one year, during which the miner was regularly employed in or around a coal mine by the operator or other employer. A ''working day'' means any day or part of a day for which a miner received pay for work as a miner. If an operator or other employer proves that the miner was not employed in or around a coal mine for a period of at least 125 working days during a year, such operator or other employer shall be determined to have established that the miner was not regularly employed for a year for the purposes of this section. If a miner worked in or around one or more coal mines for fewer than 125 days in a calendar year, he or she shall be credited with a fractional year based on the ratio of the actual number of days worked to 125. No periods of coal mine employment occurring outside the United States shall be credited toward the use of any presumption contained in this part.

§ 718.302 Relationship of pneumoconiosis to coal mine employment.

If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis

arose out of such employment. (See § 718.203.)

§ 718.303 Death from a respirable disease.

(a) If a deceased miner was employed for ten or more years in one or more coal mines and died from a respirable disease, there shall be a rebuttable presumption that his or her death was due to pneumoconiosis.

(1) Under this presumption, death shall be found due to a respirable disease in any case in which the evidence establishes that death was due to multiple causes, including a respirable disease, and it is not medically feasible to distinguish which disease caused death or the extent to which the respirable disease contributed to the cause of death.

(b) The presumption of paragraph (a) of this section may be rebutted by a showing that the deceased miner did not have pneumoconiosis, that his or her death was not due to pneumoconiosis or that pneumoconiosis did not contribute to his or her death.

(c) This section is not applicable to any claim filed on or after January 1, 1982.

[45 FR 13678, Feb. 29, 1980, as amended at 48 FR 24288, May 31, 1983]

§ 718.304 Irrebuttable presumption of total disability or death due to pneumoconiosis.

There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, that a miner's death was due to pneumoconiosis or that a miner was totally disabled due to pneumoconiosis at the time of death, if such miner is suffering or suffered from a chronic dust disease of the lung which:

(a) When diagnosed by chest X-ray (see § 718.202 concerning the standards for X-rays and the effect of interpretations of X-rays by physicians) yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C in:

(1) The ILO–U/C International Classification of Radiographs of the Pneumoconioses, 1971, or subsequent revisions thereto; or

(2) The International Classification of the Radiographs of the Pneumoconioses of the International Labour Office, Extended Classification (1968) (which may be referred to as the ''ILO Classification (1968)''); or

(3) The Classification of the Pneumoconioses of the Union Internationale Contra Cancer/Cincinnati (1968) (which may be referred to as the ''UICC/Cincinnati (1968) Classification''); or

(b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or

(c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however,* That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

§ 718.305 Presumption of pneumoconiosis.

(a) If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest X-ray submitted in connection with such miner's or his or her survivor's claim and it is interpreted as negative with respect to the requirements of § 718.304, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that such miner's death was due to pneumoconiosis, or that at the time of death such miner was totally disabled by pneumoconiosis. In the case of a living miner's claim, a spouse's affidavit or testimony may not be used by itself to establish the applicability of the presumption. The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where it is determined that conditions of the miner's employment in a coal mine were substantially similar to conditions in an underground mine. The presumption may be rebutted only by establishing that the

miner does not, or did not have pneumoconiosis, or that his or her respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

(b) In the case of a deceased miner, where there is no medical or other relevant evidence, affidavits of persons having knowledge of the miner's condition shall be considered to be sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment for purposes of this section.

(c) The determination of the existence of a totally disabling respiratory or pulmonary impairment, for purposes of applying the presumption described in this section, shall be made in accordance with § 718.204.

(d) Where the cause of death or total disability did not arise in whole or in part out of dust exposure in the miner's coal mine employment or the evidence establishes that the miner does not or did not have pneumoconiosis, the presumption will be considered rebutted. However, in no case shall the presumption be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin.

(e) This section is not applicable to any claim filed on or after January 1, 1982.

[45 FR 13678, Feb. 29, 1980, as amended at 48 FR 24288, May 31, 1983]

§ 718.306 Presumption of entitlement applicable to certain death claims.

(a) In the case of a miner who died on or before March 1, 1978, who was employed for 25 or more years in one or more coal mines prior to June 30, 1971, the eligible survivors of such miner who claims have been filed prior to June 30, 1982, shall be entitled to the payment of benefits, unless it is established that at the time of death such miner was not partially or totally disabled due to pneumoconiosis. Eligible survivors shall, upon request, furnish such evidence as is available with respect to the health of the miner at the time of death, and the nature and duration of the miner's coal mine employment.

(b) For the purpose of this section, a miner will be considered to have been ''partially disabled'' if he or she had reduced ability to engage in work as defined in § 718.204(b).

(c) In order to rebut this presumption the evidence must demonstrate that the miner's ability to perform work as defined in § 718.204(b) was not reduced at the time of his or her death or that the miner did not have pneumoconiosis.

(d) None of the following items, by itself, shall be sufficient to rebut the presumption:

(1) Evidence that a deceased miner was employed in a coal mine at the time of death;

(2) Evidence pertaining to a deceased miner's level of earnings prior to death;

(3) A chest X-ray interpreted as negative for the existence of pneumoconiosis;

(4) A death certificate which makes no mention of pneumoconiosis.

[45 FR 13678, Feb. 29, 1980, as amended at 48 FR 24289, May 31, 1983]

§ 718.307 Applicability of 33 U.S.C. 920(a).

(a) Section 20(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 920(a), provides that in any claim for benefits under the Longshoremen's Act it shall be presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of the Act. Section 422(a) of the Act incorporates such provision except as the Secretary provides by regulation.

(b) Where one or more of the presumptions contained in §§ 718.302–718.305 is or may be applicable to a claim, the provisions of section 20(a) of the Longshoremen's Act shall not apply to relieve a claimant from the burden of proving the facts necessary to give rise to the presumption, nor do the provisions of section 20(a) relieve a claimant of the burden of proving any element of the claim. See § 718.403.

Subpart E—Miscellaneous Provisions

§ 718.401 Right to obtain evidence.

Each miner who files a claim for benefits under the Act shall be provided an

opportunity to substantiate his or her claim by means of a complete pulmonary evaluation. Accordingly, the Office shall assist each claimant in obtaining the evidence, including medical evidence, necessary for a complete adjudication of a claim. In the case of a miner's claim, initial medical tests and examinations shall be arranged for the miner by the Office, at no cost to the miner (See §§ 725.405 and 725.406 of this subchapter). If a conflict in medical evidence is determined to exist by the district director or if a miner is dissatisfied with the results of medical evidence obtained by the district director, additional medical evidence may be obtained by the miner or the district director, as provided in § 725.407 of this subchapter.

§ 718.402 Failure to furnish required medical evidence.

An individual shall not be determined entitled to benefits unless he or she furnishes such medical evidence as is reasonably required to establish his or her claim. A miner who unreasonably refuses (a) to provide the Office or a coal mine operator with a complete statement of his or her medical history and/or to authorize access to his or her medical records, or (b) to submit to an examination or test requested by the district director or a coal mine operator which may be liable for the payment of a claim, shall not be found eligible for benefits under this subchapter (See §§ 725.408 and 725.414 of this subchapter).

§ 718.403 Burden of proof.

Except as provided in this subchapter, the burden of proving a fact alleged in connection with any provision of this part shall rest with the party making such allegation.

§ 718.404 Cessation of entitlement.

(a) An individual who has been finally adjudged to be totally disabled due to pneumoconiosis and is receiving benefits under the Act shall promptly notify the Office and the responsible coal mine operator, if any, if he or she engages in any work as defined in § 718.204(c).

(b) An individual who has been finally adjudged to be totally disabled due to pneumoconiosis shall, if requested to do so upon reasonable notice, where there is an issue pertaining to the validity of the original adjudication of disability, present himself or herself for, and submit to, examinations or tests as provided in § 718.101, and shall submit medical reports and other evidence necessary for the purpose of determining whether such individual continues to be under a disability. Benefits shall cease as of the month in which the miner is determined to be no longer eligible for benefits.

APPENDIX A TO PART 718—STANDARDS FOR ADMINISTRATION AND INTERPRETATION OF CHEST ROENTGENOGRAMS (X-RAYS)

The following standards are established in accordance with sections 402(f) (1) (D) and 413(b) of the Act. They were developed in consultation with the National Institute for Occupational Safety and Health. These standards are promulgated for the guidance of physicians and medical technicians to insure that uniform procedures are used in administering and interpreting X-rays and that the best available medical evidence will be submitted in connection with a claim for black lung benefits. If it is established that one or more standards have not been met, the claims adjudicator may consider such fact in determining the evidentiary weight to be assigned to the physician's report of an X-ray.

(1) Every chest roentgenogram shall be a single posteroanterior projection at full inspiration on a 14 by 17 inch film. Additional chest films or views shall be obtained if they are necessary for clarification and classification. The film and cassette shall be capable of being positioned both vertically and horizontally so that the chest roentgenogram will include both apices and costophrenic angles. If a miner is too large to permit the above requirements, then a projection with minimum loss of costophrenic angle shall be made.

(2) Miners shall be disrobed from the waist up at the time the roentgenogram is given. The facility shall provide a dressing area and, for those miners who wish to use one, the facility shall provide a clean gown. Facilities shall be heated to a comfortable temperature.

(3) Roentgenograms shall be made only with a diagnostic X-ray machine having a rotating anode tube with a maximum of a 2 mm source (focal spot).

(4) Except as provided in paragraph (5), roentgenograms shall be made with units having generators which comply with the

following: (a) the generators of existing roentgenographic units acquired by the examining facility prior to July 27, 1973, shall have a minimum rating of 200 mA at 100 kVp; (b) generators of units acquired subsequent to that date shall have a minimum rating of 300 mA at 125 kVp.

NOTE: A generator with a rating of 150 kVp is recommended.

(5) Roentgenograms made with battery-powered mobile or portable equipment shall be made with units having a minimum rating of 100 mA at 110 kVp at 500 Hz, or 200 mA at 110 kVp at 60 Hz.

(6) Capacitor discharge, and field emission units may be used.

(7) Roentgenograms shall be given only with equipment having a beam-limiting device which does not cause large unexposed boundaries. The use of such a device shall be discernible from an examination of the roentgenogram.

(8) To insure high quality chest roentgenograms:

(i) The maximum exposure time shall not exceed 1/20 of a second except that with single phase units with a rating less than 300 mA at 125 kVp and subjects with chest over 28 cm postero-anterior, the exposure may be increased to not more than 1/10 of a second;

(ii) The source or focal spot to film distance shall be at least 6 feet;

(iii) Only medium-speed film and medium-speed intensifying screens shall be used;

(iv) Film-screen contact shall be maintained and verified at 6-month or shorter intervals;

(v) Intensifying screens shall be inspected at least once a month and cleaned when necessary by the method recommended by the manufacturer;

(vi) All intensifying screens in a cassette shall be of the same type and made by the same manufacturer;

(vii) When using over 90 kV, a suitable grid or other means of reducing scattered radiation shall be used;

(viii) The geometry of the radiographic system shall insure that the central axis (ray) of the primary beam is perpendicular to the plane of the film surface and impinges on the center of the film.

(9) Radiographic processing:

(i) Either automatic or manual film processing is acceptable. A constant time-temperature technique shall be meticulously employed for manual processing.

(ii) If mineral or other impurities in the processing water introduce difficulty in obtaining a high-quality roentgenogram, a suitable filter or purification system shall be used.

(10) Before the miner is advised that the examination is concluded, the roentgenogram shall be processed and inspected and accepted for quality by the physician, or if the physician is not available, acceptance may be made by the radiologic technologist. In a case of a substandard roentgenogram, another shall be made immediately.

(11) An electric power supply shall be used which complies with the voltage, current, and regulation specified by the manufacturer of the machine.

(12) A densitometric test object may be required on each roentgenogram for an objective evaluation of film quality at the discretion of the Department of Labor.

(13) Each roentgenogram made hereunder shall be permanently and legibly marked with the name and address of the facility at which it is made, the miner's DOL claim number, the date of the roentgenogram, and left and right side of film. No other identifying markings shall be recorded on the roentgenogram.

APPENDIX B TO PART 718—STANDARDS FOR ADMINISTRATION AND INTERPRETATION OF PULMONARY FUNCTION TESTS. TABLES B1, B2, B3, B4, B5, B6

The following standards are established in accordance with section 402(f)(1)(D) of the Act. They were developed in consultation with the National Institute for Occupational Safety and Health (NIOSH). These standards are promulgated for the guidance of physicians and medical technicians to insure that uniform procedures are used in administering and interpreting ventilatory function tests and that the best available medical evidence will be submitted in support of a claim for black lung benefits. If it is established that one or more standards have not been met, the claims adjudicator may consider such fact in determining the evidentiary weight to be given to the results of the ventilatory function tests.

(1) Instruments to be used for the administration of pulmonary function tests shall be approved by NIOSH and shall conform to the following criteria:

(i) The instrument shall be accurate within ±50 ml or within ±3 percent of reading, whichever is greater.

(ii) The instrument shall be capable of measuring vital capacity from 0 to 7 liters BTPS.

(iii) The instrument shall have a low inertia and offer low resistance to airflow such that the resistance to airflow at 12 liters per second must be less than 1.5 cm H_2 O/liter/sec.

(iv) The zero time point for the purpose of timing the FEV_1 shall be determined by extrapolating the steepest portion of the volume-time curve back to the maximal inspiration volume or by an equivalent method.

(v) Instruments incorporating measurements of airflow to determine volume shall conform to the same volume accuracy stated in subparagraph (1)(i) of this Appendix B

when presented with flow rates from at least 0 to 12 liters per second.

(vi) The instrument or user of the instrument must have a means of correcting volumes to body temperature saturated with water vapor (BTPS) under conditions of varying ambient spirometer temperatures and barometric pressures.

(vii) The instrument used shall provide a tracing of either flow versus volume or volume versus time during the entire forced expiration and volume versus time during the MVV maneuver. A tracing is necessary to determine whether the patient has performed the test properly. The tracing must be of sufficient size that hand measurements may be made within the requirement of subparagraph (1)(i) of this Appendix B. If a paper record is made it must have a paper speed of at least 2 cm/sec and a volume sensitivity of at least 10.0 mm of chart per liter of volume. The recorder tracing must display the entire FVC maneuver at a constant speed for at least 10 seconds after the onset of exhalation. This constant speed must be reached prior to the onset of exhalation.

(viii) The instrument shall be capable of accumulating volume for a minimum of 10 seconds after the onset of exhalation.

(ix) The forced expiratory volume in 1 sec (FEV_1) measurement shall comply with the accuracy requirements stated in subparagraph (1)(i) of this Appendix B. That is, they shall be accurately measured to within ±50 ml or with ±3 percent of reading, whichever is greater.

(x) The instrument must be capable of being calibrated in the field with respect to the FEV_1. This calibration of the FEV_1 may be done either directly or indirectly through volume and time base measurements. The volume calibration source shall provide a volume displacement of at least 3 liters and shall be accurate to within ±30 ml.

(xi) For measuring maximum voluntary ventilation (MVV) the instrument shall have a response which is flat within ±10 percent up to 4 Hz at flow rates up to 12 liters per second over the volume range. The time for exhaled volume integration or recording shall be no less than 12 sec. and no more than 15 sec. The indicated time shall be accurate to within ±3 percent.

A recording of the spirometer tracing is required, and the volume sensitivity shall be such that 10 mm or more deflection corresponds to 1 liter volume.

(2) The administration of pulmonary function tests shall conform to the following criteria:

(i) Tests shall not be performed during or soon after an acute respiratory illness.

(ii) For the FEV_1 and FVC, use of a nose clip is required. The procedures shall be explained in simple terms to the patient who shall be instructed to loosen any tight clothing and stand in front of the apparatus. The subject may sit, or stand, but care should be taken on repeat testing that the same position be used. Particular attention shall be given to insure that the chin is slightly elevated with the neck slightly extended. The patient shall be instructed to make a full inspiration, either from the spirometer or the open atmosphere, using a normal breathing pattern and then blow into the apparatus, without interruption, as hard, fast, and completely as possible. At least three forced expirations shall be carried out. During the maneuvers, the patient shall be observed for compliance with instructions. The expirations shall be checked visually for reproducibility from the flow-volume or volume-time tracings. The effort shall be judged unacceptable when the patient:

(A) Has not reached full inspiration preceding the forced expiration; or

(B) Has not used maximal effort during the entire forced expiration; or

(C) Has not continued the expiration for least 5 sec. or until an obvious plateau in the volume-time curve has occurred; or

(D) Has coughed or closed his glottis; or

(E) Has an obstructed mouthpiece or a leak around the mouthpiece (obstruction due to tongue being placed in front of mouthpiece, false teeth falling in front of mouthpiece, etc.); or

(F) Has an unsatisfactory start of expiration, one characterized by excessive hesitation (or false starts), and therefore not allowing back extrapolation of time 0 (extrapolated volume on the volume-time tracing must be less than 10 percent of the FVC); or

(G) Has an excessive variability between the three acceptable curves. The variation between the two largest FEV_1's of the three acceptable tracings should not exceed 5 percent of the largest FEV_1 or 100 ml, whichever is greater.

(iii) For the MVV, the subject shall be instructed before beginning the test that he or she will be asked to breathe as deeply and as rapidly as possible for approximately 15 seconds.

The test shall be performed with the subject in the standing position, if possible. Care shall be taken on repeat testing that the same position be used. The subject shall breathe normally into the mouthpiece of the apparatus for 10 to 15 seconds to become accustomed to the system. The subject shall then be instructed to breathe as deeply and as rapidly as possible, and shall be continually encouraged during the remainder of the maneuver. Subject shall continue the maneuver for 15 seconds. At least 5 minutes of rest shall be allowed between maneuvers. At least three MVV's shall be carried out. (But see §718.103(b).) During the maneuvers the patient shall be observed for compliance with instructions. The effort shall be judged unacceptable when the patient:

(A) Has not maintained consistent effort for at least 12 to 15 seconds; or

(B) Has coughed or closed his glottis; or

(C) Has an obstructed mouthpiece or a leak around the mouthpiece (obstruction due to tongue being placed in front of mouthpiece, false teeth falling in front of mouthpiece, etc.); or

(D) Has an excessive variability between the three acceptable curves. The variation between the two largest MVV's of the three satisfactory tracings shall not exceed 10 percent.

(iv) A calibration check shall be performed on the instrument each day before use, using a volume source of at least three liters, accurate to within ±1 percent of full scale. The room air in the syringe is introduced into the spirometer once with a flow rate of approximately 0.5 liters per second (six seconds emptying time with a 3-liter syringe) and once with a higher flow rate of approximately 3.0 liters per second (one second emptying time with a 3-liter syringe). The volume measured by the spirometer shall be between 2.90 and 3.10 liters for both trials. Accuracy of the time measurement used in determining the FEV_1 shall be checked using the manufacturer's stated procedure and shall be within ±3 percent of actual. The procedure described herein shall be performed as well as any other procedures suggested by the manufacturer of the spirometer being used.

(v)(A) The first step in evaluating a spirogram for the FEV_1 shall be to determine whether or not the patient has performed the test properly or as described in (2)(ii) above. From the three satisfactory tracings, the forced expiratory volume in one second (FEV_1) shall be measured and recorded. The largest observed FEV_1 shall be used in the analysis, corrected to BPTS.

(B) Only MVV maneuvers which demonstrate consistent effort for at least 12 seconds shall be considered acceptable. The largest accumulated volume for a 12 second period corrected to BPTS and multiplied by five is to be reported as the MVV.

PREDICTION EQUATIONS FOR FEVI MALES * 60% OF PREDICTED **

HEIGHT (IN)	AGE (YEARS)																							
	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46
59.1	1.85	1.88	1.90	1.75	1.74	1.72	1.70	1.69	1.67	1.66	1.64	1.62	1.61	1.59	1.58	1.56	1.54	1.53	1.51	1.49	1.48	1.46	1.45	1.43	1.41
59.4	1.88	1.90	1.93	1.78	1.77	1.75	1.74	1.72	1.70	1.69	1.67	1.65	1.64	1.62	1.61	1.59	1.57	1.56	1.54	1.53	1.51	1.49	1.48	1.46	1.44
59.8	1.90	1.93	1.96	1.80	1.78	1.77	1.75	1.74	1.72	1.70	1.69	1.67	1.65	1.64	1.62	1.61	1.59	1.57	1.56	1.54	1.52	1.51	1.49	1.48	1.46
60.2	1.93	1.96	1.99	1.83	1.81	1.80	1.78	1.77	1.75	1.73	1.72	1.70	1.69	1.67	1.65	1.64	1.62	1.60	1.59	1.57	1.56	1.54	1.52	1.51	1.49
60.6	1.96	1.99	2.01	1.86	1.85	1.83	1.81	1.80	1.78	1.76	1.75	1.73	1.72	1.70	1.69	1.67	1.65	1.64	1.62	1.60	1.59	1.57	1.56	1.54	1.52
61.0	1.99	2.01	2.04	1.89	1.88	1.86	1.84	1.83	1.81	1.80	1.78	1.76	1.75	1.73	1.72	1.70	1.68	1.67	1.65	1.63	1.62	1.60	1.59	1.57	1.55
61.4	2.01	2.04	2.07	1.92	1.91	1.89	1.88	1.86	1.84	1.83	1.81	1.79	1.78	1.76	1.75	1.73	1.71	1.70	1.68	1.67	1.65	1.63	1.62	1.60	1.58
61.8	2.04	2.07	2.10	1.95	1.94	1.92	1.91	1.89	1.87	1.86	1.84	1.83	1.81	1.79	1.78	1.76	1.74	1.73	1.71	1.70	1.68	1.66	1.65	1.63	1.61
62.2	2.07	2.10	2.12	2.00	1.97	1.95	1.94	1.92	1.91	1.89	1.87	1.86	1.84	1.82	1.81	1.79	1.78	1.76	1.74	1.73	1.71	1.70	1.68	1.66	1.65
62.6	2.10	2.12	2.15	2.03	2.02	2.00	1.99	1.97	1.96	1.94	1.92	1.91	1.89	1.87	1.86	1.84	1.82	1.81	1.79	1.77	1.76	1.74	1.73	1.71	1.69
63.0	2.13	2.15	2.18	2.07	2.05	2.03	2.02	2.00	1.98	1.97	1.95	1.94	1.92	1.90	1.89	1.87	1.85	1.84	1.82	1.81	1.79	1.77	1.76	1.74	1.73
63.4	2.15	2.18	2.21	2.10	2.08	2.06	2.05	2.03	2.02	2.00	1.98	1.97	1.95	1.93	1.92	1.90	1.89	1.87	1.85	1.84	1.82	1.80	1.79	1.77	1.76
63.9	2.18	2.21	2.23	2.13	2.11	2.10	2.08	2.06	2.05	2.03	2.01	2.00	1.98	1.97	1.95	1.93	1.92	1.90	1.88	1.87	1.85	1.84	1.82	1.80	1.79
64.2	2.21	2.24	2.26	2.16	2.14	2.13	2.11	2.09	2.08	2.06	2.05	2.03	2.01	2.00	1.98	1.96	1.95	1.93	1.92	1.90	1.88	1.87	1.85	1.83	1.82
64.6	2.24	2.26	2.29	2.19	2.17	2.16	2.14	2.12	2.11	2.09	2.08	2.06	2.04	2.03	2.01	1.99	1.98	1.96	1.95	1.93	1.91	1.90	1.88	1.87	1.85
65.0	2.26	2.29	2.32	2.22	2.20	2.19	2.17	2.16	2.14	2.12	2.11	2.09	2.08	2.06	2.04	2.03	2.01	1.99	1.98	1.96	1.94	1.93	1.91	1.90	1.88
65.4	2.29	2.32	2.34	2.25	2.24	2.22	2.20	2.19	2.17	2.16	2.14	2.12	2.11	2.09	2.07	2.06	2.04	2.03	2.01	1.99	1.98	1.96	1.94	1.93	1.91
65.7	2.32	2.35	2.37	2.28	2.27	2.25	2.24	2.22	2.20	2.19	2.17	2.15	2.14	2.12	2.11	2.09	2.07	2.06	2.04	2.02	2.01	1.99	1.98	1.96	1.94
66.1	2.35	2.37	2.40	2.31	2.30	2.28	2.27	2.25	2.23	2.22	2.20	2.19	2.17	2.15	2.14	2.12	2.10	2.09	2.07	2.06	2.04	2.02	2.01	1.99	1.97
66.5	2.37	2.40	2.43	2.33	2.31	2.30	2.28	2.27	2.25	2.23	2.22	2.20	2.19	2.17	2.15	2.14	2.12	2.10	2.09	2.07	2.05	2.04	2.02	2.01	1.99
66.9	2.40	2.43	2.46	2.36	2.34	2.33	2.31	2.30	2.28	2.26	2.25	2.23	2.22	2.20	2.18	2.17	2.15	2.13	2.12	2.10	2.09	2.07	2.05	2.04	2.02
67.3	2.43	2.46	2.48	2.38	2.36	2.35	2.33	2.31	2.30	2.28	2.26	2.25	2.23	2.21	2.20	2.18	2.17	2.15	2.13	2.12	2.10	2.08	2.07	2.05	2.04
67.7	2.46	2.48	2.51	2.41	2.39	2.37	2.36	2.34	2.33	2.31	2.29	2.28	2.26	2.25	2.23	2.21	2.20	2.18	2.17	2.15	2.13	2.12	2.10	2.08	2.07
68.1	2.48	2.51	2.54	2.43	2.42	2.41	2.39	2.37	2.36	2.34	2.33	2.31	2.29	2.28	2.26	2.24	2.23	2.21	2.20	2.18	2.16	2.15	2.13	2.12	2.10
68.5	2.51	2.54	2.57	2.46	2.44	2.43	2.42	2.40	2.39	2.37	2.36	2.34	2.32	2.31	2.29	2.28	2.26	2.24	2.23	2.21	2.20	2.18	2.17	2.15	2.13
68.9	2.54	2.57	2.59	2.49	2.47	2.46	2.44	2.42	2.41	2.39	2.38	2.36	2.34	2.33	2.31	2.29	2.28	2.26	2.24	2.23	2.21	2.20	2.18	2.17	2.15
69.3	2.57	2.59	2.62	2.52	2.50	2.48	2.47	2.45	2.44	2.42	2.40	2.39	2.37	2.36	2.34	2.32	2.31	2.29	2.27	2.26	2.24	2.23	2.21	2.20	2.18
69.7	2.59	2.62	2.65	2.54	2.53	2.51	2.50	2.48	2.47	2.45	2.43	2.42	2.40	2.39	2.37	2.35	2.34	2.32	2.30	2.29	2.27	2.26	2.24	2.22	2.21
70.1	2.62	2.65	2.68	2.57	2.55	2.53	2.51	2.50	2.48	2.46	2.45	2.43	2.42	2.40	2.39	2.37	2.35	2.34	2.32	2.30	2.29	2.27	2.26	2.24	2.22
70.5	2.65	2.68	2.70	2.60	2.58	2.56	2.54	2.53	2.51	2.50	2.48	2.46	2.45	2.43	2.42	2.40	2.38	2.37	2.35	2.34	2.32	2.30	2.29	2.27	2.26
70.9	2.68	2.70	2.73	2.63	2.61	2.59	2.58	2.56	2.54	2.53	2.51	2.50	2.48	2.46	2.45	2.43	2.42	2.40	2.38	2.37	2.35	2.34	2.32	2.30	2.29
71.3	2.70	2.73	2.76	2.66	2.64	2.62	2.61	2.59	2.58	2.56	2.54	2.53	2.51	2.50	2.48	2.46	2.45	2.43	2.42	2.40	2.38	2.37	2.35	2.34	2.32
71.7	2.73	2.76	2.79	2.69	2.67	2.65	2.64	2.62	2.61	2.59	2.57	2.56	2.54	2.53	2.51	2.49	2.48	2.46	2.45	2.43	2.41	2.40	2.38	2.37	2.35
72.1	2.76	2.79	2.81	2.72	2.70	2.69	2.67	2.65	2.64	2.62	2.61	2.59	2.57	2.56	2.54	2.52	2.51	2.49	2.48	2.46	2.44	2.43	2.41	2.40	2.38
72.4	2.79	2.81	2.84	2.74	2.72	2.70	2.69	2.67	2.65	2.64	2.62	2.61	2.59	2.57	2.56	2.54	2.52	2.51	2.49	2.48	2.46	2.44	2.43	2.41	2.40
72.8	2.81	2.84	2.87	2.77	2.75	2.73	2.72	2.70	2.69	2.67	2.65	2.64	2.62	2.60	2.59	2.57	2.56	2.54	2.52	2.51	2.49	2.47	2.46	2.44	2.43
73.2	2.84	2.87	2.90	2.80	2.78	2.77	2.75	2.73	2.72	2.70	2.68	2.67	2.65	2.63	2.62	2.60	2.59	2.57	2.55	2.54	2.52	2.51	2.49	2.47	2.46
73.6	2.87	2.90	2.92	2.83	2.81	2.80	2.78	2.76	2.75	2.73	2.72	2.70	2.68	2.67	2.65	2.63	2.62	2.60	2.59	2.57	2.55	2.54	2.52	2.51	2.49
74.0	2.90	2.92	2.95	2.86	2.84	2.83	2.81	2.79	2.78	2.76	2.75	2.73	2.71	2.70	2.68	2.67	2.65	2.63	2.62	2.60	2.58	2.57	2.55	2.54	2.52
74.4	2.92	2.95	2.98	2.89	2.87	2.86	2.84	2.82	2.81	2.79	2.78	2.76	2.74	2.73	2.71	2.70	2.68	2.66	2.65	2.63	2.62	2.60	2.58	2.57	2.55
74.8	2.95	2.98	3.01	2.92	2.90	2.89	2.87	2.86	2.84	2.82	2.81	2.79	2.77	2.76	2.74	2.73	2.71	2.69	2.68	2.66	2.65	2.63	2.61	2.60	2.58
75.2	2.98	3.01	3.03	2.95	2.93	2.92	2.90	2.89	2.87	2.85	2.84	2.82	2.81	2.79	2.77	2.76	2.74	2.72	2.71	2.69	2.68	2.66	2.65	2.63	2.61
75.6	3.01	3.04	3.06	2.98	2.96	2.95	2.93	2.92	2.90	2.89	2.87	2.85	2.84	2.82	2.81	2.79	2.77	2.76	2.74	2.72	2.71	2.69	2.68	2.66	2.65
76.0	3.04	3.06	3.09	3.01	2.98	2.97	2.95	2.94	2.92	2.90	2.89	2.87	2.85	2.84	2.82	2.81	2.79	2.77	2.76	2.74	2.72	2.71	2.69	2.68	2.66
76.4	3.06	3.09	3.12	3.03	3.01	3.00	2.98	2.97	2.95	2.93	2.92	2.90	2.88	2.87	2.85	2.84	2.82	2.80	2.79	2.77	2.76	2.74	2.72	2.71	2.69
76.8	3.09	3.12	3.14	3.06	3.04	3.03	3.01	3.00	2.98	2.97	2.95	2.93	2.92	2.90	2.88	2.87	2.85	2.84	2.82	2.80	2.79	2.77	2.75	2.74	2.72
77.2	3.12	3.15	3.17	3.09	3.07	3.06	3.04	3.03	3.01	3.00	2.98	2.96	2.95	2.93	2.92	2.90	2.88	2.87	2.85	2.83	2.82	2.80	2.79	2.77	2.75
77.6	3.15	3.17	3.20	3.12	3.10	3.09	3.07	3.06	3.04	3.03	3.01	2.99	2.98	2.96	2.95	2.93	2.91	2.90	2.88	2.87	2.85	2.83	2.82	2.80	2.79
78.0	3.17	3.20	3.23	3.14	3.12	3.11	3.09	3.08	3.06	3.04	3.03	3.01	2.99	2.98	2.96	2.95	2.93	2.91	2.90	2.88	2.87	2.85	2.83	2.82	2.80
78.3	3.20	3.23	3.26	3.17	3.15	3.14	3.12	3.11	3.09	3.08	3.06	3.04	3.03	3.01	3.00	2.98	2.96	2.95	2.93	2.92	2.90	2.88	2.87	2.85	2.83
78.7	3.23	3.26	3.28	3.20	3.18	3.17	3.15	3.14	3.12	3.11	3.09	3.07	3.06	3.04	3.03	3.01	2.99	2.98	2.96	2.95	2.93	2.91	2.90	2.88	2.87
79.1	3.26	3.28	3.31	3.23	3.21	3.20	3.18	3.17	3.15	3.14	3.12	3.10	3.09	3.07	3.06	3.04	3.02	3.01	2.99	2.98	2.96	2.94	2.93	2.91	2.90
79.5	3.28	3.31	3.34	3.25	3.23	3.22	3.20	3.19	3.17	3.15	3.14	3.12	3.11	3.09	3.07	3.06	3.04	3.03	3.01	3.00	2.98	2.96	2.95	2.93	2.92
79.9	3.31	3.34	3.36	3.28	3.26	3.25	3.23	3.22	3.20	3.18	3.17	3.15	3.14	3.12	3.10	3.09	3.07	3.06	3.04	3.03	3.01	2.99	2.98	2.96	2.94
80.3	3.34	3.37	3.39	3.31	3.29	3.27	3.25	3.24	3.22	3.20	3.19	3.17	3.15	3.14	3.12	3.11	3.09	3.07	3.06	3.04	3.02	3.01	2.99	2.98	2.96
80.7	3.37	3.39	3.42	3.33	3.31	3.30	3.28	3.26	3.25	3.23	3.21	3.20	3.18	3.17	3.15	3.13	3.12	3.10	3.09	3.07	3.05	3.04	3.02	3.01	2.99
81.1	3.39	3.42	3.45	3.36	3.34	3.32	3.31	3.29	3.27	3.25	3.24	3.22	3.20	3.19	3.17	3.16	3.14	3.12	3.11	3.09	3.08	3.06	3.04	3.03	3.01
81.5	3.42	3.45	3.48	3.39	3.37	3.35	3.34	3.32	3.30	3.28	3.27	3.25	3.23	3.22	3.20	3.18	3.17	3.15	3.14	3.12	3.10	3.09	3.07	3.05	3.04
81.9	3.45	3.48	3.50	3.42	3.40	3.38	3.37	3.35	3.33	3.31	3.30	3.28	3.26	3.25	3.23	3.21	3.20	3.18	3.17	3.15	3.13	3.12	3.10	3.08	3.07
82.3	3.48	3.50	3.53	3.45	3.43	3.42	3.40	3.38	3.36	3.34	3.33	3.31	3.29	3.27	3.26	3.24	3.22	3.21	3.19	3.18	3.16	3.15	3.13	3.11	3.10
82.7	3.51	3.53	3.56	3.48	3.46	3.45	3.43	3.41	3.40	3.38	3.37	3.35	3.33	3.32	3.30	3.28	3.27	3.25	3.24	3.22	3.21	3.19	3.18	3.16	3.15

PREDICTION EQUATIONS FOR MEN * 60% OF PREDICTED **

MALES AGE (YEARS)

HEIGHT (IN)	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71
54.1	1.40	1.38	1.36	1.35	1.33	1.32	1.30	1.28	1.27	1.25	1.23	1.22	1.20	1.19	1.17	1.15	1.14	1.12	1.11	1.09	1.07	1.06	1.04	1.02	1.01
54.4	1.43	1.41	1.40	1.38	1.36	1.35	1.33	1.31	1.30	1.28	1.27	1.25	1.23	1.22	1.20	1.18	1.17	1.15	1.14	1.12	1.10	1.09	1.07	1.06	1.04
54.8	1.46	1.44	1.43	1.41	1.39	1.38	1.36	1.35	1.33	1.31	1.30	1.28	1.26	1.25	1.23	1.22	1.20	1.18	1.17	1.15	1.14	1.12	1.10	1.09	1.07
55.2	1.49	1.47	1.46	1.44	1.43	1.41	1.39	1.38	1.36	1.34	1.33	1.31	1.30	1.28	1.26	1.25	1.23	1.22	1.20	1.18	1.17	1.15	1.14	1.12	1.10
55.6	1.52	1.51	1.49	1.47	1.46	1.44	1.43	1.41	1.39	1.38	1.36	1.34	1.33	1.31	1.30	1.28	1.26	1.25	1.23	1.22	1.20	1.18	1.17	1.15	1.14
56.0	1.55	1.54	1.52	1.50	1.49	1.47	1.46	1.44	1.43	1.41	1.39	1.38	1.36	1.34	1.33	1.31	1.30	1.28	1.26	1.25	1.23	1.22	1.20	1.18	1.17
56.4	1.58	1.57	1.55	1.53	1.52	1.50	1.49	1.47	1.46	1.44	1.43	1.41	1.39	1.38	1.36	1.34	1.33	1.31	1.30	1.28	1.26	1.25	1.23	1.22	1.20
56.8	1.61	1.60	1.58	1.57	1.55	1.53	1.52	1.50	1.49	1.47	1.46	1.44	1.43	1.41	1.39	1.38	1.36	1.34	1.33	1.31	1.30	1.28	1.26	1.25	1.23
57.2	1.64	1.63	1.61	1.60	1.58	1.57	1.55	1.53	1.52	1.50	1.49	1.47	1.46	1.44	1.43	1.41	1.39	1.38	1.36	1.34	1.33	1.31	1.30	1.28	1.26
57.6	1.67	1.66	1.64	1.63	1.61	1.60	1.58	1.56	1.55	1.53	1.52	1.50	1.49	1.47	1.46	1.44	1.43	1.41	1.39	1.38	1.36	1.34	1.33	1.31	1.30
58.0	1.71	1.69	1.68	1.66	1.64	1.63	1.61	1.60	1.58	1.56	1.55	1.53	1.52	1.50	1.49	1.47	1.46	1.44	1.43	1.41	1.39	1.38	1.36	1.34	1.33
58.4	1.74	1.72	1.71	1.69	1.67	1.66	1.64	1.63	1.61	1.59	1.58	1.56	1.55	1.53	1.52	1.50	1.49	1.47	1.46	1.44	1.43	1.41	1.39	1.38	1.36
58.8	1.77	1.75	1.74	1.72	1.71	1.69	1.67	1.66	1.64	1.63	1.61	1.59	1.58	1.56	1.55	1.53	1.52	1.50	1.49	1.47	1.46	1.44	1.43	1.41	1.39
59.2	1.80	1.79	1.77	1.75	1.74	1.72	1.71	1.69	1.67	1.66	1.64	1.63	1.61	1.59	1.58	1.56	1.55	1.53	1.52	1.50	1.49	1.47	1.46	1.44	1.43
59.6	1.83	1.82	1.80	1.78	1.77	1.75	1.74	1.72	1.71	1.69	1.67	1.66	1.64	1.63	1.61	1.59	1.58	1.56	1.55	1.53	1.52	1.50	1.49	1.47	1.46
60.0	1.86	1.85	1.83	1.81	1.80	1.78	1.77	1.75	1.74	1.72	1.71	1.69	1.67	1.66	1.64	1.63	1.61	1.59	1.58	1.56	1.55	1.53	1.52	1.50	1.49
60.4	1.89	1.88	1.86	1.84	1.83	1.81	1.80	1.78	1.77	1.75	1.74	1.72	1.71	1.69	1.67	1.66	1.64	1.63	1.61	1.59	1.58	1.56	1.55	1.53	1.52
60.8	1.92	1.91	1.89	1.88	1.86	1.84	1.83	1.81	1.80	1.78	1.77	1.75	1.74	1.72	1.71	1.69	1.67	1.66	1.64	1.63	1.61	1.59	1.58	1.56	1.55
61.2	1.95	1.94	1.92	1.91	1.89	1.88	1.86	1.84	1.83	1.81	1.80	1.78	1.77	1.75	1.74	1.72	1.71	1.69	1.67	1.66	1.64	1.63	1.61	1.59	1.58
61.6	1.98	1.97	1.96	1.94	1.92	1.91	1.89	1.88	1.86	1.84	1.83	1.81	1.80	1.78	1.77	1.75	1.74	1.72	1.71	1.69	1.67	1.66	1.64	1.63	1.61
62.0	2.02	2.00	1.99	1.97	1.96	1.94	1.92	1.91	1.89	1.88	1.86	1.84	1.83	1.81	1.80	1.78	1.77	1.75	1.74	1.72	1.71	1.69	1.67	1.66	1.64
62.4	2.05	2.04	2.02	2.00	1.99	1.97	1.96	1.94	1.92	1.91	1.89	1.88	1.86	1.84	1.83	1.81	1.80	1.78	1.77	1.75	1.74	1.72	1.71	1.69	1.67
62.8	2.08	2.07	2.05	2.03	2.02	2.00	1.99	1.97	1.96	1.94	1.92	1.91	1.89	1.88	1.86	1.84	1.83	1.81	1.80	1.78	1.77	1.75	1.74	1.72	1.71
63.2	2.11	2.10	2.08	2.07	2.05	2.03	2.02	2.00	1.99	1.97	1.96	1.94	1.92	1.91	1.89	1.88	1.86	1.84	1.83	1.81	1.80	1.78	1.77	1.75	1.74
63.6	2.15	2.13	2.11	2.10	2.08	2.06	2.05	2.03	2.02	2.00	1.99	1.97	1.96	1.94	1.92	1.91	1.89	1.88	1.86	1.84	1.83	1.81	1.80	1.78	1.77
64.0	2.18	2.16	2.14	2.13	2.11	2.09	2.08	2.06	2.05	2.03	2.02	2.00	1.99	1.97	1.96	1.94	1.92	1.91	1.89	1.88	1.86	1.84	1.83	1.81	1.80
64.4	2.21	2.19	2.17	2.16	2.14	2.13	2.11	2.09	2.08	2.06	2.05	2.03	2.02	2.00	1.99	1.97	1.96	1.94	1.92	1.91	1.89	1.88	1.86	1.84	1.83
64.8	2.24	2.22	2.21	2.19	2.17	2.16	2.14	2.13	2.11	2.09	2.08	2.06	2.05	2.03	2.02	2.00	1.99	1.97	1.96	1.94	1.92	1.91	1.89	1.88	1.86
65.2	2.27	2.25	2.24	2.22	2.20	2.19	2.17	2.16	2.14	2.13	2.11	2.09	2.08	2.06	2.05	2.03	2.02	2.00	1.99	1.97	1.96	1.94	1.92	1.91	1.89
65.6	2.30	2.28	2.27	2.25	2.23	2.22	2.20	2.19	2.17	2.15	2.14	2.12	2.11	2.09	2.08	2.06	2.05	2.03	2.02	2.00	1.99	1.97	1.96	1.94	1.92
66.0	2.33	2.32	2.30	2.28	2.27	2.25	2.23	2.22	2.20	2.19	2.17	2.15	2.14	2.12	2.11	2.09	2.08	2.06	2.05	2.03	2.02	2.00	1.99	1.97	1.96
66.4	2.36	2.35	2.33	2.31	2.30	2.28	2.27	2.25	2.23	2.22	2.20	2.19	2.17	2.15	2.14	2.12	2.11	2.09	2.08	2.06	2.05	2.03	2.02	2.00	1.99
66.8	2.39	2.38	2.36	2.34	2.33	2.31	2.30	2.28	2.26	2.25	2.23	2.22	2.20	2.19	2.17	2.15	2.14	2.12	2.11	2.09	2.08	2.06	2.05	2.03	2.02
67.2	2.42	2.41	2.39	2.38	2.36	2.34	2.33	2.31	2.30	2.28	2.26	2.25	2.23	2.22	2.20	2.19	2.17	2.15	2.14	2.12	2.11	2.09	2.08	2.06	2.05
67.6	2.45	2.44	2.42	2.41	2.39	2.38	2.36	2.34	2.33	2.31	2.30	2.28	2.26	2.25	2.23	2.22	2.20	2.19	2.17	2.15	2.14	2.12	2.11	2.09	2.08
68.0	2.48	2.47	2.45	2.44	2.42	2.41	2.39	2.38	2.36	2.34	2.33	2.31	2.30	2.28	2.26	2.25	2.23	2.22	2.20	2.19	2.17	2.15	2.14	2.12	2.11
68.4	2.51	2.50	2.48	2.47	2.45	2.44	2.42	2.41	2.39	2.38	2.36	2.34	2.33	2.31	2.30	2.28	2.26	2.25	2.23	2.22	2.20	2.19	2.17	2.15	2.14
68.8	2.54	2.53	2.51	2.50	2.48	2.47	2.45	2.44	2.42	2.41	2.39	2.38	2.36	2.34	2.33	2.31	2.30	2.28	2.26	2.25	2.23	2.22	2.20	2.19	2.17
69.2	2.57	2.56	2.54	2.53	2.51	2.50	2.48	2.47	2.45	2.44	2.42	2.41	2.39	2.38	2.36	2.34	2.33	2.31	2.30	2.28	2.26	2.25	2.23	2.22	2.20
69.6	2.60	2.59	2.57	2.56	2.54	2.53	2.51	2.50	2.48	2.47	2.45	2.44	2.42	2.41	2.39	2.38	2.36	2.34	2.33	2.31	2.30	2.28	2.26	2.25	2.23
70.0	2.63	2.62	2.60	2.59	2.57	2.56	2.54	2.53	2.51	2.50	2.48	2.47	2.45	2.44	2.42	2.41	2.39	2.38	2.36	2.34	2.33	2.31	2.30	2.28	2.26
70.4	2.66	2.65	2.63	2.62	2.60	2.59	2.57	2.56	2.54	2.53	2.51	2.50	2.48	2.47	2.45	2.44	2.42	2.41	2.39	2.38	2.36	2.34	2.33	2.31	2.30
70.8	2.69	2.68	2.66	2.65	2.63	2.62	2.60	2.59	2.57	2.56	2.54	2.53	2.51	2.50	2.48	2.47	2.45	2.44	2.42	2.41	2.39	2.38	2.36	2.34	2.33
71.2	2.72	2.71	2.69	2.68	2.66	2.65	2.63	2.62	2.60	2.59	2.57	2.56	2.54	2.53	2.51	2.50	2.48	2.47	2.45	2.44	2.42	2.41	2.39	2.38	2.36
71.6	2.75	2.74	2.72	2.71	2.69	2.68	2.66	2.65	2.63	2.62	2.60	2.59	2.57	2.56	2.54	2.53	2.51	2.50	2.48	2.47	2.45	2.44	2.42	2.41	2.39
72.0	2.78	2.77	2.75	2.74	2.72	2.71	2.69	2.68	2.66	2.65	2.63	2.62	2.60	2.59	2.57	2.56	2.54	2.53	2.51	2.50	2.48	2.47	2.45	2.44	2.42
72.4	2.81	2.80	2.78	2.77	2.75	2.74	2.72	2.71	2.69	2.68	2.66	2.65	2.63	2.62	2.60	2.59	2.57	2.56	2.54	2.53	2.51	2.50	2.48	2.47	2.45
72.8	2.84	2.83	2.81	2.80	2.78	2.77	2.75	2.74	2.72	2.71	2.69	2.68	2.66	2.65	2.63	2.62	2.60	2.59	2.57	2.56	2.54	2.53	2.51	2.50	2.48
73.2	2.87	2.86	2.84	2.83	2.81	2.80	2.78	2.77	2.75	2.74	2.72	2.71	2.69	2.68	2.66	2.65	2.63	2.62	2.60	2.59	2.57	2.56	2.54	2.53	2.51
73.6	2.90	2.89	2.87	2.86	2.84	2.83	2.81	2.80	2.78	2.77	2.75	2.74	2.72	2.71	2.69	2.68	2.66	2.65	2.63	2.62	2.60	2.59	2.57	2.56	2.54
74.0	2.93	2.92	2.90	2.89	2.87	2.86	2.84	2.83	2.81	2.80	2.78	2.77	2.75	2.74	2.72	2.71	2.69	2.68	2.66	2.65	2.63	2.62	2.60	2.59	2.57
74.4	2.96	2.95	2.93	2.92	2.90	2.89	2.87	2.86	2.84	2.83	2.81	2.80	2.78	2.77	2.75	2.74	2.72	2.71	2.69	2.68	2.66	2.65	2.63	2.62	2.60
74.8	2.99	2.98	2.96	2.95	2.93	2.92	2.90	2.89	2.87	2.86	2.84	2.83	2.81	2.80	2.78	2.77	2.75	2.74	2.72	2.71	2.69	2.68	2.66	2.65	2.63
75.2	3.02	3.01	2.99	2.98	2.96	2.95	2.93	2.92	2.90	2.89	2.87	2.86	2.84	2.83	2.81	2.80	2.78	2.77	2.75	2.74	2.72	2.71	2.69	2.68	2.66
75.6	3.05	3.04	3.02	3.01	2.99	2.98	2.96	2.95	2.93	2.92	2.90	2.89	2.87	2.86	2.84	2.83	2.81	2.80	2.78	2.77	2.75	2.74	2.72	2.71	2.69
76.0	3.08	3.07	3.05	3.04	3.02	3.01	2.99	2.98	2.96	2.95	2.93	2.92	2.90	2.89	2.87	2.86	2.84	2.83	2.81	2.80	2.78	2.77	2.75	2.74	2.72
76.4	3.11	3.10	3.08	3.07	3.05	3.04	3.02	3.01	2.99	2.98	2.96	2.95	2.93	2.92	2.90	2.89	2.87	2.86	2.84	2.83	2.81	2.80	2.78	2.77	2.75
76.8	3.14	3.13	3.11	3.10	3.08	3.07	3.05	3.04	3.02	3.01	2.99	2.98	2.96	2.95	2.93	2.92	2.90	2.89	2.87	2.86	2.84	2.83	2.81	2.80	2.78
77.2	3.18	3.16	3.14	3.13	3.11	3.10	3.08	3.07	3.05	3.04	3.02	3.01	2.99	2.98	2.96	2.95	2.93	2.92	2.90	2.89	2.87	2.86	2.84	2.83	2.81
77.6	3.21	3.19	3.17	3.16	3.14	3.13	3.11	3.10	3.08	3.07	3.05	3.04	3.02	3.01	3.00	2.98	2.96	2.95	2.93	2.92	2.90	2.89	2.87	2.86	2.84
78.0	3.24	3.22	3.20	3.19	3.17	3.16	3.14	3.13	3.11	3.10	3.08	3.07	3.05	3.04	3.02	3.01	3.00	2.98	2.97	2.95	2.93	2.92	2.90	2.89	2.87
78.4	3.27	3.25	3.24	3.22	3.20	3.19	3.17	3.16	3.14	3.13	3.11	3.10	3.08	3.07	3.06	3.04	3.03	3.01	3.00	2.98	2.97	2.95	2.93	2.92	2.90
78.8	3.30	3.28	3.27	3.25	3.23	3.22	3.20	3.19	3.17	3.16	3.14	3.13	3.11	3.10	3.09	3.07	3.06	3.04	3.03	3.01	3.00	2.98	2.97	2.95	2.93

PREDICTION EQUATIONS FOR FEV1 FEMALES * 90% OF PREDICTED **

HEIGHT (IN)	AGE (YEARS)																							
	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46
51.2	1.35	1.34	1.33	1.31	1.30	1.29	1.28	1.26	1.25	1.24	1.23	1.21	1.20	1.19	1.18	1.16	1.15	1.14	1.13	1.11	1.10	1.09	1.08	1.06	1.05
51.6	1.37	1.36	1.34	1.33	1.32	1.31	1.29	1.28	1.27	1.26	1.24	1.23	1.22	1.20	1.19	1.18	1.17	1.15	1.14	1.13	1.12	1.10	1.09	1.08	1.07
52.0	1.38	1.37	1.36	1.35	1.33	1.32	1.31	1.30	1.28	1.27	1.26	1.24	1.23	1.22	1.21	1.20	1.18	1.17	1.16	1.15	1.13	1.12	1.11	1.10	1.08
52.4	1.40	1.39	1.38	1.36	1.35	1.33	1.32	1.31	1.29	1.28	1.26	1.25	1.24	1.22	1.21	1.20	1.19	1.17	1.16	1.15	1.14	1.12	1.11	1.10	1.09
52.8	1.42	1.40	1.39	1.38	1.36	1.35	1.33	1.32	1.31	1.29	1.28	1.27	1.25	1.24	1.23	1.22	1.20	1.19	1.18	1.17	1.15	1.14	1.13	1.11	1.10
53.1	1.43	1.42	1.41	1.40	1.38	1.37	1.35	1.34	1.32	1.31	1.29	1.28	1.27	1.26	1.24	1.23	1.22	1.21	1.19	1.18	1.17	1.16	1.14	1.13	1.12
53.5	1.45	1.44	1.42	1.41	1.40	1.39	1.37	1.36	1.34	1.33	1.31	1.30	1.29	1.27	1.26	1.25	1.24	1.22	1.21	1.20	1.19	1.17	1.16	1.15	1.13
53.9	1.47	1.45	1.44	1.43	1.41	1.40	1.39	1.37	1.36	1.34	1.33	1.32	1.31	1.29	1.28	1.26	1.25	1.24	1.23	1.21	1.20	1.19	1.18	1.16	1.15
54.3	1.48	1.47	1.46	1.44	1.43	1.42	1.40	1.39	1.37	1.36	1.34	1.33	1.32	1.31	1.29	1.28	1.26	1.25	1.24	1.23	1.22	1.20	1.19	1.18	1.16
54.7	1.50	1.49	1.47	1.46	1.45	1.43	1.42	1.41	1.40	1.38	1.37	1.36	1.34	1.33	1.32	1.31	1.30	1.28	1.27	1.26	1.25	1.23	1.22	1.21	1.20
55.1	1.51	1.50	1.49	1.48	1.46	1.45	1.43	1.42	1.41	1.40	1.39	1.38	1.36	1.35	1.33	1.32	1.31	1.30	1.29	1.28	1.26	1.25	1.24	1.22	1.21
55.5	1.53	1.52	1.51	1.49	1.48	1.47	1.46	1.44	1.43	1.42	1.40	1.39	1.38	1.37	1.35	1.34	1.33	1.32	1.30	1.29	1.28	1.27	1.25	1.24	1.23
55.9	1.55	1.53	1.52	1.51	1.49	1.48	1.47	1.46	1.45	1.43	1.42	1.41	1.40	1.38	1.37	1.36	1.35	1.33	1.32	1.31	1.29	1.28	1.27	1.26	1.24
56.3	1.56	1.55	1.54	1.53	1.51	1.50	1.48	1.47	1.46	1.45	1.43	1.42	1.41	1.40	1.39	1.37	1.36	1.35	1.34	1.32	1.31	1.30	1.29	1.27	1.26
56.7	1.58	1.57	1.55	1.54	1.53	1.52	1.50	1.49	1.47	1.46	1.45	1.44	1.42	1.41	1.40	1.39	1.38	1.37	1.35	1.34	1.33	1.31	1.30	1.29	1.28
57.1	1.60	1.58	1.57	1.56	1.54	1.53	1.52	1.50	1.49	1.48	1.46	1.45	1.44	1.43	1.42	1.41	1.39	1.38	1.37	1.36	1.34	1.33	1.32	1.31	1.29
57.5	1.61	1.60	1.59	1.57	1.56	1.55	1.53	1.52	1.51	1.50	1.49	1.47	1.46	1.45	1.44	1.42	1.41	1.40	1.38	1.37	1.36	1.35	1.33	1.32	1.31
57.9	1.63	1.62	1.60	1.59	1.58	1.56	1.55	1.53	1.52	1.51	1.50	1.49	1.48	1.46	1.45	1.44	1.43	1.41	1.40	1.39	1.38	1.36	1.35	1.34	1.33
58.3	1.64	1.63	1.62	1.60	1.59	1.58	1.56	1.55	1.53	1.52	1.51	1.50	1.49	1.48	1.47	1.46	1.44	1.43	1.42	1.40	1.39	1.38	1.37	1.35	1.34
58.7	1.66	1.65	1.64	1.62	1.61	1.59	1.58	1.56	1.55	1.53	1.52	1.51	1.50	1.49	1.47	1.46	1.45	1.43	1.42	1.41	1.40	1.38	1.37	1.36	1.35
59.1	1.68	1.66	1.65	1.64	1.62	1.61	1.59	1.58	1.56	1.55	1.53	1.52	1.51	1.50	1.49	1.47	1.46	1.45	1.44	1.42	1.41	1.40	1.39	1.37	1.36
59.4	1.69	1.68	1.67	1.65	1.64	1.62	1.61	1.59	1.58	1.57	1.55	1.54	1.53	1.52	1.50	1.49	1.48	1.47	1.45	1.44	1.43	1.42	1.40	1.39	1.38
59.8	1.71	1.70	1.68	1.67	1.65	1.64	1.62	1.61	1.60	1.58	1.57	1.56	1.55	1.53	1.52	1.51	1.50	1.49	1.48	1.47	1.45	1.44	1.43	1.42	1.41
60.2	1.73	1.71	1.70	1.69	1.67	1.66	1.64	1.63	1.61	1.60	1.59	1.57	1.56	1.55	1.54	1.52	1.51	1.50	1.49	1.47	1.46	1.45	1.44	1.42	1.41
60.6	1.74	1.73	1.72	1.70	1.69	1.68	1.66	1.65	1.63	1.62	1.60	1.59	1.58	1.56	1.55	1.54	1.53	1.51	1.50	1.49	1.48	1.46	1.45	1.44	1.43
61.0	1.76	1.74	1.73	1.72	1.70	1.69	1.68	1.66	1.65	1.63	1.62	1.61	1.59	1.58	1.57	1.56	1.54	1.53	1.52	1.51	1.49	1.48	1.47	1.46	1.44
61.4	1.77	1.76	1.75	1.73	1.72	1.71	1.69	1.68	1.66	1.65	1.64	1.62	1.61	1.60	1.58	1.57	1.56	1.55	1.53	1.52	1.51	1.50	1.48	1.47	1.46
61.8	1.79	1.78	1.76	1.75	1.73	1.72	1.71	1.69	1.68	1.67	1.65	1.64	1.63	1.61	1.60	1.59	1.58	1.56	1.55	1.54	1.53	1.51	1.50	1.49	1.47
62.2	1.81	1.79	1.78	1.76	1.75	1.73	1.72	1.71	1.70	1.68	1.67	1.66	1.65	1.63	1.62	1.61	1.60	1.59	1.58	1.56	1.55	1.54	1.53	1.52	1.50
62.6	1.82	1.81	1.80	1.78	1.77	1.75	1.74	1.73	1.71	1.70	1.68	1.67	1.66	1.65	1.63	1.62	1.61	1.60	1.59	1.58	1.56	1.55	1.54	1.52	1.51
63.0	1.84	1.83	1.81	1.80	1.78	1.77	1.75	1.74	1.73	1.71	1.70	1.69	1.67	1.66	1.65	1.63	1.62	1.61	1.60	1.59	1.57	1.56	1.55	1.54	1.52
63.4	1.85	1.84	1.83	1.82	1.80	1.78	1.77	1.75	1.74	1.73	1.72	1.70	1.69	1.67	1.66	1.65	1.64	1.63	1.62	1.60	1.59	1.58	1.56	1.55	1.54
63.8	1.87	1.86	1.85	1.83	1.82	1.81	1.80	1.78	1.77	1.75	1.74	1.73	1.72	1.71	1.69	1.68	1.67	1.66	1.64	1.63	1.62	1.61	1.59	1.58	1.57
64.2	1.89	1.87	1.86	1.85	1.84	1.82	1.81	1.80	1.79	1.77	1.76	1.75	1.74	1.72	1.71	1.70	1.69	1.67	1.66	1.65	1.64	1.62	1.61	1.60	1.58
64.6	1.90	1.89	1.88	1.87	1.85	1.84	1.83	1.82	1.80	1.79	1.78	1.76	1.75	1.74	1.73	1.71	1.70	1.69	1.68	1.66	1.65	1.64	1.63	1.61	1.60
65.0	1.92	1.91	1.89	1.88	1.87	1.86	1.84	1.83	1.82	1.81	1.79	1.78	1.77	1.76	1.74	1.73	1.72	1.71	1.69	1.68	1.67	1.66	1.64	1.63	1.62
65.4	1.94	1.92	1.91	1.90	1.89	1.87	1.86	1.85	1.83	1.82	1.81	1.80	1.79	1.77	1.76	1.75	1.73	1.72	1.71	1.70	1.68	1.67	1.66	1.65	1.63
65.7	1.95	1.94	1.93	1.91	1.90	1.89	1.88	1.86	1.85	1.84	1.83	1.81	1.80	1.79	1.78	1.76	1.75	1.74	1.73	1.71	1.70	1.69	1.67	1.66	1.65
66.1	1.97	1.96	1.94	1.93	1.92	1.91	1.89	1.88	1.87	1.85	1.84	1.83	1.82	1.80	1.79	1.78	1.77	1.75	1.74	1.73	1.72	1.70	1.69	1.68	1.67
66.5	1.98	1.97	1.96	1.95	1.93	1.92	1.91	1.90	1.88	1.87	1.86	1.85	1.84	1.82	1.81	1.80	1.79	1.77	1.76	1.75	1.74	1.72	1.71	1.70	1.68
66.9	2.00	1.99	1.98	1.96	1.95	1.94	1.92	1.91	1.90	1.89	1.87	1.86	1.85	1.84	1.82	1.81	1.80	1.79	1.77	1.76	1.75	1.74	1.72	1.71	1.70
67.3	2.02	2.00	1.99	1.98	1.96	1.95	1.94	1.92	1.91	1.90	1.89	1.87	1.86	1.85	1.84	1.82	1.81	1.80	1.79	1.77	1.76	1.75	1.74	1.73	1.71
67.7	2.03	2.02	2.01	2.00	1.99	1.97	1.96	1.95	1.94	1.93	1.91	1.90	1.89	1.87	1.86	1.85	1.84	1.82	1.81	1.80	1.78	1.77	1.76	1.74	1.73
68.1	2.05	2.04	2.02	2.01	2.00	1.99	1.97	1.96	1.95	1.94	1.93	1.92	1.91	1.89	1.88	1.87	1.85	1.84	1.83	1.81	1.80	1.79	1.77	1.76	1.75
68.5	2.07	2.06	2.04	2.03	2.02	2.01	2.00	1.98	1.97	1.96	1.95	1.93	1.92	1.91	1.90	1.88	1.87	1.86	1.84	1.83	1.81	1.80	1.79	1.78	1.76
68.9	2.08	2.07	2.06	2.04	2.03	2.02	2.01	2.00	1.98	1.97	1.96	1.95	1.93	1.92	1.91	1.90	1.88	1.87	1.85	1.84	1.83	1.82	1.80	1.79	1.78
69.3	2.10	2.09	2.07	2.06	2.05	2.03	2.02	2.01	2.00	1.98	1.97	1.96	1.95	1.93	1.92	1.91	1.90	1.88	1.87	1.86	1.85	1.83	1.82	1.81	1.80
69.7	2.11	2.10	2.09	2.08	2.06	2.05	2.03	2.02	2.01	2.00	1.99	1.98	1.96	1.95	1.94	1.92	1.91	1.90	1.89	1.87	1.86	1.85	1.84	1.82	1.81
70.1	2.13	2.12	2.10	2.09	2.08	2.06	2.05	2.03	2.02	2.01	2.00	1.99	1.98	1.96	1.95	1.94	1.93	1.92	1.90	1.89	1.88	1.87	1.85	1.84	1.83
70.5	2.15	2.13	2.12	2.11	2.10	2.08	2.07	2.06	2.05	2.03	2.02	2.01	2.00	1.99	1.97	1.96	1.95	1.94	1.93	1.92	1.91	1.90	1.88	1.87	1.86
70.9	2.16	2.15	2.14	2.12	2.11	2.10	2.09	2.07	2.06	2.05	2.03	2.02	2.01	2.00	1.99	1.97	1.96	1.95	1.94	1.92	1.91	1.90	1.89	1.87	1.86
71.3	2.18	2.17	2.15	2.14	2.13	2.11	2.10	2.09	2.07	2.06	2.05	2.03	2.02	2.01	2.00	1.98	1.97	1.96	1.95	1.94	1.93	1.91	1.90	1.89	1.88
71.7	2.19	2.18	2.17	2.16	2.14	2.13	2.11	2.10	2.09	2.07	2.06	2.05	2.03	2.02	2.01	1.99	1.98	1.97	1.96	1.94	1.93	1.92	1.91	1.89	1.88
72.0	2.21	2.20	2.18	2.17	2.16	2.14	2.13	2.11	2.10	2.09	2.07	2.06	2.05	2.03	2.02	2.01	2.00	1.98	1.97	1.96	1.95	1.93	1.92	1.91	1.90
72.4	2.23	2.21	2.20	2.19	2.17	2.16	2.14	2.13	2.11	2.10	2.09	2.08	2.06	2.05	2.04	2.03	2.01	2.00	1.99	1.97	1.96	1.95	1.94	1.93	1.92
72.8	2.24	2.23	2.22	2.21	2.19	2.18	2.17	2.16	2.14	2.13	2.12	2.10	2.09	2.08	2.07	2.05	2.04	2.03	2.02	2.00	1.99	1.98	1.97	1.95	1.94
73.2	2.26	2.25	2.23	2.22	2.21	2.20	2.18	2.17	2.16	2.15	2.13	2.12	2.11	2.09	2.08	2.07	2.06	2.05	2.03	2.02	2.01	2.00	1.98	1.97	1.96
73.6	2.28	2.26	2.25	2.24	2.23	2.21	2.20	2.19	2.18	2.16	2.15	2.14	2.12	2.11	2.10	2.09	2.07	2.06	2.05	2.04	2.02	2.01	2.00	1.99	1.97
74.0	2.29	2.28	2.27	2.25	2.24	2.23	2.22	2.20	2.19	2.18	2.17	2.15	2.14	2.13	2.12	2.10	2.09	2.08	2.07	2.05	2.04	2.03	2.01	2.00	1.99
74.4	2.31	2.30	2.28	2.27	2.26	2.25	2.23	2.22	2.21	2.19	2.18	2.17	2.16	2.14	2.13	2.12	2.11	2.09	2.08	2.07	2.06	2.04	2.03	2.02	2.01
74.8	2.32	2.31	2.30	2.29	2.27	2.26	2.25	2.24	2.22	2.21	2.20	2.19	2.17	2.16	2.15	2.14	2.12	2.11	2.10	2.09	2.07	2.06	2.05	2.03	2.02

PREDICTION EQUATIONS FOR REVI — FEMALES — * 60% OF PREDICTED **

AGE (YEARS)

HEIGHT (IN)	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71
51.2	1.04	1.02	1.01	1.00	0.99	0.97	0.96	0.95	0.94	0.92	0.91	0.90	0.89	0.87	0.86	0.85	0.84	0.82	0.81	0.80	0.79	0.77	0.76	0.75	0.73
51.6	1.05	1.04	1.03	1.02	1.00	0.99	0.98	0.97	0.95	0.94	0.93	0.92	0.90	0.89	0.88	0.86	0.85	0.84	0.83	0.81	0.80	0.79	0.78	0.76	0.75
52.0	1.07	1.06	1.04	1.03	1.02	1.01	0.99	0.98	0.97	0.96	0.94	0.93	0.92	0.91	0.89	0.88	0.87	0.86	0.84	0.83	0.82	0.81	0.79	0.78	0.77
52.4	1.09	1.07	1.06	1.05	1.04	1.02	1.01	1.00	0.99	0.97	0.96	0.95	0.93	0.92	0.91	0.90	0.88	0.87	0.86	0.85	0.83	0.82	0.81	0.80	0.78
52.8	1.10	1.09	1.08	1.06	1.05	1.04	1.03	1.01	1.00	0.99	0.98	0.96	0.95	0.94	0.93	0.91	0.90	0.89	0.88	0.86	0.85	0.83	0.82	0.81	0.80
53.1	1.12	1.11	1.09	1.08	1.07	1.05	1.04	1.03	1.02	1.00	0.99	0.98	0.97	0.95	0.94	0.93	0.92	0.90	0.89	0.88	0.87	0.85	0.84	0.83	0.82
53.5	1.13	1.12	1.11	1.10	1.08	1.07	1.06	1.04	1.03	1.02	1.01	1.00	0.98	0.97	0.96	0.95	0.93	0.92	0.91	0.90	0.88	0.87	0.86	0.84	0.83
53.9	1.15	1.14	1.13	1.11	1.10	1.09	1.08	1.06	1.05	1.04	1.02	1.01	1.00	0.99	0.97	0.96	0.95	0.94	0.92	0.91	0.90	0.89	0.87	0.86	0.85
54.3	1.17	1.15	1.14	1.13	1.11	1.10	1.09	1.08	1.07	1.05	1.04	1.03	1.02	1.00	0.99	0.98	0.97	0.95	0.94	0.93	0.92	0.90	0.89	0.88	0.86
54.7	1.18	1.17	1.16	1.15	1.13	1.12	1.11	1.10	1.08	1.07	1.06	1.04	1.03	1.02	1.01	0.99	0.98	0.97	0.96	0.94	0.93	0.92	0.91	0.89	0.88
55.1	1.20	1.19	1.17	1.16	1.15	1.14	1.12	1.11	1.10	1.09	1.07	1.06	1.05	1.04	1.02	1.01	1.00	0.99	0.97	0.96	0.95	0.93	0.92	0.91	0.90
55.5	1.22	1.20	1.19	1.18	1.17	1.15	1.14	1.13	1.11	1.10	1.09	1.08	1.06	1.05	1.04	1.03	1.01	1.00	0.99	0.98	0.96	0.95	0.94	0.93	0.91
55.9	1.23	1.22	1.21	1.19	1.18	1.17	1.16	1.14	1.13	1.12	1.11	1.09	1.08	1.07	1.06	1.04	1.03	1.02	1.00	0.99	0.98	0.97	0.95	0.94	0.93
56.3	1.25	1.24	1.22	1.21	1.20	1.19	1.17	1.16	1.15	1.13	1.12	1.11	1.10	1.08	1.07	1.06	1.05	1.03	1.02	1.01	1.00	0.98	0.97	0.96	0.95
56.7	1.26	1.25	1.24	1.23	1.21	1.20	1.19	1.17	1.16	1.15	1.14	1.12	1.11	1.10	1.09	1.08	1.06	1.05	1.04	1.02	1.01	1.00	0.99	0.97	0.96
57.1	1.28	1.27	1.26	1.24	1.23	1.22	1.20	1.19	1.18	1.17	1.15	1.14	1.13	1.12	1.10	1.09	1.08	1.07	1.05	1.04	1.03	1.02	1.00	0.99	0.98
57.5	1.30	1.28	1.27	1.26	1.25	1.23	1.22	1.21	1.20	1.18	1.17	1.16	1.15	1.13	1.12	1.11	1.10	1.08	1.07	1.06	1.04	1.03	1.02	1.01	0.99
57.9	1.31	1.30	1.29	1.28	1.26	1.25	1.24	1.22	1.21	1.20	1.19	1.17	1.16	1.15	1.14	1.12	1.11	1.10	1.09	1.07	1.06	1.05	1.04	1.02	1.01
58.3	1.33	1.32	1.30	1.29	1.28	1.27	1.25	1.24	1.23	1.22	1.20	1.19	1.18	1.17	1.15	1.14	1.13	1.11	1.10	1.09	1.08	1.06	1.05	1.04	1.03
58.7	1.35	1.33	1.32	1.31	1.29	1.28	1.27	1.25	1.24	1.23	1.22	1.21	1.19	1.18	1.17	1.16	1.14	1.13	1.12	1.11	1.09	1.08	1.07	1.06	1.04
59.1	1.36	1.35	1.34	1.32	1.31	1.30	1.29	1.27	1.26	1.25	1.24	1.22	1.21	1.20	1.19	1.17	1.16	1.15	1.13	1.12	1.11	1.10	1.08	1.07	1.06
59.4	1.38	1.37	1.35	1.34	1.33	1.31	1.30	1.29	1.28	1.26	1.25	1.24	1.23	1.21	1.20	1.19	1.18	1.16	1.15	1.14	1.13	1.11	1.10	1.09	1.08
59.8	1.39	1.38	1.37	1.36	1.34	1.33	1.32	1.31	1.29	1.28	1.27	1.26	1.24	1.23	1.22	1.20	1.19	1.18	1.17	1.15	1.14	1.13	1.11	1.10	1.09
60.2	1.41	1.40	1.39	1.37	1.36	1.35	1.33	1.32	1.31	1.30	1.28	1.27	1.26	1.25	1.23	1.22	1.21	1.20	1.19	1.17	1.16	1.15	1.13	1.12	1.11
60.6	1.43	1.41	1.40	1.39	1.38	1.36	1.35	1.34	1.33	1.31	1.30	1.29	1.28	1.26	1.25	1.24	1.22	1.21	1.20	1.19	1.17	1.16	1.15	1.14	1.12
61.0	1.44	1.43	1.42	1.40	1.39	1.38	1.37	1.35	1.34	1.33	1.32	1.30	1.29	1.28	1.27	1.25	1.24	1.23	1.22	1.20	1.19	1.18	1.17	1.15	1.14
61.4	1.46	1.45	1.43	1.42	1.41	1.39	1.38	1.37	1.35	1.34	1.33	1.32	1.30	1.29	1.28	1.27	1.26	1.24	1.23	1.22	1.21	1.19	1.18	1.17	1.16
61.8	1.47	1.46	1.45	1.44	1.42	1.41	1.40	1.39	1.37	1.36	1.35	1.34	1.32	1.31	1.30	1.29	1.27	1.26	1.25	1.24	1.22	1.21	1.20	1.19	1.17
62.2	1.49	1.48	1.46	1.45	1.44	1.42	1.41	1.40	1.39	1.38	1.37	1.35	1.34	1.33	1.32	1.31	1.29	1.28	1.27	1.26	1.24	1.23	1.22	1.20	1.19
62.6	1.51	1.49	1.47	1.46	1.45	1.44	1.42	1.41	1.40	1.39	1.38	1.37	1.36	1.34	1.33	1.32	1.31	1.29	1.28	1.27	1.26	1.24	1.23	1.22	1.20
63.0	1.52	1.51	1.50	1.48	1.47	1.46	1.44	1.43	1.42	1.41	1.40	1.38	1.37	1.36	1.35	1.33	1.32	1.31	1.30	1.28	1.27	1.26	1.25	1.23	1.22
63.4	1.54	1.53	1.51	1.50	1.49	1.48	1.46	1.45	1.44	1.43	1.41	1.40	1.39	1.38	1.36	1.35	1.34	1.33	1.31	1.30	1.29	1.28	1.26	1.25	1.24
63.8	1.56	1.54	1.53	1.52	1.51	1.49	1.48	1.47	1.46	1.44	1.43	1.42	1.40	1.39	1.38	1.37	1.35	1.34	1.33	1.32	1.30	1.29	1.28	1.27	1.25
64.2	1.57	1.56	1.55	1.53	1.52	1.51	1.50	1.48	1.47	1.46	1.45	1.43	1.42	1.41	1.40	1.38	1.37	1.36	1.35	1.33	1.32	1.31	1.29	1.28	1.27
64.6	1.59	1.58	1.56	1.55	1.53	1.52	1.51	1.50	1.49	1.47	1.46	1.45	1.44	1.42	1.41	1.40	1.39	1.37	1.36	1.35	1.33	1.32	1.31	1.30	1.29
65.0	1.60	1.59	1.57	1.56	1.54	1.53	1.52	1.50	1.49	1.48	1.47	1.45	1.44	1.43	1.42	1.40	1.39	1.38	1.37	1.35	1.34	1.33	1.31	1.30	1.30
65.4	1.62	1.61	1.60	1.58	1.57	1.56	1.54	1.53	1.52	1.51	1.50	1.48	1.47	1.46	1.44	1.43	1.42	1.41	1.39	1.38	1.37	1.36	1.34	1.33	1.32
65.7	1.64	1.62	1.61	1.60	1.59	1.57	1.56	1.55	1.54	1.52	1.51	1.50	1.49	1.47	1.46	1.45	1.44	1.42	1.41	1.40	1.39	1.38	1.36	1.35	1.33
66.1	1.65	1.64	1.63	1.61	1.60	1.59	1.57	1.56	1.55	1.53	1.52	1.51	1.49	1.48	1.46	1.45	1.44	1.43	1.41	1.40	1.39	1.38	1.36	1.35	1.34
66.5	1.67	1.66	1.64	1.63	1.61	1.60	1.59	1.57	1.56	1.55	1.54	1.53	1.51	1.50	1.48	1.47	1.46	1.45	1.43	1.42	1.41	1.40	1.38	1.37	1.36
66.9	1.69	1.67	1.66	1.64	1.63	1.61	1.60	1.59	1.57	1.56	1.55	1.54	1.52	1.51	1.50	1.48	1.47	1.46	1.45	1.43	1.42	1.41	1.40	1.38	1.37
67.3	1.70	1.69	1.67	1.66	1.65	1.63	1.62	1.60	1.59	1.58	1.56	1.55	1.54	1.53	1.51	1.50	1.49	1.47	1.46	1.45	1.43	1.42	1.41	1.40	1.38
67.7	1.72	1.71	1.69	1.68	1.66	1.65	1.63	1.62	1.60	1.59	1.58	1.56	1.55	1.54	1.53	1.52	1.50	1.49	1.48	1.46	1.45	1.44	1.43	1.41	1.40
68.1	1.73	1.72	1.71	1.70	1.68	1.67	1.65	1.64	1.62	1.61	1.60	1.58	1.57	1.56	1.55	1.53	1.52	1.51	1.50	1.48	1.47	1.46	1.44	1.43	1.42
68.5	1.75	1.74	1.73	1.71	1.70	1.69	1.67	1.66	1.65	1.64	1.62	1.61	1.60	1.59	1.57	1.56	1.55	1.53	1.52	1.51	1.50	1.49	1.47	1.46	1.45
68.9	1.77	1.75	1.74	1.73	1.72	1.70	1.69	1.67	1.66	1.65	1.64	1.63	1.62	1.60	1.59	1.58	1.56	1.55	1.54	1.53	1.51	1.50	1.49	1.48	1.46
69.3	1.78	1.77	1.76	1.74	1.73	1.72	1.71	1.69	1.68	1.67	1.66	1.64	1.63	1.62	1.61	1.59	1.58	1.57	1.56	1.54	1.53	1.52	1.51	1.49	1.48
69.7	1.80	1.79	1.77	1.76	1.75	1.74	1.72	1.71	1.70	1.69	1.67	1.66	1.65	1.64	1.62	1.61	1.60	1.58	1.57	1.56	1.55	1.53	1.52	1.51	1.50
70.1	1.82	1.80	1.79	1.78	1.76	1.75	1.74	1.73	1.71	1.70	1.69	1.68	1.66	1.65	1.64	1.63	1.61	1.60	1.59	1.58	1.56	1.55	1.54	1.53	1.51
70.5	1.83	1.82	1.81	1.79	1.78	1.77	1.75	1.74	1.73	1.71	1.70	1.69	1.67	1.66	1.65	1.64	1.63	1.62	1.60	1.59	1.58	1.56	1.55	1.54	1.53
70.9	1.85	1.83	1.82	1.81	1.80	1.78	1.77	1.76	1.74	1.73	1.72	1.70	1.69	1.68	1.67	1.66	1.65	1.63	1.62	1.61	1.60	1.58	1.57	1.56	1.55
71.3	1.86	1.85	1.83	1.82	1.81	1.80	1.78	1.77	1.76	1.74	1.73	1.72	1.71	1.70	1.69	1.67	1.66	1.65	1.64	1.62	1.61	1.60	1.59	1.57	1.56
71.7	1.88	1.86	1.85	1.84	1.82	1.81	1.80	1.78	1.77	1.76	1.74	1.73	1.72	1.71	1.70	1.69	1.68	1.67	1.65	1.64	1.63	1.62	1.60	1.59	1.58
72.0	1.89	1.88	1.86	1.85	1.84	1.82	1.81	1.80	1.78	1.77	1.76	1.74	1.73	1.72	1.71	1.70	1.69	1.68	1.67	1.66	1.64	1.63	1.62	1.61	1.59
72.4	1.91	1.90	1.88	1.87	1.85	1.84	1.83	1.81	1.80	1.79	1.77	1.76	1.75	1.74	1.72	1.71	1.70	1.69	1.67	1.66	1.65	1.63	1.62	1.61	1.61
72.8	1.93	1.92	1.90	1.89	1.87	1.86	1.85	1.83	1.82	1.81	1.79	1.78	1.76	1.75	1.74	1.73	1.71	1.70	1.69	1.68	1.66	1.65	1.64	1.63	1.62
73.2	1.94	1.93	1.92	1.91	1.89	1.88	1.86	1.85	1.84	1.82	1.81	1.79	1.78	1.77	1.76	1.74	1.73	1.72	1.71	1.69	1.68	1.67	1.65	1.64	1.64
73.6	1.96	1.95	1.94	1.92	1.91	1.90	1.88	1.87	1.86	1.85	1.83	1.82	1.81	1.80	1.78	1.77	1.76	1.75	1.73	1.72	1.71	1.70	1.68	1.67	1.66
74.0	1.98	1.96	1.95	1.94	1.93	1.91	1.90	1.89	1.88	1.86	1.85	1.84	1.83	1.81	1.80	1.79	1.78	1.76	1.75	1.74	1.73	1.71	1.70	1.69	1.67
74.4	1.99	1.98	1.97	1.96	1.94	1.93	1.92	1.91	1.89	1.88	1.87	1.85	1.84	1.83	1.82	1.80	1.79	1.78	1.77	1.75	1.74	1.73	1.72	1.70	1.69
74.8	2.01	2.00	1.98	1.97	1.96	1.95	1.93	1.92	1.91	1.90	1.88	1.87	1.86	1.85	1.83	1.82	1.81	1.80	1.78	1.77	1.76	1.74	1.73	1.72	1.71

PREDICTION EQUATIONS FOR FVC MALES * 60% OF PREDICTED **

HEIGHT	AGE (YEARS)																							
(IN)	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46
59.1	2.22	2.27	2.32	2.14	2.12	2.10	2.09	2.07	2.05	2.04	2.02	2.00	1.98	1.97	1.95	1.93	1.91	1.90	1.88	1.86	1.84	1.83	1.81	1.79	1.77
59.4	2.25	2.30	2.35	2.18	2.16	2.14	2.13	2.11	2.09	2.07	2.06	2.04	2.02	2.00	1.99	1.97	1.95	1.93	1.92	1.90	1.88	1.87	1.85	1.83	1.81
59.8	2.28	2.33	2.38	2.22	2.20	2.18	2.17	2.15	2.13	2.11	2.10	2.08	2.06	2.04	2.03	2.01	1.99	1.97	1.96	1.94	1.92	1.90	1.89	1.87	1.85
60.2	2.31	2.36	2.41	2.26	2.24	2.22	2.20	2.19	2.17	2.15	2.13	2.12	2.10	2.08	2.07	2.05	2.03	2.01	2.00	1.98	1.96	1.94	1.93	1.91	1.89
60.6	2.34	2.39	2.44	2.30	2.28	2.26	2.24	2.23	2.21	2.19	2.17	2.16	2.14	2.12	2.10	2.09	2.07	2.05	2.03	2.02	2.00	1.98	1.96	1.95	1.93
61.0	2.37	2.42	2.47	2.33	2.32	2.30	2.28	2.26	2.25	2.23	2.21	2.20	2.18	2.16	2.14	2.13	2.11	2.09	2.07	2.06	2.04	2.02	2.00	1.99	1.97
61.4	2.40	2.45	2.50	2.37	2.36	2.34	2.32	2.30	2.29	2.27	2.25	2.23	2.22	2.20	2.18	2.16	2.15	2.13	2.11	2.10	2.08	2.06	2.04	2.03	2.01
61.8	2.43	2.48	2.53	2.41	2.40	2.38	2.36	2.34	2.33	2.31	2.29	2.27	2.26	2.24	2.22	2.20	2.19	2.17	2.15	2.13	2.12	2.10	2.08	2.06	2.05
62.2	2.46	2.51	2.56	2.45	2.43	2.42	2.40	2.38	2.36	2.35	2.33	2.31	2.29	2.28	2.26	2.24	2.23	2.21	2.19	2.17	2.16	2.14	2.12	2.10	2.09
62.6	2.49	2.54	2.59	2.49	2.47	2.46	2.44	2.42	2.40	2.39	2.37	2.35	2.33	2.32	2.30	2.28	2.26	2.25	2.23	2.21	2.19	2.18	2.16	2.14	2.13
63.0	2.52	2.57	2.62	2.53	2.51	2.49	2.48	2.46	2.44	2.43	2.41	2.39	2.37	2.36	2.34	2.32	2.30	2.29	2.27	2.25	2.23	2.22	2.20	2.18	2.16
63.4	2.55	2.60	2.65	2.55	2.53	2.52	2.50	2.48	2.46	2.45	2.43	2.41	2.39	2.38	2.36	2.34	2.32	2.31	2.29	2.27	2.25	2.24	2.22	2.20	2.18
63.8	2.58	2.63	2.68	2.58	2.57	2.55	2.54	2.52	2.50	2.49	2.47	2.45	2.43	2.42	2.40	2.38	2.36	2.35	2.33	2.31	2.29	2.28	2.26	2.24	2.22
64.2	2.61	2.66	2.71	2.61	2.59	2.58	2.56	2.54	2.52	2.51	2.49	2.47	2.46	2.44	2.42	2.40	2.39	2.37	2.35	2.33	2.32	2.30	2.28	2.26	2.24
64.6	2.64	2.69	2.74	2.64	2.62	2.61	2.59	2.57	2.55	2.54	2.52	2.50	2.48	2.47	2.45	2.43	2.42	2.40	2.38	2.36	2.34	2.33	2.31	2.29	2.28
65.0	2.67	2.72	2.77	2.67	2.65	2.64	2.62	2.60	2.59	2.57	2.55	2.53	2.52	2.50	2.48	2.46	2.45	2.43	2.41	2.39	2.37	2.36	2.34	2.32	2.30
65.4	2.70	2.75	2.80	2.70	2.68	2.66	2.64	2.62	2.61	2.59	2.57	2.55	2.54	2.52	2.50	2.49	2.47	2.45	2.43	2.42	2.40	2.39	2.37	2.35	2.34
65.7	2.73	2.78	2.83	2.73	2.71	2.69	2.67	2.65	2.64	2.62	2.60	2.58	2.56	2.55	2.53	2.51	2.50	2.48	2.46	2.44	2.43	2.41	2.40	2.38	2.36
66.1	2.76	2.81	2.86	2.76	2.74	2.72	2.70	2.68	2.66	2.65	2.63	2.61	2.59	2.58	2.56	2.54	2.52	2.51	2.49	2.47	2.46	2.44	2.43	2.41	2.39
66.5	2.79	2.84	2.89	2.79	2.77	2.75	2.73	2.71	2.69	2.68	2.66	2.64	2.62	2.61	2.59	2.57	2.55	2.54	2.52	2.50	2.49	2.47	2.45	2.44	2.42
66.9	2.82	2.87	2.92	2.82	2.80	2.78	2.76	2.74	2.72	2.71	2.69	2.67	2.65	2.64	2.62	2.60	2.58	2.57	2.55	2.53	2.52	2.50	2.48	2.47	2.45
67.3	2.85	2.90	2.95	2.85	2.83	2.81	2.79	2.77	2.75	2.74	2.72	2.70	2.68	2.67	2.65	2.63	2.61	2.60	2.58	2.56	2.55	2.53	2.51	2.50	2.48
67.7	2.88	2.93	2.98	2.88	2.86	2.84	2.82	2.80	2.78	2.77	2.75	2.73	2.71	2.70	2.68	2.66	2.64	2.63	2.61	2.59	2.58	2.56	2.54	2.53	2.51
68.1	2.91	2.96	3.01	2.91	2.89	2.87	2.85	2.83	2.81	2.80	2.78	2.76	2.74	2.73	2.71	2.69	2.67	2.66	2.64	2.62	2.61	2.59	2.57	2.56	2.54
68.5	2.94	2.99	3.04	2.94	2.92	2.90	2.88	2.86	2.84	2.83	2.81	2.79	2.77	2.76	2.74	2.72	2.70	2.69	2.67	2.65	2.64	2.62	2.60	2.59	2.57
68.9	2.97	3.02	3.07	2.97	2.95	2.93	2.91	2.89	2.87	2.86	2.84	2.82	2.80	2.79	2.77	2.75	2.73	2.72	2.70	2.68	2.67	2.65	2.63	2.62	2.60
69.3	3.00	3.05	3.10	3.00	2.98	2.96	2.94	2.92	2.90	2.89	2.87	2.85	2.83	2.82	2.80	2.78	2.76	2.75	2.73	2.71	2.70	2.68	2.66	2.65	2.63
69.7	3.03	3.08	3.13	3.03	3.01	2.99	2.97	2.95	2.93	2.92	2.90	2.88	2.86	2.85	2.83	2.81	2.79	2.78	2.76	2.74	2.73	2.71	2.69	2.68	2.66
70.1	3.06	3.11	3.16	3.06	3.04	3.02	3.00	2.98	2.96	2.95	2.93	2.91	2.89	2.88	2.86	2.84	2.82	2.81	2.79	2.77	2.76	2.74	2.72	2.71	2.69
70.5	3.09	3.14	3.19	3.09	3.07	3.05	3.03	3.01	2.99	2.98	2.96	2.94	2.92	2.91	2.89	2.87	2.85	2.84	2.82	2.80	2.79	2.77	2.75	2.74	2.72
70.9	3.12	3.17	3.22	3.12	3.10	3.08	3.06	3.04	3.02	3.01	2.99	2.97	2.95	2.94	2.92	2.90	2.88	2.87	2.85	2.83	2.82	2.80	2.78	2.77	2.75
71.3	3.15	3.20	3.25	3.15	3.13	3.11	3.09	3.07	3.05	3.04	3.02	3.00	2.98	2.97	2.95	2.93	2.91	2.90	2.88	2.86	2.85	2.83	2.81	2.80	2.78
71.7	3.18	3.23	3.28	3.18	3.16	3.14	3.12	3.10	3.08	3.07	3.05	3.03	3.01	3.00	2.98	2.96	2.94	2.93	2.91	2.89	2.87	2.86	2.84	2.82	2.81
72.1	3.21	3.26	3.31	3.21	3.19	3.17	3.15	3.13	3.11	3.10	3.08	3.06	3.04	3.03	3.01	2.99	2.97	2.96	2.94	2.92	2.91	2.89	2.87	2.86	2.84
72.4	3.24	3.29	3.34	3.24	3.22	3.20	3.18	3.16	3.14	3.13	3.11	3.09	3.07	3.06	3.04	3.02	3.01	2.99	2.97	2.96	2.94	2.92	2.90	2.89	2.87
72.8	3.27	3.32	3.37	3.27	3.25	3.23	3.21	3.19	3.17	3.16	3.14	3.12	3.10	3.09	3.07	3.05	3.04	3.02	3.00	2.99	2.97	2.96	2.94	2.92	2.90
73.2	3.30	3.35	3.40	3.30	3.28	3.26	3.24	3.22	3.21	3.19	3.17	3.15	3.14	3.12	3.10	3.08	3.07	3.05	3.03	3.01	3.00	2.98	2.96	2.94	2.93
73.6	3.33	3.38	3.43	3.33	3.31	3.29	3.27	3.25	3.24	3.22	3.20	3.18	3.16	3.14	3.13	3.11	3.09	3.08	3.06	3.04	3.03	3.01	2.99	2.98	2.96
74.0	3.36	3.41	3.46	3.36	3.34	3.32	3.30	3.28	3.27	3.25	3.23	3.21	3.20	3.18	3.16	3.15	3.13	3.11	3.09	3.08	3.06	3.04	3.02	3.01	2.99
74.4	3.39	3.44	3.49	3.39	3.37	3.35	3.33	3.31	3.30	3.28	3.26	3.24	3.23	3.21	3.19	3.18	3.16	3.14	3.12	3.11	3.09	3.07	3.06	3.04	3.02
74.8	3.42	3.47	3.52	3.42	3.40	3.38	3.36	3.34	3.33	3.31	3.29	3.27	3.26	3.24	3.22	3.21	3.19	3.17	3.15	3.14	3.12	3.10	3.09	3.07	3.06
75.2	3.45	3.50	3.55	3.45	3.43	3.41	3.39	3.37	3.36	3.34	3.32	3.30	3.29	3.27	3.25	3.24	3.22	3.20	3.18	3.17	3.15	3.13	3.12	3.10	3.08
75.6	3.48	3.53	3.58	3.48	3.46	3.44	3.42	3.40	3.39	3.37	3.35	3.33	3.32	3.30	3.28	3.27	3.25	3.23	3.21	3.20	3.18	3.16	3.15	3.13	3.12
76.0	3.51	3.56	3.61	3.51	3.49	3.47	3.45	3.43	3.42	3.40	3.38	3.37	3.35	3.33	3.31	3.30	3.28	3.26	3.24	3.23	3.21	3.19	3.17	3.16	3.14
76.4	3.54	3.59	3.64	3.54	3.52	3.50	3.48	3.46	3.45	3.43	3.41	3.40	3.38	3.36	3.34	3.33	3.31	3.29	3.27	3.26	3.24	3.22	3.21	3.20	3.18
76.8	3.57	3.62	3.67	3.57	3.55	3.53	3.51	3.50	3.48	3.46	3.44	3.43	3.41	3.39	3.37	3.36	3.34	3.32	3.30	3.29	3.27	3.25	3.23	3.22	3.20
77.2	3.60	3.65	3.70	3.60	3.58	3.56	3.54	3.52	3.51	3.49	3.47	3.46	3.44	3.42	3.40	3.39	3.37	3.35	3.33	3.32	3.30	3.28	3.27	3.25	3.23
77.6	3.63	3.68	3.73	3.63	3.61	3.59	3.57	3.55	3.53	3.52	3.50	3.48	3.47	3.45	3.43	3.42	3.40	3.38	3.36	3.35	3.33	3.31	3.30	3.28	3.26
78.0	3.66	3.71	3.76	3.66	3.64	3.62	3.60	3.58	3.56	3.55	3.53	3.51	3.50	3.48	3.46	3.44	3.43	3.41	3.39	3.38	3.36	3.34	3.33	3.31	3.29
78.3	3.69	3.74	3.79	3.69	3.67	3.65	3.63	3.61	3.60	3.58	3.56	3.55	3.53	3.51	3.50	3.48	3.46	3.44	3.43	3.41	3.39	3.37	3.35	3.34	3.32
78.7	3.72	3.77	3.82	3.72	3.70	3.68	3.66	3.64	3.62	3.61	3.59	3.57	3.55	3.53	3.52	3.50	3.48	3.47	3.45	3.43	3.41	3.40	3.38	3.36	3.34
79.1	3.75	3.80	3.85	3.75	3.73	3.71	3.69	3.67	3.66	3.64	3.62	3.60	3.58	3.57	3.55	3.53	3.51	3.50	3.48	3.46	3.44	3.43	3.41	3.39	3.37
79.5	3.78	3.83	3.88	3.78	3.76	3.74	3.72	3.70	3.68	3.66	3.65	3.63	3.61	3.59	3.57	3.56	3.54	3.52	3.50	3.49	3.47	3.45	3.43	3.41	3.40
79.9	3.81	3.86	3.91	3.81	3.79	3.77	3.75	3.73	3.71	3.70	3.68	3.66	3.64	3.62	3.60	3.59	3.57	3.55	3.53	3.52	3.50	3.48	3.46	3.44	3.43
80.3	3.84	3.89	3.94	3.84	3.82	3.80	3.78	3.76	3.74	3.73	3.71	3.69	3.67	3.65	3.63	3.62	3.60	3.58	3.56	3.55	3.53	3.51	3.49	3.48	3.46
80.7	3.87	3.92	3.97	3.87	3.85	3.83	3.81	3.79	3.77	3.76	3.74	3.72	3.70	3.68	3.66	3.65	3.63	3.61	3.59	3.58	3.56	3.54	3.52	3.51	3.49
81.1	3.90	3.95	4.00	3.90	3.88	3.86	3.84	3.82	3.80	3.79	3.77	3.75	3.73	3.71	3.69	3.68	3.66	3.64	3.62	3.61	3.59	3.57	3.55	3.54	3.52
81.5	3.93	3.98	4.03	3.93	3.91	3.89	3.87	3.85	3.83	3.82	3.80	3.78	3.76	3.74	3.73	3.71	3.69	3.67	3.65	3.64	3.62	3.60	3.58	3.57	3.55
81.9	3.96	4.01	4.06	3.96	3.94	3.92	3.90	3.89	3.87	3.85	3.83	3.81	3.79	3.78	3.76	3.74	3.72	3.70	3.68	3.67	3.65	3.63	3.61	3.60	3.58
82.3	3.99	4.04	4.09	3.99	3.97	3.95	3.93	3.92	3.90	3.88	3.86	3.84	3.82	3.81	3.79	3.77	3.75	3.73	3.71	3.70	3.68	3.66	3.64	3.63	3.61
82.7	4.02	4.07	4.12	4.02	4.00	3.98	3.96	3.94	3.93	3.91	3.89	3.87	3.85	3.84	3.82	3.80	3.78	3.76	3.74	3.73	3.71	3.69	3.67	3.66	3.64

PREDICTION EQUATIONS FOR FVC

MALES * 80% OF PREDICTED **

HEIGHT (IN.)	AGE (YEARS)																									
	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71
59.1	1.76	1.74	1.72	1.70	1.69	1.67	1.65	1.63	1.62	1.60	1.58	1.57	1.55	1.53	1.51	1.50	1.48	1.46	1.44	1.43	1.41	1.39	1.37	1.36	1.34
59.4	1.80	1.78	1.76	1.74	1.73	1.71	1.69	1.67	1.66	1.64	1.62	1.60	1.59	1.57	1.55	1.53	1.52	1.50	1.48	1.47	1.45	1.43	1.41	1.40	1.38
59.8	1.83	1.82	1.80	1.78	1.77	1.75	1.73	1.71	1.70	1.68	1.66	1.64	1.63	1.61	1.59	1.57	1.56	1.54	1.52	1.50	1.49	1.47	1.45	1.43	1.42
60.2	1.87	1.86	1.84	1.82	1.80	1.79	1.77	1.75	1.73	1.72	1.70	1.68	1.66	1.65	1.63	1.61	1.60	1.58	1.56	1.54	1.53	1.51	1.49	1.47	1.46
60.6	1.91	1.90	1.88	1.86	1.84	1.83	1.81	1.79	1.77	1.76	1.74	1.72	1.70	1.69	1.67	1.65	1.63	1.62	1.60	1.58	1.56	1.55	1.53	1.51	1.50
61.0	1.95	1.93	1.92	1.90	1.88	1.86	1.85	1.83	1.81	1.80	1.78	1.76	1.74	1.73	1.71	1.69	1.67	1.66	1.64	1.62	1.60	1.59	1.57	1.55	1.53
61.4	1.99	1.97	1.96	1.94	1.92	1.90	1.89	1.87	1.85	1.83	1.82	1.80	1.78	1.76	1.75	1.73	1.71	1.69	1.68	1.66	1.64	1.63	1.61	1.59	1.57
61.8	2.03	2.01	2.00	1.98	1.96	1.94	1.93	1.91	1.89	1.87	1.86	1.84	1.82	1.80	1.79	1.77	1.75	1.73	1.72	1.70	1.68	1.66	1.65	1.63	1.61
62.2	2.07	2.06	2.04	2.02	2.00	1.98	1.97	1.95	1.93	1.91	1.90	1.88	1.86	1.84	1.83	1.81	1.79	1.77	1.76	1.74	1.72	1.70	1.69	1.67	1.65
62.6	2.11	2.10	2.08	2.06	2.04	2.02	2.01	1.99	1.97	1.96	1.94	1.92	1.90	1.89	1.87	1.85	1.83	1.81	1.80	1.78	1.76	1.74	1.73	1.71	1.69
63.0	2.15	2.13	2.12	2.10	2.08	2.06	2.05	2.03	2.01	1.99	1.98	1.96	1.94	1.92	1.91	1.89	1.87	1.85	1.84	1.82	1.80	1.78	1.76	1.75	1.73
63.4	2.19	2.17	2.16	2.14	2.12	2.10	2.09	2.07	2.05	2.03	2.02	2.00	1.98	1.96	1.95	1.93	1.91	1.89	1.88	1.86	1.84	1.82	1.80	1.79	1.77
63.8	2.23	2.21	2.20	2.18	2.16	2.14	2.13	2.11	2.09	2.07	2.06	2.04	2.02	2.00	1.99	1.97	1.95	1.93	1.92	1.90	1.88	1.86	1.84	1.82	1.81
64.2	2.27	2.25	2.24	2.22	2.20	2.18	2.17	2.15	2.13	2.11	2.10	2.08	2.06	2.04	2.02	2.00	1.99	1.97	1.96	1.94	1.92	1.90	1.88	1.86	1.85
64.6	2.31	2.29	2.28	2.26	2.24	2.22	2.21	2.19	2.17	2.15	2.14	2.12	2.10	2.08	2.06	2.04	2.03	2.01	1.99	1.97	1.96	1.94	1.92	1.90	1.89
65.0	2.36	2.34	2.32	2.30	2.28	2.26	2.25	2.23	2.21	2.19	2.18	2.16	2.14	2.12	2.10	2.09	2.07	2.05	2.03	2.02	2.00	1.98	1.96	1.94	1.92
65.4	2.40	2.38	2.36	2.34	2.33	2.31	2.29	2.27	2.25	2.24	2.22	2.20	2.18	2.16	2.14	2.12	2.11	2.09	2.07	2.05	2.04	2.02	2.00	1.98	1.96
65.8	2.44	2.42	2.41	2.39	2.37	2.35	2.34	2.32	2.30	2.28	2.27	2.25	2.23	2.21	2.19	2.17	2.15	2.13	2.11	2.09	2.08	2.06	2.04	2.02	2.00
66.2	2.48	2.46	2.45	2.43	2.41	2.39	2.38	2.36	2.34	2.32	2.31	2.29	2.27	2.25	2.24	2.22	2.20	2.18	2.17	2.15	2.13	2.11	2.10	2.08	2.06
66.6	2.52	2.50	2.48	2.47	2.45	2.43	2.41	2.40	2.38	2.36	2.35	2.33	2.31	2.29	2.28	2.26	2.24	2.22	2.21	2.19	2.17	2.15	2.14	2.12	2.10
67.0	2.56	2.54	2.52	2.51	2.49	2.47	2.45	2.44	2.42	2.40	2.38	2.37	2.35	2.33	2.31	2.30	2.28	2.26	2.25	2.23	2.21	2.19	2.18	2.16	2.14
67.3	2.58	2.56	2.54	2.52	2.51	2.49	2.47	2.45	2.44	2.42	2.40	2.39	2.37	2.35	2.33	2.31	2.30	2.28	2.26	2.25	2.23	2.21	2.19	2.18	2.16
67.7	2.61	2.60	2.58	2.56	2.55	2.53	2.51	2.49	2.48	2.46	2.44	2.42	2.41	2.39	2.37	2.35	2.34	2.32	2.30	2.28	2.27	2.25	2.23	2.21	2.20
68.1	2.65	2.64	2.62	2.60	2.58	2.57	2.55	2.53	2.51	2.50	2.48	2.46	2.44	2.43	2.41	2.39	2.38	2.36	2.34	2.32	2.31	2.29	2.27	2.25	2.24
68.5	2.69	2.68	2.66	2.64	2.62	2.61	2.59	2.57	2.55	2.54	2.52	2.50	2.48	2.47	2.45	2.43	2.41	2.40	2.38	2.36	2.34	2.33	2.31	2.29	2.28
68.9	2.73	2.71	2.70	2.68	2.66	2.64	2.63	2.61	2.59	2.58	2.56	2.54	2.52	2.51	2.49	2.47	2.45	2.44	2.42	2.40	2.38	2.37	2.35	2.33	2.31
69.3	2.77	2.75	2.74	2.72	2.70	2.68	2.67	2.65	2.63	2.61	2.60	2.58	2.56	2.54	2.53	2.51	2.49	2.47	2.46	2.44	2.42	2.41	2.39	2.37	2.35
69.7	2.81	2.79	2.77	2.76	2.74	2.72	2.71	2.69	2.67	2.65	2.64	2.62	2.60	2.58	2.57	2.55	2.53	2.51	2.50	2.48	2.46	2.44	2.43	2.41	2.39
70.1	2.85	2.83	2.81	2.80	2.78	2.76	2.74	2.73	2.71	2.69	2.67	2.66	2.64	2.62	2.61	2.59	2.57	2.55	2.54	2.52	2.50	2.48	2.47	2.45	2.43
70.5	2.89	2.87	2.85	2.84	2.82	2.80	2.78	2.77	2.75	2.73	2.71	2.70	2.68	2.66	2.64	2.63	2.61	2.59	2.57	2.56	2.54	2.52	2.50	2.49	2.47
70.9	2.93	2.91	2.89	2.87	2.86	2.84	2.82	2.80	2.79	2.77	2.75	2.74	2.72	2.70	2.68	2.67	2.65	2.63	2.61	2.60	2.58	2.56	2.54	2.53	2.51
71.3	2.97	2.95	2.93	2.91	2.90	2.88	2.86	2.84	2.83	2.81	2.79	2.77	2.76	2.74	2.72	2.70	2.69	2.67	2.65	2.64	2.62	2.60	2.58	2.57	2.55
71.7	3.00	2.99	2.97	2.95	2.94	2.92	2.90	2.88	2.87	2.85	2.83	2.81	2.80	2.78	2.76	2.74	2.73	2.71	2.69	2.67	2.66	2.64	2.62	2.60	2.59
72.0	3.04	3.03	3.01	2.99	2.97	2.96	2.94	2.92	2.90	2.89	2.87	2.85	2.83	2.82	2.80	2.78	2.77	2.75	2.73	2.71	2.70	2.68	2.66	2.64	2.63
72.4	3.08	3.07	3.05	3.03	3.01	3.00	2.98	2.96	2.94	2.93	2.91	2.89	2.87	2.86	2.84	2.82	2.80	2.79	2.77	2.75	2.73	2.72	2.70	2.68	2.67
72.8	3.12	3.10	3.09	3.07	3.05	3.03	3.02	3.00	2.98	2.97	2.95	2.93	2.91	2.90	2.88	2.86	2.84	2.83	2.81	2.79	2.77	2.76	2.74	2.72	2.70
73.2	3.16	3.14	3.13	3.11	3.09	3.07	3.06	3.04	3.02	3.00	2.99	2.97	2.95	2.93	2.92	2.90	2.88	2.86	2.84	2.83	2.81	2.79	2.78	2.76	2.74
73.6	3.20	3.18	3.16	3.15	3.13	3.11	3.10	3.08	3.06	3.04	3.03	3.01	2.99	2.97	2.96	2.94	2.92	2.90	2.88	2.87	2.85	2.83	2.82	2.80	2.78
74.0	3.24	3.22	3.20	3.19	3.17	3.15	3.13	3.12	3.10	3.08	3.06	3.05	3.03	3.01	3.00	2.98	2.96	2.94	2.92	2.91	2.89	2.87	2.86	2.84	2.82
74.4	3.28	3.26	3.24	3.23	3.21	3.19	3.17	3.16	3.14	3.12	3.10	3.09	3.07	3.05	3.03	3.02	3.00	2.98	2.96	2.95	2.93	2.91	2.89	2.88	2.86
74.8	3.32	3.30	3.28	3.26	3.25	3.23	3.21	3.19	3.18	3.16	3.14	3.13	3.11	3.09	3.07	3.06	3.04	3.02	3.00	2.99	2.97	2.95	2.93	2.92	2.90
75.2	3.36	3.34	3.32	3.30	3.29	3.27	3.25	3.23	3.22	3.20	3.18	3.16	3.15	3.13	3.11	3.09	3.08	3.06	3.04	3.03	3.01	2.99	2.97	2.96	2.94
75.6	3.39	3.38	3.36	3.34	3.33	3.31	3.29	3.27	3.26	3.24	3.22	3.20	3.19	3.17	3.15	3.13	3.12	3.10	3.08	3.06	3.05	3.03	3.01	2.99	2.98
76.0	3.43	3.42	3.40	3.38	3.36	3.35	3.33	3.31	3.29	3.28	3.26	3.24	3.22	3.21	3.19	3.17	3.16	3.14	3.12	3.10	3.09	3.07	3.05	3.03	3.02
76.4	3.47	3.46	3.44	3.42	3.40	3.39	3.37	3.35	3.33	3.32	3.30	3.28	3.26	3.25	3.23	3.21	3.19	3.18	3.16	3.14	3.12	3.11	3.09	3.07	3.06
76.8	3.51	3.49	3.48	3.46	3.44	3.42	3.41	3.39	3.37	3.36	3.34	3.32	3.30	3.29	3.27	3.25	3.23	3.22	3.20	3.18	3.16	3.15	3.13	3.11	3.09
77.2	3.55	3.53	3.52	3.50	3.48	3.46	3.45	3.43	3.41	3.39	3.38	3.36	3.34	3.32	3.31	3.29	3.27	3.25	3.24	3.22	3.20	3.19	3.17	3.15	3.13
77.6	3.59	3.57	3.55	3.54	3.52	3.50	3.49	3.47	3.45	3.43	3.42	3.40	3.38	3.36	3.35	3.33	3.31	3.29	3.28	3.26	3.24	3.22	3.21	3.19	3.17
78.0	3.63	3.61	3.59	3.58	3.56	3.54	3.52	3.51	3.49	3.47	3.45	3.44	3.42	3.40	3.39	3.37	3.35	3.33	3.32	3.30	3.28	3.26	3.25	3.23	3.21
78.3	3.67	3.65	3.63	3.62	3.60	3.58	3.56	3.55	3.53	3.51	3.49	3.48	3.46	3.44	3.42	3.41	3.39	3.37	3.35	3.34	3.32	3.30	3.28	3.27	3.25
78.7	3.71	3.69	3.67	3.65	3.64	3.62	3.60	3.59	3.57	3.55	3.53	3.52	3.50	3.48	3.46	3.45	3.43	3.41	3.39	3.38	3.36	3.34	3.32	3.31	3.29
79.1	3.75	3.73	3.71	3.69	3.68	3.66	3.64	3.62	3.61	3.59	3.57	3.55	3.54	3.52	3.50	3.48	3.47	3.45	3.43	3.42	3.40	3.38	3.36	3.35	3.33
79.5	3.78	3.77	3.75	3.73	3.72	3.70	3.68	3.66	3.65	3.63	3.61	3.59	3.58	3.56	3.54	3.52	3.51	3.49	3.47	3.45	3.44	3.42	3.40	3.38	3.37
79.9	3.82	3.81	3.79	3.77	3.75	3.74	3.72	3.70	3.68	3.67	3.65	3.63	3.61	3.60	3.58	3.56	3.55	3.53	3.51	3.49	3.48	3.46	3.44	3.42	3.41
80.3	3.86	3.85	3.83	3.81	3.79	3.78	3.76	3.74	3.72	3.71	3.69	3.67	3.65	3.64	3.62	3.60	3.58	3.57	3.55	3.53	3.51	3.50	3.48	3.46	3.45
80.7	3.90	3.88	3.87	3.85	3.83	3.81	3.80	3.78	3.76	3.75	3.73	3.71	3.69	3.68	3.66	3.64	3.62	3.61	3.59	3.57	3.55	3.54	3.52	3.50	3.48
81.1	3.94	3.92	3.91	3.89	3.87	3.85	3.84	3.82	3.80	3.78	3.77	3.75	3.73	3.71	3.70	3.68	3.66	3.64	3.63	3.61	3.59	3.58	3.56	3.54	3.52
81.5	3.98	3.96	3.94	3.93	3.91	3.89	3.88	3.86	3.84	3.82	3.81	3.79	3.77	3.75	3.74	3.72	3.70	3.68	3.67	3.65	3.63	3.61	3.60	3.58	3.56
81.9	4.02	4.00	3.98	3.97	3.95	3.93	3.91	3.90	3.88	3.86	3.84	3.83	3.81	3.79	3.78	3.76	3.74	3.72	3.71	3.69	3.67	3.65	3.64	3.62	3.60
82.3	4.06	4.04	4.02	4.01	3.99	3.97	3.96	3.94	3.92	3.90	3.88	3.87	3.85	3.83	3.81	3.80	3.78	3.76	3.74	3.73	3.71	3.69	3.67	3.66	3.64
82.7	4.10	4.08	4.06	4.04	4.03	4.01	3.99	3.97	3.96	3.94	3.92	3.91	3.89	3.87	3.85	3.84	3.82	3.80	3.78	3.77	3.75	3.73	3.71	3.70	3.68

PREDICTION EQUATIONS FOR FVC FEMALES * 60% OF PREDICTED **

HEIGHT (IN)	AGE (YEARS)																								
	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46
51.2	1.53	1.52	1.50	1.49	1.48	1.47	1.45	1.44	1.43	1.41	1.40	1.39	1.37	1.36	1.35	1.33	1.32	1.31	1.29	1.28	1.27	1.25	1.24	1.23	1.21
51.6	1.55	1.54	1.53	1.51	1.50	1.49	1.47	1.46	1.45	1.43	1.42	1.41	1.40	1.38	1.37	1.36	1.34	1.33	1.32	1.30	1.29	1.28	1.26	1.25	1.24
52.0	1.56	1.55	1.54	1.52	1.51	1.50	1.48	1.47	1.46	1.44	1.43	1.42	1.40	1.39	1.38	1.36	1.35	1.34	1.32	1.31	1.30	1.29	1.27	1.26	1.26
52.4	1.58	1.57	1.56	1.54	1.53	1.52	1.51	1.49	1.48	1.47	1.45	1.44	1.43	1.41	1.40	1.39	1.37	1.36	1.35	1.33	1.32	1.31	1.29	1.28	1.27
52.8	1.60	1.58	1.57	1.56	1.54	1.53	1.51	1.50	1.49	1.47	1.46	1.45	1.44	1.42	1.41	1.40	1.39	1.37	1.36	1.34	1.33	1.32	1.31	1.30	1.28
53.2	1.62	1.60	1.59	1.57	1.56	1.54	1.53	1.51	1.50	1.49	1.47	1.46	1.45	1.44	1.43	1.41	1.40	1.39	1.38	1.37	1.35	1.34	1.33	1.32	1.30
53.5	1.64	1.62	1.61	1.59	1.57	1.56	1.55	1.53	1.52	1.51	1.49	1.48	1.47	1.45	1.44	1.43	1.41	1.40	1.39	1.39	1.37	1.36	1.35	1.34	1.33
53.9	1.65	1.64	1.62	1.61	1.60	1.59	1.57	1.56	1.55	1.53	1.52	1.51	1.50	1.48	1.47	1.46	1.45	1.44	1.42	1.41	1.40	1.39	1.37	1.36	1.35
54.3	1.67	1.66	1.64	1.63	1.62	1.60	1.59	1.58	1.56	1.55	1.54	1.52	1.51	1.50	1.48	1.47	1.46	1.45	1.44	1.43	1.42	1.41	1.40	1.38	1.37
54.7	1.68	1.67	1.66	1.65	1.63	1.62	1.61	1.60	1.59	1.57	1.56	1.55	1.53	1.52	1.51	1.49	1.48	1.47	1.46	1.45	1.44	1.43	1.41	1.40	1.39
55.1	1.70	1.69	1.68	1.67	1.65	1.64	1.63	1.61	1.60	1.59	1.57	1.56	1.55	1.53	1.52	1.51	1.50	1.48	1.47	1.46	1.45	1.44	1.43	1.41	1.41
55.5	1.71	1.70	1.69	1.68	1.67	1.66	1.64	1.63	1.62	1.61	1.59	1.58	1.56	1.55	1.54	1.53	1.52	1.50	1.49	1.48	1.47	1.45	1.44	1.43	1.42
55.9	1.73	1.72	1.71	1.70	1.68	1.67	1.66	1.65	1.63	1.62	1.61	1.60	1.59	1.57	1.56	1.55	1.54	1.52	1.51	1.50	1.49	1.48	1.46	1.45	1.44
56.3	1.74	1.73	1.72	1.71	1.70	1.68	1.67	1.66	1.65	1.63	1.62	1.61	1.60	1.59	1.57	1.56	1.55	1.53	1.52	1.51	1.50	1.49	1.48	1.46	1.45
56.7	1.76	1.75	1.74	1.73	1.71	1.70	1.69	1.67	1.66	1.65	1.64	1.63	1.61	1.60	1.59	1.57	1.56	1.55	1.53	1.52	1.51	1.50	1.49	1.47	1.46
57.1	1.77	1.76	1.75	1.74	1.73	1.71	1.70	1.69	1.68	1.66	1.65	1.64	1.63	1.61	1.60	1.59	1.57	1.56	1.55	1.53	1.52	1.51	1.50	1.48	1.47
57.5	1.79	1.78	1.77	1.75	1.74	1.73	1.72	1.70	1.69	1.68	1.67	1.65	1.64	1.63	1.62	1.60	1.59	1.58	1.56	1.55	1.54	1.52	1.51	1.50	1.48
57.9	1.80	1.79	1.78	1.77	1.75	1.74	1.73	1.72	1.71	1.69	1.68	1.67	1.66	1.64	1.63	1.62	1.61	1.59	1.58	1.57	1.56	1.54	1.53	1.51	1.50
58.3	1.82	1.81	1.80	1.78	1.77	1.76	1.74	1.73	1.72	1.71	1.70	1.68	1.67	1.66	1.65	1.63	1.62	1.61	1.60	1.58	1.57	1.56	1.55	1.53	1.52
58.7	1.83	1.82	1.81	1.80	1.78	1.77	1.76	1.75	1.73	1.72	1.71	1.70	1.69	1.67	1.66	1.65	1.64	1.62	1.61	1.60	1.59	1.57	1.56	1.55	1.53
59.1	1.85	1.84	1.82	1.81	1.80	1.79	1.77	1.76	1.75	1.74	1.72	1.71	1.70	1.69	1.67	1.66	1.65	1.64	1.62	1.61	1.60	1.59	1.57	1.56	1.55
59.4	1.86	1.85	1.84	1.83	1.81	1.80	1.79	1.78	1.76	1.75	1.74	1.72	1.71	1.70	1.69	1.67	1.66	1.65	1.64	1.62	1.61	1.60	1.59	1.57	1.56
59.8	1.88	1.87	1.85	1.84	1.83	1.81	1.80	1.79	1.78	1.76	1.75	1.74	1.73	1.71	1.70	1.69	1.68	1.66	1.65	1.64	1.63	1.61	1.60	1.59	1.57
60.2	1.89	1.88	1.87	1.85	1.84	1.83	1.82	1.80	1.79	1.78	1.77	1.75	1.74	1.73	1.72	1.70	1.69	1.68	1.67	1.65	1.64	1.63	1.62	1.60	1.59
60.6	1.91	1.90	1.88	1.87	1.86	1.84	1.83	1.82	1.80	1.79	1.78	1.76	1.75	1.74	1.73	1.71	1.70	1.69	1.68	1.67	1.66	1.64	1.63	1.62	1.60
61.0	1.92	1.91	1.90	1.89	1.87	1.86	1.85	1.83	1.82	1.81	1.80	1.78	1.77	1.76	1.75	1.73	1.72	1.71	1.70	1.68	1.67	1.66	1.65	1.63	1.62
61.4	1.94	1.93	1.91	1.90	1.89	1.87	1.86	1.85	1.83	1.82	1.81	1.80	1.78	1.77	1.76	1.75	1.73	1.72	1.71	1.70	1.68	1.67	1.66	1.65	1.63
61.8	1.95	1.94	1.93	1.91	1.90	1.89	1.87	1.86	1.85	1.83	1.82	1.81	1.80	1.78	1.77	1.76	1.74	1.73	1.72	1.71	1.70	1.68	1.67	1.66	1.65
62.2	1.97	1.96	1.94	1.93	1.92	1.90	1.89	1.88	1.86	1.85	1.84	1.82	1.81	1.80	1.78	1.77	1.76	1.75	1.73	1.72	1.71	1.70	1.68	1.67	1.66
62.6	1.98	1.97	1.96	1.94	1.93	1.92	1.90	1.89	1.88	1.86	1.85	1.84	1.82	1.81	1.80	1.79	1.77	1.76	1.75	1.73	1.72	1.71	1.70	1.68	1.67
63.0	2.00	1.98	1.97	1.96	1.94	1.93	1.92	1.91	1.89	1.88	1.87	1.85	1.84	1.83	1.81	1.80	1.79	1.77	1.76	1.75	1.73	1.72	1.71	1.70	1.68
63.4	2.01	2.00	1.99	1.97	1.96	1.95	1.93	1.92	1.91	1.89	1.88	1.87	1.85	1.84	1.83	1.81	1.80	1.79	1.77	1.76	1.75	1.73	1.72	1.71	1.70
63.8	2.02	2.01	2.00	1.98	1.97	1.96	1.95	1.93	1.92	1.91	1.89	1.88	1.87	1.85	1.84	1.83	1.81	1.80	1.79	1.77	1.76	1.75	1.73	1.72	1.71
64.2	2.04	2.02	2.01	2.00	1.98	1.97	1.96	1.94	1.93	1.92	1.91	1.89	1.88	1.87	1.85	1.84	1.83	1.81	1.80	1.79	1.77	1.76	1.75	1.73	1.72
64.6	2.05	2.04	2.02	2.01	2.00	1.98	1.97	1.96	1.94	1.93	1.92	1.91	1.89	1.88	1.87	1.85	1.84	1.83	1.81	1.80	1.79	1.77	1.76	1.75	1.73
65.0	2.07	2.05	2.04	2.02	2.01	2.00	1.98	1.97	1.96	1.94	1.93	1.92	1.91	1.89	1.88	1.87	1.85	1.84	1.83	1.81	1.80	1.79	1.77	1.76	1.75
65.4	2.08	2.07	2.05	2.04	2.03	2.01	2.00	1.99	1.97	1.96	1.95	1.93	1.92	1.91	1.89	1.88	1.87	1.85	1.84	1.83	1.81	1.80	1.79	1.77	1.76
65.7	2.10	2.08	2.07	2.05	2.04	2.03	2.01	2.00	1.99	1.97	1.96	1.95	1.93	1.92	1.91	1.89	1.88	1.87	1.85	1.84	1.83	1.81	1.80	1.79	1.77
66.1	2.11	2.10	2.08	2.07	2.06	2.04	2.03	2.01	2.00	1.99	1.97	1.96	1.95	1.93	1.92	1.91	1.89	1.88	1.87	1.85	1.84	1.83	1.81	1.80	1.79
66.5	2.13	2.11	2.10	2.08	2.07	2.06	2.04	2.03	2.02	2.00	1.99	1.98	1.96	1.95	1.93	1.92	1.91	1.89	1.88	1.87	1.85	1.84	1.83	1.81	1.80
66.9	2.14	2.13	2.11	2.10	2.08	2.07	2.06	2.04	2.03	2.02	2.00	1.99	1.98	1.96	1.95	1.93	1.92	1.91	1.89	1.88	1.87	1.85	1.84	1.83	1.81
67.3	2.16	2.14	2.13	2.11	2.10	2.09	2.07	2.06	2.05	2.03	2.02	2.01	1.99	1.98	1.96	1.95	1.93	1.92	1.91	1.89	1.88	1.87	1.85	1.84	1.83
67.7	2.17	2.16	2.14	2.13	2.11	2.10	2.09	2.07	2.06	2.05	2.03	2.02	2.01	1.99	1.98	1.96	1.95	1.93	1.92	1.91	1.89	1.88	1.87	1.85	1.84
68.1	2.19	2.17	2.16	2.14	2.13	2.12	2.10	2.09	2.08	2.06	2.05	2.04	2.02	2.01	2.00	1.98	1.97	1.96	1.94	1.93	1.92	1.90	1.89	1.88	1.86
68.5	2.20	2.19	2.17	2.16	2.14	2.13	2.12	2.10	2.09	2.08	2.06	2.05	2.04	2.02	2.01	2.00	1.98	1.97	1.96	1.94	1.93	1.92	1.90	1.89	1.88
68.9	2.22	2.20	2.19	2.17	2.16	2.15	2.13	2.12	2.11	2.09	2.08	2.07	2.05	2.04	2.03	2.01	2.00	1.99	1.97	1.96	1.95	1.93	1.92	1.91	1.89
69.3	2.23	2.22	2.20	2.19	2.18	2.16	2.15	2.13	2.12	2.11	2.09	2.08	2.07	2.06	2.04	2.03	2.02	2.00	1.99	1.98	1.96	1.95	1.93	1.92	1.91
69.7	2.25	2.23	2.22	2.20	2.19	2.18	2.16	2.15	2.14	2.12	2.11	2.10	2.08	2.07	2.06	2.04	2.03	2.02	2.01	1.99	1.98	1.97	1.96	1.94	1.93
70.1	2.26	2.25	2.23	2.22	2.21	2.19	2.18	2.16	2.15	2.14	2.13	2.11	2.10	2.09	2.07	2.06	2.05	2.03	2.02	2.01	2.00	1.98	1.97	1.96	1.94
70.5	2.28	2.26	2.25	2.23	2.22	2.21	2.19	2.18	2.16	2.15	2.14	2.13	2.11	2.10	2.09	2.07	2.06	2.05	2.03	2.02	2.01	1.99	1.98	1.97	1.96
70.9	2.29	2.28	2.26	2.25	2.23	2.22	2.21	2.19	2.18	2.17	2.15	2.14	2.13	2.11	2.10	2.09	2.07	2.06	2.05	2.03	2.02	2.01	1.99	1.98	1.97
71.3	2.31	2.29	2.28	2.26	2.25	2.24	2.22	2.21	2.19	2.18	2.17	2.15	2.14	2.13	2.12	2.10	2.09	2.08	2.06	2.05	2.04	2.02	2.01	2.00	1.98
71.7	2.32	2.31	2.29	2.28	2.26	2.25	2.24	2.22	2.21	2.20	2.18	2.17	2.16	2.14	2.13	2.12	2.10	2.09	2.08	2.06	2.05	2.04	2.02	2.01	2.00
72.1	2.34	2.32	2.31	2.29	2.28	2.26	2.25	2.24	2.22	2.21	2.20	2.18	2.17	2.16	2.14	2.13	2.12	2.10	2.09	2.08	2.06	2.05	2.04	2.02	2.01
72.4	2.35	2.34	2.32	2.31	2.29	2.28	2.27	2.25	2.24	2.23	2.21	2.20	2.19	2.17	2.16	2.15	2.13	2.12	2.11	2.09	2.08	2.07	2.05	2.04	2.03
72.8	2.37	2.35	2.34	2.32	2.31	2.30	2.28	2.27	2.26	2.24	2.23	2.22	2.20	2.19	2.18	2.16	2.15	2.14	2.12	2.11	2.10	2.08	2.07	2.06	2.04
73.2	2.38	2.37	2.35	2.34	2.33	2.31	2.30	2.29	2.27	2.26	2.25	2.23	2.22	2.21	2.20	2.19	2.17	2.16	2.15	2.13	2.12	2.11	2.10	2.08	2.07
73.6	2.40	2.38	2.37	2.36	2.34	2.33	2.32	2.30	2.29	2.28	2.26	2.25	2.24	2.23	2.21	2.20	2.19	2.17	2.16	2.15	2.13	2.12	2.11	2.10	2.08
74.0	2.41	2.40	2.38	2.37	2.36	2.34	2.33	2.32	2.31	2.29	2.28	2.27	2.25	2.24	2.23	2.22	2.20	2.19	2.18	2.16	2.15	2.14	2.13	2.11	2.10
74.4	2.42	2.41	2.40	2.38	2.37	2.36	2.34	2.33	2.32	2.31	2.29	2.28	2.27	2.25	2.24	2.23	2.22	2.20	2.19	2.18	2.16	2.15	2.14	2.13	2.11
74.8	2.44	2.42	2.41	2.40	2.38	2.37	2.36	2.34	2.33	2.32	2.31	2.29	2.28	2.27	2.26	2.24	2.23	2.22	2.21	2.19	2.18	2.17	2.16	2.14	2.13

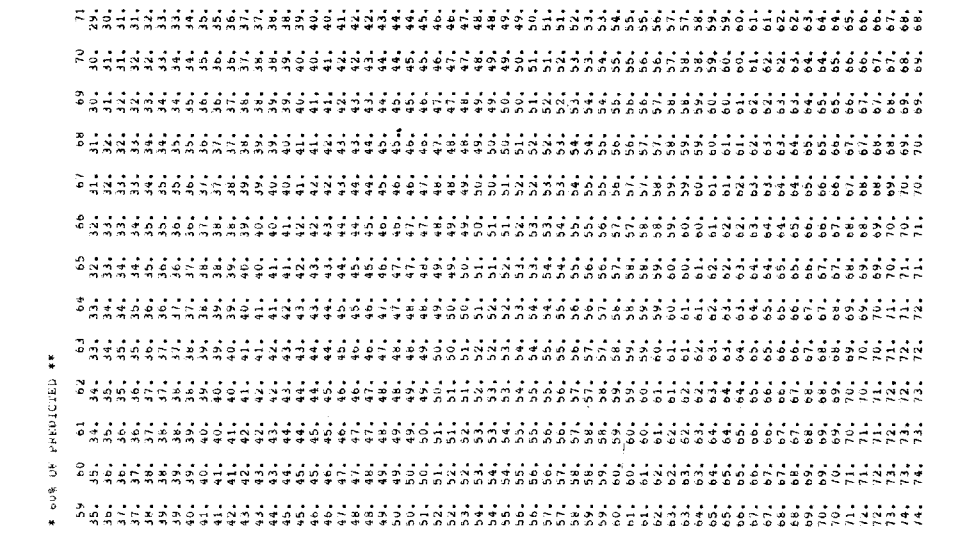
PREDICTION ENDPOINTS FOR FVC FEMALES * CUM% OF PREDICTED **

AGE (YEARS)

HEIGHT (IN)	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70
51.2	1.20	1.19	1.17	1.16	1.15	1.14	1.12	1.11	1.10	1.08	1.07	1.06	1.04	1.03	1.02	1.00	0.99	0.98	0.96	0.95	0.94	0.92	0.91	0.90
51.8	1.22	1.21	1.20	1.18	1.17	1.16	1.14	1.13	1.12	1.10	1.09	1.08	1.07	1.05	1.04	1.03	1.01	1.00	0.99	0.97	0.96	0.95	0.93	0.92
52.4	1.23	1.22	1.21	1.19	1.18	1.17	1.15	1.14	1.13	1.11	1.10	1.09	1.08	1.06	1.05	1.03	1.02	1.01	0.99	0.98	0.97	0.96	0.94	0.93
52.8	1.25	1.24	1.23	1.21	1.20	1.19	1.18	1.16	1.15	1.14	1.12	1.11	1.10	1.08	1.07	1.06	1.04	1.03	1.02	1.00	0.99	0.98	0.96	0.95
53.3	1.26	1.25	1.24	1.23	1.22	1.21	1.20	1.18	1.17	1.16	1.15	1.13	1.12	1.11	1.09	1.08	1.07	1.06	1.04	1.03	1.02	1.01	0.99	0.98
53.7	1.28	1.27	1.26	1.24	1.23	1.22	1.21	1.20	1.18	1.17	1.16	1.14	1.13	1.12	1.11	1.09	1.08	1.07	1.05	1.04	1.03	1.01	1.00	0.99
54.1	1.29	1.28	1.27	1.26	1.24	1.23	1.22	1.21	1.20	1.18	1.17	1.16	1.15	1.13	1.12	1.11	1.10	1.08	1.07	1.06	1.04	1.03	1.02	1.00
54.5	1.31	1.30	1.29	1.27	1.26	1.25	1.23	1.22	1.21	1.20	1.19	1.17	1.16	1.15	1.13	1.12	1.11	1.10	1.08	1.07	1.06	1.04	1.03	1.02
54.9	1.32	1.31	1.30	1.29	1.27	1.26	1.25	1.23	1.22	1.21	1.20	1.18	1.17	1.16	1.15	1.13	1.12	1.11	1.10	1.08	1.07	1.06	1.04	1.03
55.3	1.34	1.33	1.32	1.30	1.29	1.28	1.26	1.25	1.24	1.22	1.21	1.20	1.19	1.17	1.16	1.15	1.13	1.12	1.11	1.10	1.08	1.07	1.06	1.04
55.7	1.35	1.34	1.33	1.32	1.30	1.29	1.28	1.26	1.25	1.24	1.23	1.21	1.20	1.19	1.18	1.16	1.15	1.14	1.12	1.11	1.10	1.08	1.07	1.06
56.1	1.37	1.36	1.35	1.33	1.32	1.31	1.29	1.28	1.27	1.25	1.24	1.23	1.22	1.20	1.19	1.18	1.17	1.15	1.14	1.13	1.11	1.10	1.09	1.08
56.5	1.38	1.37	1.36	1.34	1.33	1.32	1.30	1.29	1.28	1.26	1.25	1.24	1.23	1.21	1.20	1.19	1.18	1.17	1.15	1.14	1.13	1.11	1.10	1.09
56.9	1.40	1.39	1.37	1.36	1.34	1.33	1.32	1.30	1.29	1.27	1.26	1.25	1.24	1.22	1.21	1.20	1.19	1.18	1.16	1.15	1.14	1.12	1.11	1.10
57.3	1.41	1.40	1.38	1.37	1.36	1.34	1.33	1.32	1.30	1.29	1.28	1.26	1.25	1.24	1.23	1.21	1.20	1.19	1.17	1.16	1.15	1.13	1.12	1.11
57.7	1.43	1.42	1.41	1.39	1.38	1.37	1.35	1.34	1.33	1.31	1.30	1.29	1.27	1.26	1.25	1.24	1.22	1.21	1.20	1.19	1.17	1.16	1.15	1.13
58.1	1.44	1.43	1.42	1.41	1.39	1.38	1.37	1.35	1.34	1.33	1.31	1.30	1.29	1.28	1.26	1.25	1.24	1.23	1.21	1.20	1.19	1.17	1.16	1.15
58.5	1.46	1.45	1.44	1.42	1.41	1.40	1.38	1.37	1.36	1.34	1.33	1.32	1.31	1.30	1.28	1.27	1.26	1.24	1.23	1.22	1.20	1.19	1.18	1.16
58.9	1.47	1.46	1.45	1.43	1.42	1.41	1.40	1.38	1.37	1.36	1.34	1.33	1.32	1.31	1.30	1.28	1.27	1.26	1.24	1.23	1.22	1.20	1.19	1.18
59.3	1.48	1.47	1.46	1.44	1.43	1.42	1.41	1.39	1.38	1.37	1.35	1.34	1.33	1.32	1.31	1.30	1.28	1.27	1.26	1.24	1.23	1.22	1.21	1.19
59.7	1.50	1.49	1.47	1.46	1.45	1.43	1.42	1.41	1.40	1.38	1.37	1.36	1.35	1.33	1.32	1.31	1.30	1.29	1.27	1.26	1.25	1.23	1.22	1.21
60.1	1.51	1.50	1.49	1.47	1.46	1.45	1.43	1.42	1.41	1.40	1.38	1.37	1.36	1.34	1.33	1.32	1.31	1.30	1.28	1.27	1.26	1.24	1.23	1.22
60.5	1.53	1.52	1.50	1.49	1.47	1.46	1.45	1.43	1.42	1.41	1.39	1.38	1.37	1.35	1.34	1.33	1.32	1.31	1.29	1.28	1.27	1.25	1.24	1.23
60.9	1.54	1.53	1.51	1.50	1.49	1.47	1.46	1.45	1.43	1.42	1.41	1.39	1.38	1.37	1.35	1.34	1.33	1.32	1.30	1.29	1.28	1.26	1.25	1.24
61.3	1.56	1.54	1.53	1.51	1.50	1.48	1.47	1.46	1.44	1.43	1.42	1.40	1.39	1.38	1.36	1.35	1.34	1.33	1.31	1.30	1.29	1.27	1.26	1.25
61.7	1.57	1.56	1.54	1.53	1.51	1.50	1.48	1.47	1.46	1.44	1.43	1.41	1.40	1.39	1.37	1.36	1.35	1.34	1.32	1.31	1.30	1.28	1.27	1.26
62.1	1.59	1.57	1.56	1.54	1.53	1.51	1.50	1.48	1.47	1.45	1.44	1.43	1.41	1.40	1.39	1.37	1.36	1.35	1.33	1.32	1.31	1.29	1.28	1.27
62.5	1.60	1.59	1.57	1.56	1.54	1.53	1.51	1.50	1.48	1.47	1.46	1.44	1.43	1.41	1.40	1.39	1.37	1.36	1.35	1.33	1.32	1.31	1.29	1.28
62.9	1.62	1.60	1.59	1.57	1.56	1.54	1.53	1.51	1.50	1.48	1.47	1.45	1.44	1.43	1.41	1.40	1.39	1.37	1.36	1.35	1.33	1.32	1.31	1.29
63.3	1.63	1.62	1.60	1.59	1.57	1.56	1.54	1.53	1.51	1.50	1.48	1.47	1.46	1.44	1.43	1.42	1.40	1.39	1.38	1.36	1.35	1.33	1.32	1.31
63.7	1.65	1.63	1.62	1.60	1.59	1.57	1.56	1.54	1.53	1.51	1.50	1.49	1.47	1.46	1.44	1.43	1.42	1.40	1.39	1.38	1.36	1.35	1.33	1.32
64.1	1.66	1.65	1.63	1.62	1.60	1.59	1.57	1.56	1.54	1.53	1.51	1.50	1.49	1.47	1.46	1.45	1.43	1.42	1.41	1.39	1.38	1.36	1.35	1.34
64.5	1.68	1.66	1.65	1.63	1.62	1.60	1.59	1.57	1.56	1.54	1.53	1.52	1.50	1.49	1.48	1.46	1.45	1.43	1.42	1.41	1.39	1.38	1.37	1.35
64.9	1.69	1.68	1.66	1.65	1.63	1.62	1.60	1.59	1.57	1.56	1.55	1.53	1.52	1.51	1.49	1.48	1.47	1.45	1.44	1.43	1.41	1.40	1.39	1.37
65.3	1.71	1.69	1.68	1.66	1.65	1.63	1.62	1.60	1.59	1.58	1.56	1.55	1.53	1.52	1.51	1.49	1.48	1.47	1.45	1.44	1.43	1.41	1.40	1.39
65.7	1.72	1.71	1.69	1.68	1.66	1.65	1.63	1.62	1.61	1.59	1.58	1.56	1.55	1.54	1.52	1.51	1.50	1.48	1.47	1.46	1.44	1.43	1.42	1.40
66.1	1.74	1.72	1.71	1.69	1.68	1.66	1.65	1.63	1.62	1.61	1.59	1.58	1.57	1.55	1.54	1.53	1.51	1.50	1.49	1.47	1.46	1.45	1.43	1.42
66.5	1.75	1.74	1.72	1.71	1.69	1.68	1.66	1.65	1.63	1.62	1.61	1.59	1.58	1.57	1.55	1.54	1.53	1.51	1.50	1.49	1.47	1.46	1.45	1.43
66.9	1.77	1.75	1.74	1.72	1.71	1.69	1.68	1.66	1.65	1.63	1.62	1.61	1.59	1.58	1.57	1.55	1.54	1.53	1.51	1.50	1.49	1.47	1.46	1.45
67.3	1.78	1.77	1.75	1.74	1.72	1.71	1.69	1.68	1.66	1.65	1.63	1.62	1.61	1.59	1.58	1.57	1.55	1.54	1.53	1.51	1.50	1.49	1.47	1.46
67.7	1.80	1.78	1.77	1.75	1.74	1.72	1.71	1.69	1.68	1.66	1.65	1.64	1.62	1.61	1.59	1.58	1.57	1.55	1.54	1.53	1.51	1.50	1.49	1.47
68.1	1.81	1.80	1.78	1.77	1.75	1.74	1.72	1.71	1.69	1.68	1.66	1.65	1.64	1.62	1.61	1.60	1.58	1.57	1.56	1.54	1.53	1.52	1.50	1.49
68.5	1.83	1.81	1.80	1.78	1.77	1.75	1.74	1.72	1.71	1.70	1.68	1.67	1.65	1.64	1.62	1.61	1.60	1.58	1.57	1.56	1.54	1.53	1.52	1.50
68.9	1.84	1.83	1.81	1.80	1.78	1.77	1.75	1.74	1.72	1.71	1.70	1.68	1.67	1.65	1.64	1.63	1.61	1.60	1.59	1.57	1.56	1.55	1.53	1.52
69.3	1.86	1.84	1.83	1.81	1.80	1.78	1.77	1.75	1.74	1.73	1.71	1.70	1.68	1.67	1.66	1.64	1.63	1.61	1.60	1.59	1.57	1.56	1.55	1.53
69.7	1.87	1.86	1.84	1.83	1.81	1.80	1.78	1.77	1.75	1.74	1.73	1.71	1.70	1.69	1.67	1.66	1.64	1.63	1.62	1.60	1.59	1.57	1.56	1.55
70.1	1.89	1.87	1.86	1.84	1.83	1.81	1.80	1.78	1.77	1.76	1.74	1.73	1.72	1.70	1.69	1.68	1.67	1.65	1.64	1.63	1.61	1.60	1.59	1.57
70.5	1.90	1.89	1.87	1.86	1.84	1.83	1.82	1.80	1.79	1.77	1.76	1.75	1.73	1.72	1.71	1.70	1.68	1.67	1.66	1.65	1.63	1.62	1.61	1.59
70.9	1.91	1.90	1.89	1.87	1.86	1.85	1.83	1.82	1.81	1.79	1.78	1.77	1.75	1.74	1.73	1.71	1.70	1.69	1.67	1.66	1.65	1.63	1.62	1.61
71.3	1.93	1.91	1.90	1.89	1.87	1.86	1.85	1.83	1.82	1.81	1.80	1.78	1.77	1.76	1.74	1.73	1.71	1.70	1.69	1.67	1.66	1.65	1.63	1.62
71.7	1.94	1.93	1.91	1.90	1.89	1.87	1.86	1.85	1.83	1.82	1.81	1.80	1.78	1.77	1.76	1.74	1.73	1.72	1.71	1.69	1.68	1.67	1.65	1.64
72.0	1.96	1.94	1.93	1.92	1.90	1.89	1.87	1.86	1.85	1.83	1.82	1.81	1.80	1.78	1.77	1.76	1.74	1.73	1.72	1.71	1.69	1.68	1.67	1.65
72.4	1.97	1.96	1.94	1.93	1.92	1.90	1.89	1.87	1.86	1.85	1.83	1.82	1.81	1.79	1.78	1.77	1.75	1.74	1.73	1.71	1.70	1.69	1.67	1.66
72.8	1.98	1.97	1.96	1.94	1.93	1.92	1.90	1.89	1.88	1.86	1.85	1.84	1.83	1.82	1.80	1.79	1.78	1.76	1.75	1.74	1.73	1.71	1.70	1.68
73.2	2.00	1.98	1.97	1.96	1.94	1.93	1.92	1.90	1.89	1.88	1.86	1.85	1.84	1.83	1.82	1.80	1.79	1.78	1.77	1.75	1.74	1.73	1.71	1.70
73.6	2.01	2.00	1.98	1.97	1.96	1.94	1.93	1.92	1.91	1.89	1.88	1.87	1.86	1.84	1.83	1.82	1.81	1.80	1.78	1.77	1.76	1.74	1.73	1.72
74.0	2.03	2.01	2.00	1.99	1.97	1.96	1.95	1.93	1.92	1.91	1.90	1.88	1.87	1.86	1.85	1.84	1.82	1.81	1.80	1.79	1.77	1.76	1.75	1.73
74.4	2.04	2.03	2.01	2.00	1.99	1.98	1.96	1.95	1.94	1.92	1.91	1.90	1.89	1.87	1.86	1.85	1.84	1.83	1.81	1.80	1.79	1.78	1.76	1.75
74.8	2.05	2.04	2.03	2.01	2.00	1.99	1.98	1.96	1.95	1.94	1.93	1.91	1.90	1.89	1.88	1.87	1.85	1.84	1.83	1.82	1.81	1.79	1.78	1.77
75.2	2.07	2.05	2.04	2.03	2.01	2.00	1.99	1.98	1.97	1.95	1.94	1.93	1.92	1.91	1.89	1.88	1.87	1.86	1.85	1.83	1.82	1.81	1.80	1.78
75.6	2.08	2.06	2.05	2.04	2.03	2.01	2.00	1.99	1.98	1.97	1.96	1.94	1.93	1.92	1.91	1.90	1.88	1.87	1.86	1.85	1.84	1.82	1.81	1.80
76.0	2.09	2.08	2.06	2.05	2.04	2.03	2.01	2.00	1.99	1.98	1.97	1.96	1.95	1.93	1.92	1.91	1.90	1.88	1.87	1.86	1.85	1.84	1.83	1.81
76.4	2.11	2.09	2.08	2.06	2.05	2.04	2.03	2.01	2.00	1.99	1.98	1.97	1.96	1.94	1.93	1.92	1.91	1.90	1.88	1.87	1.86	1.85	1.84	1.83
76.8	2.12	2.11	2.09	2.08	2.06	2.05	2.04	2.03	2.01	2.00	1.99	1.98	1.97	1.96	1.94	1.93	1.92	1.91	1.90	1.88	1.87	1.86	1.85	1.84
77.2	2.14	2.12	2.11	2.09	2.08	2.06	2.05	2.04	2.03	2.02	2.00	1.99	1.98	1.97	1.96	1.95	1.94	1.93	1.91	1.90	1.89	1.87	1.86	1.85
77.6	2.15	2.14	2.12	2.11	2.09	2.08	2.07	2.05	2.04	2.03	2.02	2.01	2.00	1.98	1.97	1.96	1.95	1.94	1.93	1.92	1.90	1.89	1.88	1.87
78.0	2.16	2.15	2.14	2.12	2.11	2.10	2.08	2.07	2.06	2.05	2.03	2.02	2.01	2.00	1.99	1.98	1.97	1.96	1.94	1.93	1.92	1.91	1.90	1.88
78.4	2.18	2.16	2.15	2.14	2.12	2.11	2.10	2.08	2.07	2.06	2.05	2.04	2.02	2.01	2.00	1.99	1.98	1.97	1.96	1.95	1.93	1.92	1.91	1.90
78.8	2.19	2.18	2.16	2.15	2.14	2.12	2.11	2.10	2.09	2.07	2.06	2.05	2.04	2.03	2.01	2.00	1.99	1.98	1.97	1.96	1.95	1.94	1.92	1.91
79.2	2.20	2.19	2.18	2.16	2.15	2.14	2.13	2.11	2.10	2.09	2.08	2.06	2.05	2.04	2.03	2.02	2.01	2.00	1.98	1.97	1.96	1.95	1.94	1.93
79.6	2.22	2.20	2.19	2.18	2.16	2.15	2.14	2.13	2.11	2.10	2.09	2.08	2.07	2.05	2.04	2.03	2.02	2.01	2.00	1.99	1.98	1.96	1.95	1.94
80.0	2.23	2.22	2.20	2.19	2.18	2.17	2.15	2.14	2.13	2.12	2.10	2.09	2.08	2.07	2.06	2.05	2.03	2.02	2.01	2.00	1.99	1.98	1.97	1.95
80.4	2.24	2.23	2.22	2.20	2.19	2.18	2.17	2.15	2.14	2.13	2.12	2.10	2.09	2.08	2.07	2.06	2.05	2.04	2.02	2.01	2.00	1.99	1.98	1.97
80.8	2.26	2.24	2.23	2.22	2.20	2.19	2.18	2.17	2.15	2.14	2.13	2.12	2.10	2.09	2.08	2.07	2.06	2.05	2.04	2.02	2.01	2.00	1.99	1.98
81.2	2.27	2.26	2.24	2.23	2.22	2.21	2.19	2.18	2.17	2.16	2.14	2.13	2.12	2.11	2.09	2.08	2.07	2.06	2.05	2.03	2.02	2.01	2.00	1.99
81.6	2.28	2.27	2.26	2.24	2.23	2.22	2.21	2.19	2.18	2.17	2.16	2.14	2.13	2.12	2.11	2.10	2.08	2.07	2.06	2.05	2.03	2.02	2.01	2.00
82.0	2.30	2.28	2.27	2.26	2.24	2.23	2.22	2.21	2.20	2.18	2.17	2.16	2.15	2.13	2.12	2.11	2.10	2.08	2.07	2.06	2.05	2.03	2.02	2.01
82.4	2.31	2.30	2.28	2.27	2.26	2.24	2.23	2.22	2.21	2.20	2.18	2.17	2.16	2.14	2.13	2.12	2.11	2.10	2.08	2.07	2.06	2.05	2.03	2.02
82.8	2.32	2.31	2.30	2.28	2.27	2.26	2.24	2.23	2.22	2.21	2.20	2.18	2.17	2.16	2.15	2.13	2.12	2.11	2.10	2.08	2.07	2.06	2.04	2.03
83.2	2.34	2.32	2.31	2.30	2.28	2.27	2.26	2.25	2.23	2.22	2.21	2.20	2.18	2.17	2.16	2.15	2.13	2.12	2.11	2.10	2.08	2.07	2.06	2.04
83.6	2.35	2.34	2.32	2.31	2.30	2.28	2.27	2.26	2.25	2.23	2.22	2.21	2.20	2.18	2.17	2.16	2.15	2.13	2.12	2.11	2.10	2.08	2.07	2.06
84.0	2.36	2.35	2.34	2.32	2.31	2.30	2.28	2.27	2.26	2.25	2.23	2.22	2.21	2.20	2.18	2.17	2.16	2.15	2.13	2.12	2.11	2.10	2.08	2.07
84.4	2.38	2.36	2.35	2.34	2.32	2.31	2.30	2.28	2.27	2.26	2.25	2.23	2.22	2.21	2.20	2.18	2.17	2.16	2.15	2.13	2.12	2.11	2.10	2.08
84.8	2.39	2.38	2.36	2.35	2.34	2.32	2.31	2.30	2.29	2.27	2.26	2.25	2.23	2.22	2.21	2.20	2.18	2.17	2.16	2.15	2.13	2.12	2.11	2.10
85.2	2.40	2.39	2.38	2.36	2.35	2.34	2.32	2.31	2.30	2.29	2.27	2.26	2.25	2.24	2.22	2.21	2.20	2.18	2.17	2.16	2.15	2.13	2.12	2.11
85.6	2.42	2.40	2.39	2.38	2.36	2.35	2.34	2.33	2.31	2.30	2.29	2.28	2.26	2.25	2.24	2.22	2.21	2.20	2.18	2.17	2.16	2.15	2.13	2.12
86.0	2.43	2.42	2.40	2.39	2.38	2.36	2.35	2.34	2.33	2.31	2.30	2.29	2.27	2.26	2.25	2.23	2.22	2.21	2.20	2.18	2.17	2.16	2.15	2.13
86.4	2.44	2.43	2.42	2.40	2.39	2.38	2.36	2.35	2.34	2.33	2.31	2.30	2.29	2.28	2.26	2.25	2.23	2.22	2.21	2.20	2.18	2.17	2.16	2.15
86.8	2.46	2.44	2.43	2.42	2.40	2.39	2.38	2.36	2.35	2.34	2.33	2.32	2.30	2.29	2.28	2.26	2.25	2.24	2.22	2.21	2.20	2.19	2.17	2.16
87.2	2.47	2.46	2.44	2.43	2.42	2.41	2.39	2.38	2.37	2.35	2.34	2.33	2.31	2.30	2.29	2.27	2.26	2.25	2.23	2.22	2.21	2.20	2.19	2.17
87.6	2.48	2.47	2.46	2.44	2.43	2.42	2.41	2.40	2.38	2.37	2.36	2.34	2.33	2.32	2.30	2.29	2.28	2.26	2.25	2.24	2.22	2.21	2.20	2.19
88.0	2.49	2.48	2.47	2.45	2.44	2.43	2.41	2.40	2.39	2.37	2.36	2.35	2.34	2.32	2.31	2.30	2.28	2.27	2.26	2.25	2.23	2.22	2.21	2.20
88.4	2.50	2.49	2.48	2.47	2.45	2.44	2.43	2.42	2.40	2.39	2.38	2.37	2.35	2.34	2.33	2.31	2.30	2.29	2.27	2.26	2.25	2.23	2.22	2.21
88.8	2.51	2.50	2.49	2.48	2.47	2.45	2.44	2.43	2.41	2.40	2.39	2.38	2.36	2.35	2.34	2.32	2.31	2.30	2.29	2.27	2.26	2.25	2.24	2.22
89.2	2.53	2.52	2.51	2.49	2.48	2.47	2.45	2.44	2.43	2.41	2.40	2.39	2.37	2.36	2.35	2.34	2.32	2.31	2.30	2.29	2.28	2.27	2.26	2.24

PREDICTION EQUATIONS FOR NVV MALES * 66% OF PREDICTED **

HEIGHT (IN)	AGE (YEARS) 22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46
59.1	74.	75.	76.	70.	69.	69.	68.	68.	67.	66.	66.	65.	64.	64.	63.	62.	62.	61.	60.	60.	59.	58.	58.	57.	57.
59.4	75.	76.	77.	71.	71.	70.	69.	69.	68.	67.	67.	66.	66.	65.	64.	64.	63.	62.	62.	61.	60.	60.	59.	58.	58.
59.8	76.	77.	78.	73.	72.	71.	71.	70.	69.	69.	68.	67.	67.	66.	65.	65.	64.	64.	63.	62.	62.	61.	60.	60.	59.
60.2	77.	78.	79.	74.	73.	73.	72.	71.	71.	70.	69.	69.	68.	67.	67.	66.	65.	65.	64.	64.	63.	62.	62.	61.	60.
60.6	78.	79.	81.	75.	74.	74.	73.	73.	72.	72.	71.	70.	69.	69.	68.	67.	67.	66.	65.	65.	64.	63.	63.	62.	62.
61.0	79.	81.	82.	76.	76.	75.	74.	74.	73.	73.	72.	72.	71.	70.	70.	69.	68.	67.	67.	66.	65.	65.	64.	63.	63.
61.4	81.	82.	83.	78.	77.	76.	76.	75.	75.	74.	74.	73.	72.	72.	71.	70.	69.	69.	68.	67.	67.	66.	65.	65.	64.
61.8	82.	83.	84.	79.	79.	78.	77.	77.	76.	76.	75.	74.	74.	73.	72.	72.	71.	70.	69.	69.	68.	67.	67.	66.	65.
62.2	83.	84.	85.	80.	81.	80.	79.	78.	78.	77.	77.	76.	75.	75.	74.	73.	72.	72.	71.	70.	70.	69.	68.	67.	67.
62.6	84.	85.	86.	81.	82.	81.	81.	80.	79.	79.	78.	77.	77.	76.	75.	75.	74.	73.	72.	72.	71.	70.	70.	69.	68.
63.0	85.	86.	87.	83.	84.	83.	82.	82.	81.	80.	80.	79.	78.	78.	77.	76.	75.	75.	74.	73.	72.	72.	71.	70.	70.
63.4	86.	87.	88.	84.	85.	85.	84.	83.	83.	82.	81.	81.	80.	79.	79.	78.	77.	76.	75.	75.	74.	73.	72.	72.	71.
63.8	87.	88.	89.	86.	86.	86.	85.	85.	84.	83.	83.	82.	81.	81.	80.	80.	79.	78.	77.	77.	76.	75.	74.	73.	73.
64.2	88.	89.	90.	87.	88.	87.	87.	86.	86.	85.	84.	84.	83.	82.	82.	81.	80.	80.	79.	78.	77.	77.	76.	75.	74.
64.6	89.	91.	92.	89.	89.	89.	88.	88.	87.	87.	86.	85.	85.	84.	83.	83.	82.	81.	80.	80.	79.	78.	77.	77.	76.
65.0	91.	92.	93.	90.	91.	90.	90.	89.	89.	88.	88.	87.	86.	86.	85.	84.	84.	83.	82.	82.	81.	80.	79.	78.	78.
65.4	92.	93.	94.	92.	92.	92.	91.	91.	90.	90.	89.	89.	88.	87.	87.	86.	85.	85.	84.	84.	83.	82.	82.	81.	80.
65.72	93.	94.	95.	93.	93.	93.	93.	92.	92.	91.	91.	90.	90.	89.	89.	88.	87.	87.	86.	85.	85.	84.	83.	82.	82.
66.1	94.	95.	96.	94.	95.	94.	94.	94.	93.	93.	92.	92.	91.	91.	90.	89.	89.	88.	87.	87.	86.	85.	85.	84.	83.
66.5	95.	96.	97.	96.	96.	96.	96.	95.	95.	94.	94.	93.	93.	92.	92.	91.	90.	90.	89.	88.	88.	87.	86.	86.	85.
66.9	96.	97.	98.	97.	98.	97.	97.	97.	96.	96.	95.	95.	94.	94.	93.	93.	92.	91.	91.	90.	89.	89.	88.	87.	87.
67.3	97.	98.	99.	99.	99.	99.	98.	98.	98.	97.	97.	96.	96.	95.	95.	94.	94.	93.	92.	92.	91.	90.	90.	89.	88.
67.7	98.	99.	100.	100.	101.	100.	100.	100.	99.	99.	98.	98.	97.	97.	96.	96.	95.	94.	94.	93.	93.	92.	91.	91.	90.
68.1	99.	100.	102.	101.	102.	102.	101.	101.	101.	100.	100.	99.	99.	98.	98.	97.	97.	96.	95.	95.	94.	94.	93.	92.	92.
68.5	100.	102.	103.	103.	104.	103.	103.	102.	102.	102.	101.	101.	100.	100.	99.	99.	98.	98.	97.	96.	96.	95.	95.	94.	93.
68.9	102.	103.	104.	104.	105.	105.	104.	104.	103.	103.	102.	102.	101.	101.	100.	100.	99.	99.	98.	98.	97.	97.	96.	95.	95.
69.3	103.	104.	105.	106.	106.	106.	106.	105.	105.	104.	104.	103.	103.	102.	102.	101.	101.	100.	100.	99.	99.	98.	97.	97.	96.
69.7	104.	105.	106.	107.	107.	107.	107.	106.	106.	105.	105.	104.	104.	104.	103.	103.	102.	102.	101.	101.	100.	100.	99.	98.	98.
70.1	105.	106.	107.	108.	108.	108.	108.	107.	107.	106.	106.	106.	105.	105.	105.	104.	104.	103.	103.	102.	102.	101.	101.	100.	100.
70.5	106.	107.	108.	109.	109.	109.	109.	108.	108.	107.	107.	107.	106.	106.	106.	105.	105.	105.	104.	104.	103.	103.	102.	102.	101.
70.9	107.	108.	109.	110.	110.	110.	110.	109.	109.	109.	108.	108.	107.	107.	107.	106.	106.	106.	105.	105.	104.	104.	104.	103.	103.
71.3	108.	109.	110.	111.	111.	111.	111.	110.	110.	110.	109.	109.	109.	108.	108.	108.	107.	107.	107.	106.	106.	105.	105.	105.	104.
71.7	109.	110.	111.	112.	112.	112.	112.	111.	111.	111.	110.	110.	110.	109.	109.	109.	108.	108.	108.	107.	107.	107.	106.	106.	106.
72.0	110.	111.	113.	113.	113.	113.	113.	112.	112.	112.	111.	111.	111.	110.	110.	110.	109.	109.	109.	108.	108.	108.	107.	107.	107.
72.4	112.	113.	114.	114.	114.	114.	114.	113.	113.	113.	112.	112.	112.	111.	111.	111.	110.	110.	110.	109.	109.	109.	108.	108.	108.
72.8	113.	114.	115.	115.	115.	115.	115.	114.	114.	114.	113.	113.	113.	112.	112.	112.	111.	111.	111.	110.	110.	110.	109.	109.	109.
73.2	114.	115.	116.	116.	116.	116.	116.	115.	115.	115.	114.	114.	114.	113.	113.	113.	112.	112.	112.	111.	111.	111.	110.	110.	110.
73.6	115.	116.	117.	117.	117.	117.	117.	116.	116.	116.	115.	115.	115.	114.	114.	114.	113.	113.	113.	112.	112.	112.	111.	111.	111.
74.0	116.	117.	118.	118.	118.	118.	118.	117.	117.	117.	116.	116.	116.	115.	115.	115.	114.	114.	114.	113.	113.	113.	112.	112.	112.
74.4	117.	118.	119.	119.	119.	119.	119.	118.	118.	118.	117.	117.	117.	116.	116.	116.	115.	115.	115.	114.	114.	114.	113.	113.	113.
74.8	118.	119.	120.	120.	120.	120.	120.	119.	119.	119.	118.	118.	118.	117.	117.	117.	116.	116.	116.	115.	115.	115.	114.	114.	114.
75.2	119.	120.	121.	121.	121.	121.	121.	120.	120.	120.	119.	119.	119.	118.	118.	118.	117.	117.	117.	116.	116.	116.	115.	115.	115.
75.6	120.	121.	122.	122.	122.	122.	122.	121.	121.	121.	120.	120.	120.	119.	119.	119.	118.	118.	118.	117.	117.	117.	116.	116.	116.
76.0	121.	123.	123.	123.	123.	123.	123.	122.	122.	122.	121.	121.	121.	120.	120.	120.	119.	119.	119.	118.	118.	118.	117.	117.	117.
76.4	123.	124.	124.	124.	124.	124.	124.	123.	123.	123.	122.	122.	122.	121.	121.	121.	120.	120.	120.	119.	119.	119.	118.	118.	118.
76.8	124.	125.	125.	125.	125.	125.	125.	124.	124.	124.	123.	123.	123.	122.	122.	122.	121.	121.	121.	120.	120.	120.	119.	119.	119.
77.2	125.	126.	126.	126.	126.	126.	126.	125.	125.	125.	124.	124.	124.	123.	123.	123.	122.	122.	122.	121.	121.	121.	120.	120.	120.
77.6	126.	127.	127.	127.	127.	127.	127.	126.	126.	126.	125.	125.	125.	124.	124.	124.	123.	123.	123.	122.	122.	122.	121.	121.	121.
78.0	127.	128.	128.	128.	128.	128.	128.	127.	127.	127.	126.	126.	126.	125.	125.	125.	124.	124.	124.	123.	123.	123.	122.	122.	122.
78.4	128.	129.	130.	130.	130.	130.	130.	129.	129.	129.	128.	128.	127.	127.	127.	126.	126.	126.	125.	125.	125.	124.	124.	123.	123.
78.8	130.	131.	131.	131.	131.	131.	131.	130.	130.	130.	129.	129.	129.	128.	128.	128.	127.	127.	127.	126.	126.	126.	125.	125.	124.
79.1	131.	132.	132.	132.	132.	132.	132.	131.	131.	131.	130.	130.	130.	130.	129.	129.	128.	128.	128.	127.	127.	127.	126.	126.	125.
79.5	132.	133.	134.	134.	134.	134.	134.	133.	133.	132.	132.	132.	131.	131.	131.	130.	130.	130.	129.	129.	128.	128.	128.	127.	126.
79.9	134.	135.	135.	135.	135.	135.	135.	134.	134.	134.	133.	133.	133.	132.	132.	132.	131.	131.	131.	130.	130.	129.	129.	128.	128.
80.3	135.	136.	137.	137.	137.	136.	136.	136.	135.	135.	135.	134.	134.	134.	133.	133.	132.	132.	132.	131.	131.	131.	130.	130.	129.
80.7	137.	138.	138.	138.	138.	138.	137.	137.	137.	136.	136.	136.	135.	135.	135.	134.	134.	133.	133.	133.	132.	132.	131.	131.	130.
81.1	138.	139.	140.	140.	140.	139.	139.	139.	138.	138.	137.	137.	137.	136.	136.	135.	135.	135.	134.	134.	133.	133.	132.	132.	131.
81.5	139.	140.	141.	141.	141.	141.	140.	140.	139.	139.	139.	138.	138.	137.	137.	136.	136.	135.	135.	134.	134.	133.	133.	132.	132.
81.9	140.	141.	142.	142.	142.	142.	141.	141.	140.	140.	139.	139.	139.	138.	138.	137.	137.	136.	136.	135.	135.	134.	134.	133.	133.
82.3	141.	142.	143.	143.	143.	143.	142.	142.	141.	141.	140.	140.	139.	139.	138.	138.	137.	137.	136.	136.	135.	135.	134.	134.	133.
82.7	142.	143.	144.	144.	144.	144.	143.	143.	142.	142.	141.	140.	140.	139.	139.	138.	138.	137.	137.	136.	136.	135.	135.	134.	134.



APPENDIX C TO PART 718—BLOOD-GAS TABLES

The following tables set forth the values to be applied in determining whether total disability may be established in accordance with §§718.204(c)(2) and 718.305 (a), (c). The values contained in the tables are indicative of impairment only. They do not establish a degree of disability except as provided in §§718.204(c)(2) and 718.305 (a), (c) of this subchapter, nor do they establish standards for determining normal alveolar gas exchange values for any particular individual.

A miner who meets the following medical specifications shall be found to be totally disabled, in the absence of rebutting evidence, if the values specified in one of the following tables are met:

(1) For arterial blood-gas studies performed at test sites up to 2,999 feet above sea level:

Arterial $_pCO_2$ (mm Hg)	Arterial $_pO_2$ equal to or less than (mm Hg)
25 or below	75
26	74
27	73
28	72
29	71
30	70
31	69
32	68
33	67
34	66
35	65
36	64
37	63
38	62
39	61
40–49	60
Above 50	(1)

[1] Any value.

(2) For arterial blood-gas studies performed at test sites 3,000 to 5,999 feet above sea level:

Arterial $_pCO_2$ (mm Hg)	Arterial $_pO_2$ equal to or less than (mm Hg)
25 or below	70
26	69
27	68
28	67
29	66
30	65
31	64
32	63
33	62
34	61
35	60
36	59
37	58
38	57
39	56
40–49	55
Above 50	(2)

[2] Any value.

(3) For arterial blood-gas studies performed at test sites 6,000 feet or more above sea level:

Arterial $_pCO_2$ (mm Hg)	Arterial $_pO_2$ equal to or less than (mm Hg)
25 or below	65
26	64
27	63
28	62
29	61
30	60
31	59
32	58
33	57
34	56
35	55
36	54
37	53
38	52
39	51
40–49	50
Above 50	(3)

[3] Any value.

PART 722—CRITERIA FOR DETERMINING WHETHER STATE WORKMEN'S COMPENSATION LAWS PROVIDE ADEQUATE COVERAGE FOR PNEUMOCONIOSIS AND LISTING OF APPROVED STATE LAWS

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AUTHORITY: 5 U.S.C. 301, Reorganization Plan No. 6 of 1950, 15 FR 3174, 30 U.S.C. 901 et seq., 902(f), 925, 932, 934, 936, 945; 33 U.S.C. 901 et seq., Secretary's Order 7–87, 52 FR 48466, Employment Standards Order No. 90–02.

SOURCE: 38 FR 8328, Mar. 30, 1973, unless otherwise noted.

INTRODUCTORY

§ 722.101 Purpose and scope of this part.

Section 421 of part C of title IV of the Federal Coal Mine Health and Safety Act, as amended, provides that on and after January 1, 1974, any claim for benefits for death or total disability due to pneumoconiosis shall be filed pursuant to the applicable State workmen's compensation law, except that during any period when miners or their eligible surviving dependents are not covered by a State workmen's compensation law which provides adequate coverage for pneumoconiosis, such persons shall be entitled to claim benefits under section 422 and related provisions of part C of title IV of such Act. Section 421(b)(1) in part C of title IV of the Federal Coal Mine Health and Safety Act, as amended, provides that a State workmen's compensation law shall not be deemed to provide adequate coverage for pneumoconiosis during any period unless it is included in the list of State laws (see § 722.152) found by the Secretary of Labor to provide adequate coverage for pneumoconiosis during such period. Section 421(b)(2) of such Act provides that no State workmen's compensation law shall be included on such list during any period unless such law is consistent with each of the criteria mandated by paragraphs A through E of section 421(b)(2) of the Act, as amended, and that there are certain other provisions, regulations, or interpretations which are consistent with the Longshoremen's and Harbor Workers' Compensation Act, as amended (44 Stat. 1424, 86 Stat. 1251, 33 U.S.C. 901 et seq.), as described in this part. This part 722 is designed to assure that any State law which appears on the list herein described shall provide appropriate claimants with adequate benefits for total disability or death due to pneumoconiosis. The purpose of this part is to describe the procedures by which the Secretary shall determine whether any State workmen's compensation law does, in fact, provide adequate coverage for death or disability due to pneumoconiosis and further describes with particularity the standards and criteria to be applied by the Secretary in making such determination.

§ 722.102 Definitions and use of terms.

(a) For purposes of this part except where the content clearly indicates otherwise, the following definitions apply:

(1) *Act* means title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 795 (30 U.S.C. 901 et seq.), as amended by Pub. L. 92–302, 86 Stat. 156, the Black Lung Benefits Act of 1972.

(2) *Longshoremen's Act* means the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, 86 Stat. 1251 (33 U.S.C. 901 et seq.)), as amended by Pub. L. 92–576, 86 Stat. 1251.

(3) *Social Security Act* means the Social Security Act (49 Stat. 620 (42 U.S.C. 301 et seq.)), as amended from time to time.

(4) *Department* means the Department of Labor.

(5) *Secretary* means the Secretary of Labor or a person authorized by him to perform his functions under section 421 of the Act.

(6) *State* includes a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands.

(7) *Workmen's compensation law* means the law or laws of a State providing for payment of compensation by employers to employees (and their dependents or survivors) for injury including occupational disease, or death suffered in connection with the employment.

(8) *State agency* means, with respect to any State, the agency, department, or officer designated by the workmen's compensation law of the State to administer such law. In any case in which more than one agency participates in the administration of a State workmen's compensation law, the Governor may designate which of such agencies shall be the State agency for purposes of this part.

(9) *The Secretary's list* means the list published by the Secretary of Labor in the FEDERAL REGISTER (see §722.152) containing the names of those States which have in effect a workmen's compensation law which provides adequate coverage for death or total disability due to pneumoconiosis.

(10) *Pneumoconiosis* means coal workers' pneumoconiosis as defined in section 402(b) of the Act.

(b) Masculine gender includes the feminine, and the singular includes the plural.

(c) No definition contained in this part shall be deemed to derogate from the meaning of any term defined in the Act or any term elsewhere defined in this subchapter B with respect thereto.

PROCEDURE FOR DETERMINING WHETHER A STATE LAW PROVIDES ADEQUATE COVERAGE FOR PNEUMOCONIOSIS

§722.103 Application to the Secretary.

The Governor of any State or any duly authorized State agency may, at any time after the effective date of this revised part 722, request that the Secretary include such State's workmen's compensation law on his list of those State workmen's compensation laws providing adequate coverage for total disability and death due to pneumoconiosis.

§722.104 Contents of application, supporting documents.

Each request that a State be included on the Secretary's list shall be in writing and shall be accompanied by the following documents and information:

(a) A copy of the State workmen's compensation law and any other pertinent State laws;

(b) A copy of any regulations either proposed or promulgated in final form with respect to the administration of the State law or laws submitted;

(c) A copy of any administrative or court decision interpreting State laws or regulations so as to bring such laws or regulations in compliance with the standards set forth in this part. If such decisions are published and reported in official or privately published reporter systems or in some other readily available case reporter, it shall be permissible to refer to such decision by its appropriate citation in such case reporter; and

(d) Each request shall be accompanied by a written analysis completed by a duly authorized State official describing by citation, explanation, or with reference to the decisional law of the State, the appropriate provision or provisions of such State's workmen's compensation law which bring it in compliance with each standard prescribed in this part 722.

§722.105 Initial action on the request.

Upon receipt by the Secretary of a request that a State be included on the Secretary's list, action shall be taken

to review such request. Each State law submitted shall be reviewed in light of the specific standards and criteria set forth below.

CRITERIA: STANDARDS OF COVERAGE, ELIGIBILITY

§ 722.110 Coverage generally.

The following §§ 722.111–722.114 describe the individuals who are eligible to claim benefits for total disability or death due to pneumoconiosis under the Act. In order that a State workmen's compensation law be deemed by the Secretary to provide adequate coverage for total disability or death due to pneumoconiosis, such State law shall insure that such individuals shall be entitled to receive benefits under conditions in accordance with those described below.

§ 722.111 Miner.

(a) An individual shall be entitled to receive benefits for total disability due to pneumoconiosis if he is a miner as defined in this section and if such individual is totally disabled due to pneumoconiosis (see §§ 722.117–722.120).

(b) Such individual shall be entitled to receive benefits until his death or until such disability ceases.

(c) For purposes of this part an individual is a miner if he is or was employed in a coal mine.

(d) For purposes of this part, ''Coal mine'' means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from the work of extracting in such area bituminous coal, lignite, or anthracite, from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

(e) Any State workmen's compensation law which does not separately define miner or coal miner shall be deemed adequate for purposes of this section if such law contains a definition or use of the terms employee, worker, or any other related term which is sufficiently broad to encompass all individuals contemplated by the term miner as defined in this section.

§ 722.112 Widow, surviving divorced wife.

(a) An individual shall be entitled to claim for and receive benefits as the widow or surviving divorced wife of a deceased miner if:

(1) Such individual is not married and is the ''widow'' of such miner as defined in section 402(e) of the Act; and

(2) Such miner's death or total disability at time of death was due to pneumoconiosis (which, for purposes of the Act, includes any death of a miner who was totally disabled by pneumoconiosis or was receiving benefits for such disability at the time of his death).

(b) A widow or surviving divorced wife shall be entitled to receive benefits until she remarries, or dies, or her entitlement otherwise ceases.

§ 722.113 Child.

(a) An individual shall be entitled to claim for and receive benefits if:

(1) Such individual is a child, as defined in section 402(g) of the Act (including a stepchild) of a deceased miner or of the widow of a miner; and if

(2) Such individual was dependent upon the deceased miner or widow for his support; and if

(3) Such deceased parent,

(i) If a miner, was receiving pneumoconiosis benefits at the time of his death, or his death was due to pneumoconiosis, or at the time of his death was totally disabled by pneumoconiosis; or

(ii) If a widow, was receiving pneumoconiosis benefits at the time of her death.

(b) A child or stepchild shall be entitled to receive benefits until one of the following events first occurs:

(1) The child dies;

(2) The child marries;

(3) The child attains age 18, unless

(i) He is a ''full time'' student as defined in section 202(a)(7) of the Social Security Act, or a ''student'' as defined in section 8101(7) of title 5, United States Code, in which case such child's

or stepchild's eligibility is extended until he reaches age 23; or unless

(ii) He is under a disability as defined in section 223(d) of the Social Security Act and such disability began before he attained age 18 (see 202(d)(1)(B)(ii) of the Social Security Act).

(c) A child or stepchild is not entitled to claim benefits for any month for which a widow of a miner establishes entitlement to benefits.

§ 722.114 Parents, brothers, or sisters.

(a) An individual shall be entitled to claim for and receive benefits if:

(1) Such individual is the parent, brother, or sister of a deceased miner; and if

(2) Such individual, for not less than 1 year prior to the miner's death, was living in the same household as the miner and was totally dependent on the miner for support; and if

(3) The deceased miner was entitled to benefits at the time of his death, or his death is determined to have been due to pneumoconiosis, or at the time of his death was totally disabled by pneumoconiosis; and,

(4) In the case of a parent, if the deceased miner was not survived by a widow or child at the time of his death; and,

(5) In the case of a brother or sister, if the deceased miner was not survived by a widow, child or parent at the time of his death; and,

(6) In the case of a brother, he also is under 18 years of age unless he is a full-time student or under a disability as described in § 722.113(b)(3) in which case his eligibility shall be extended as is appropriate.

(b) No benefits to a sister or brother shall be payable for any month beginning with the month in which he or she receives support from his or her spouse, or marries.

(c) The individuals described in this section shall be eligible to claim for or receive benefits until such time as the requirements for eligibility cease.

CRITERIA: CLAIMS FOR BENEFITS

§ 722.115 Claims generally.

In order to assure that a State workmen's compensation law will provide adequate coverage for total disability or death due to pneumoconiosis, such law shall contain or shall be implemented by available rules and regulations which establish a comprehensive and viable scheme for the filing and processing of claims. If filing and processing procedures in any State are substantially informal, such State shall include in its application to be included on the Secretary's list, a full description of such State's filing and processing procedures, copies of any material disseminated to individuals to assist them in pursuing a claim, and a full description, including exemplary cases, of the time periods required by such State to fully process such claims. No State workmen's compensation law shall be included on the Secretary's list if it appears that any class of claimants shall be subject to inordinate delays, unnecessarily protracted proceedings, unnecessarily difficult requirements of proof, or other unwarranted difficulties in the pursuit of a claim.

§ 722.116 Time limitations on filing claims.

(a) No State workmen's compensation law shall be deemed to provide adequate coverage for total disability or death due to pneumoconiosis unless the determination of claims filed pursuant to it shall be permitted:

(1) In the case of claims for disability benefits, if filed within 3 years of the date of the discovery of total disability due to pneumoconiosis; or

(2) In the case of claims for death benefits, if filed within 3 years of the date of such death;

(3) And in the case of any claim for benefits predicated upon the presumption contained in section 411(c)(4) of part B of title IV of the Act (see § 722.119);

(i) If in the case of total disability due to pneumoconiosis it is filed within 3 years from the date of last exposed employment in a coal mine; or

(ii) If in the case of death from a respiratory or pulmonary impairment for which benefits would be payable under section 411(c)(4) of the Act, incurred as a result of employment in a coal mine, it is filed within 15 years from the date of last exposed employment in a coal mine.

(b) Any State workmen's compensation law which provides longer periods for filing a claim subsequent to the events specified in this section shall be deemed to have met the requirements described herein. Any State workmen's compensation law which provides shorter time limitations on filing a claim, or which commences the period for filing a claim beginning with an event which is more restrictive than those specified in this section, shall be deemed not to have met the requirements of this section.

CRITERIA: MEDICAL STANDARDS FOR DETERMINING WHETHER MINER'S TOTAL DISABILITY OR DEATH WAS DUE TO PNEUMOCONIOSIS

§ 722.117 Medical criteria—generally.

Section 402(f) of the Act authorizes the Secretary of Health, Education, and Welfare to establish and promulgate standards and medical criteria for determining whether a miner is totally disabled due to pneumoconiosis, whether a miner's death was due to pneumoconiosis, and whether a miner was totally disabled by pneumoconiosis at the time of his death. Section 421(b)(2)(C) of the Act requires that in order for a State to be included on the Secretary's list, such State must promulgate standards for determining death or total disability due to pneumoconiosis which are substantially equivalent to those promulgated by the Secretary of Health, Education, and Welfare (see 20 CFR part 410, subpart D) and adopted pursuant to sections 415(a) and 422(c) of the Act by the Secretary of Labor in respect of claims filed subsequent to June 30, 1973 (see 20 CFR part 718). Therefore, no State shall be included on the Secretary's list if it does not by statute or published formal rules and regulations provide standards which are substantially equivalent to or less restrictive than those standards published by the Secretary of Health, Education, and Welfare in subpart D of 20 CFR part 410 as amended on September 30, 1972 (37 FR 20641–20645).

§ 722.118 Medical evidence.

No State workmen's compensation law shall be included on the Secretary's list unless such law or regulations promulgated thereunder provide that no claim shall be denied solely on the basis of a chest roentgenogram and, that in determining the validity of claims all evidence shall be considered, including, where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence pertaining to future employability, evidence submitted by a miner's physician, or a miner's wife's affidavits, and in the case of a deceased miner, autopsy, biopsy, or other appropriate affidavits of persons with knowledge of the miner's physical condition, and any other supportive materials.

§ 722.119 Medical presumptions.

Section 411(c) of part B of title IV of the Act establishes a series of presumptions which shall be available to claimants for purposes of determining whether a miner's death or total disability was due to pneumoconiosis. No State workmen's compensation law shall be included on the Secretary's list if it does not provide or if regulations promulgated pursuant to such State law do not make available to claimants presumptions which are equivalent to or less restrictive than those presumptions contained in section 411(c) of the Act as set forth below:

(a) If a miner who is suffering or suffered from pneumoconiosis was employed for 10 years or more in one or more coal mines, there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment;

(b) If a deceased miner was employed for 10 years or more in one or more coal mines and died from a respirable disease, there shall be a rebuttable presumption that his death was due to pneumoconiosis;

(c) If a miner is suffering or suffered from a chronic dust disease of the lung which (1) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (2) when

diagnosed by biopsy or autopsy, yields massive lesions in the lungs, or (3) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in paragraph (c) (1) or (2) of this section if diagnosis had been made in the manner prescribed in paragraph (c) (1) or (2) of this section, then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be; and

(d) If a miner was employed for 15 years or more before July 1, 1971, in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, his widow's, his child's, his parent's, his brother's, his sister's, or his dependent's claim and it is interpreted as negative with respect to the requirements of paragraph (c) of this section, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. In the case of a living miner, a wife's affidavit may not be used by itself to establish the presumption. A State shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where it determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine. Such presumption may be rebutted only by establishing that (1) such miner does not, or did not, have pneumoconiosis, or that (2) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

§ 722.120 Total disability determination.

The Act requires that benefits be paid for total disability of a miner if pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time. No State workmen's compensation law shall be included on the Secretary's list if such law prohibits a finding that a miner is totally disabled solely on the basis of his ability to engage in gainful noncoal mine related employment, except that in cases where a miner engaged in noncoal mine related employment utilizes skills comparable to those required in his coal mine employment, it may be found that such miner is not entitled to benefits for total disability due to pneumoconiosis.

§ 722.121 Cause of death.

Section 421 of the Act requires the Secretary to find, before including a State workmen's compensation law in his listing of laws which provide adequate coverage for pneumoconiosis, that such law assures payment of benefits for total disability or death of a miner, determined under standards substantially equivalent to those established under part B of title IV of the Act, in all cases where either such total disability or such death was due to pneumoconiosis. Accordingly, in the case of death benefits, such benefits must be paid whether the miner's death or his total disability at the time of death was due to pneumoconiosis. Thus, sections 401 and 430 of the Act require that benefits be paid (a) for death due to pneumoconiosis and (b) for death due to any cause if the miner was totally disabled by pneumoconiosis at the time of his death. No State workmen's compensation law shall be included on the Secretary's list unless it contains a provision or provisions equivalent to those described in this section.

CRITERIA: ADMINISTRATIVE STANDARDS

§ 722.122 Administrative standards—generally.

In order to insure that each claimant for pneumoconiosis benefits under a State workmen's compensation law be afforded full due process of law, including notice and opportunity to be heard

on all matters materially affecting such claimant's claim, no State workmen's compensation law shall be included on the Secretary's list unless it provides, or regulations promulgated pursuant to such law provide (a) that a claimant in a contested case shall have a right to a full adversary hearing to resolve contested issues of fact or law, (b) that a claimant shall be notified of and shall have a means of legal recourse by right in the event that any adverse action is taken in respect of his claim, and (c) that a claimant shall in appropriate cases be entitled to have his claim finally adjudicated by an appellate court of the State.

§ 722.123 Cessation of payment of benefits.

No State workmen's compensation law shall be included on the Secretary's list unless such law provides, or regulations promulgated pursuant to such law provide, that in the event the payment of benefits to any beneficiary is terminated or suspended for any reason, such beneficiary shall be given prior notice thereof and shall have an opportunity to be heard in a formal proceeding before an appropriate adjudication officer of the State in respect of such suspension or termination, and that such investigations, including medical examination, shall be undertaken as will properly protect the rights of all parties.

§ 722.124 Regulation of fees for legal services.

Unrestricted fees for legal services incurred by a claimant in the pursuit of a claim undermine the intent of Congress expressed in the enactment of title IV of the Act. Section 28 (33 U.S.C. 928) of the Longshoremen's Act, as incorporated by section 422(a) of the Act, requires the Secretary to exercise reasonable control over professional fees for services incurred by a claimant in the pursuit of a claim. Accordingly, no State workmen's compensation law shall be included on the Secretary's list if such law permits unrestricted or unreasonable fees for services rendered in the pursuit of a claim to be charged to a claimant.

CRITERIA: GUARANTEE OF BENEFITS TO ELIGIBLE INDIVIDUALS

§ 722.126 Guarantee of benefits—generally.

It is the intent of the Act to insure that every eligible individual who has proven his entitlement to benefits for total disability or death due to pneumoconiosis shall be guaranteed such benefits whether or not there is in existence an employer, coal mine operator, or insurance carrier who is or may be adjudicated liable for the payment of such benefits. No State workmen's compensation law shall be included on the Secretary's list unless such law explicitly provides that every claimant who is, based upon the medical evidence and the evidence of such claimant's identity as a miner or eligible relation or dependent, entitled to receive benefits for total disability or death due to pneumoconiosis shall be paid such benefits either by a responsible coal mine operator or employer or such operator or employer's insurance carrier, or by the State from its general revenue or whatever funds are available for such purposes. A State must bear the ultimate liability for the payment of benefits to an entitled individual in all cases where no other source of benefits is available to such claimant.

§ 722.127 Voluntary and elective compensation systems.

A State workmen's compensation law may be included on the Secretary's list, notwithstanding the fact that such law permits voluntary or elective participation by an employer or coal mine operator in any program to insure the payment of benefits for total disability or death due to pneumoconiosis: *Provided,* That there is in effect in such State an alternative system to guarantee that all benefits including medical benefits shall be paid.

§ 722.128 Responsible coal mine operators.

Sections 421 and 422 of part C of title IV as well as the legislative history of the Act, indicate that Congress intended the coal mine operators in the several States to bear as fully as possible the liability for the payment of

pneumoconiosis benefits. In accordance with this intent Congress in section 421(b)(2)(E) of the Act has required that no State workmen's compensation law shall be included on the Secretary's list, unless such law provides that a coal mine operator who acquired his or its mine or substantially all of the assets thereof from a person (hereinafter referred to in this section as a ''prior operator'') who was an operator of such mine on or after December 30, 1969, shall be liable for and shall secure the payment of all benefits which would have been payable by the prior operator with respect to miners previously employed in such mine if the acquisition had not occurred and the prior operator had continued to operate such mine, and further that such prior operator shall not be relieved of his or its liability for the payment of pneumoconiosis benefits in the event that his successor to such mine is for any reason unable to discharge his liability (see section 422(i) of the Act).

§ 722.129 Insurance, self insurance.

(a) A State workmen's compensation law may, in appropriate circumstances, be excluded from the Secretary's list if such law permits coal mine operators or employers to obtain commercial contracts of insurance to guarantee the payment of pneumoconiosis benefits and such State law does not require (1) that such commercial insurer be authorized under the laws of the State to insure workmen's compensation, and (2) that each such commercial contract of insurance contain a provision that insolvency or bankruptcy of the insured or discharge therein (or both) shall not relieve the insurance carrier from liability for all current and future payments of benefits due an entitled individual.

(b) A State workmen's compensation law may, in the discretion of the Secretary, be excluded from the Secretary's list if it is apparent that self-insurance arrangements permitted under such State law in general are not sufficient to insure the uninterrupted payment of benefits to an entitled individual.

(c) Contribution or apportionment of liability among insurers and/or self-insurers, if so provided for by a State workmen's compensation law, shall not be a basis for exclusion of such law from the Secretary's list.

(d) This section shall not be construed to require that a State workmen's compensation law guarantee the payment of pneumoconiosis benefits by means of commercial insurance or self-insurance programs.

§ 722.130 State protections of benefits.

No State workmen's compensation law shall be included on the Secretary's list, unless such State law establishes and provides a means of obtaining revenues to insure that pneumoconiosis benefits shall be paid to entitled individuals for whom no other source of benefits is available.

§ 722.131 Contributions by miners.

No State workmen's compensation law shall be included on the Secretary's list if such law permits or requires miners to provide funds for the payment of insurance premiums, the support for a self-insurance fund, or the support for any State fund established for the purpose of insuring the payment of pneumoconiosis benefits.

§ 722.132 Waiver of right to benefits.

No State workmen's compensation shall be included on the Secretary's list if such law permits a miner or other prospective claimant to by any means waive, in whole or in part, such individual's rights to receive full benefits for total disability or death due to pneumoconiosis. However, under appropriate circumstances, a waiver may be permitted in respect of the liability of any individual coal mine operator or employer if such State workmen's compensation law contains a provision or provisions which otherwise insure that benefits shall be available to be paid to such claimant from some other approved source.

§ 722.133 Retroactive coverage required.

No State workmen's compensation law shall be included on the Secretary's list if such law prohibits the filing of or does not provide for benefits in respect of an otherwise timely (see § 722.116) and valid claim solely on the grounds that the miner on whose total

disability or death the claim is predicated was not employed in a coal mine in such State on the effective date of such State's law.

§ 722.134 Residency requirements.

No State workmen's compensation law shall be included on the Secretary's list if such law requires that the claimant be domiciled in or a resident of such State at the time the claim is filed. This section shall not be construed to prohibit a State from refusing to process a claim for benefits in any case in which the miner on whose total disability or death a claim is predicated, was not exposed for a reasonable period of time in such State.

CRITERIA: AMOUNT OF BENEFITS: MEDICAL BENEFITS

§ 722.135 Amount of benefits, computation.

(a) Section 412(a) of the Act sets forth the amount of benefits for total disability or death due to pneumoconiosis to which an individual shall be entitled, the extent of such entitlement and persons so entitled. No State workmen's compensation law shall be included on the Secretary's list if it does not, in every case, provide benefit amounts which are substantially equivalent to or greater than those amounts to which an eligible individual would be entitled under section 412(a).

(b) No State workmen's compensation law which arbitrarily limits the total amount of benefits to which an eligible individual may be entitled over such individual's lifetime shall be included on the Secretary's list.

(c) No State workmen's compensation law which subsequent to the effective date of this part 722 is amended to reduce the amount of benefits to which an eligible individual is entitled for total disability or death due to pneumoconiosis shall be included on the Secretary's list.

§ 722.136 Augmented benefits.

As set forth in section 412(a) of the Act the amount of benefits to which a beneficiary is entitled may be augmented by up to 100 percent based upon the number of persons (wife, children, parents, brothers, sisters) dependent upon such beneficiary for support. No State workmen's compensation law shall be excluded from the Secretary's list because it does not contain similar augmentation provisions if such law otherwise insures that beneficiaries and their dependents shall receive benefits substantially equivalent to or greater than the amounts such persons would receive under section 412(a) of the Act.

§ 722.137 Minimum benefit amounts.

No State workmen's compensation law shall be included on the Secretary's list if it does not guarantee that the minimum amount of benefits payable to any beneficiary or dependent shall be substantially equivalent to or greater than the amount to which such beneficiary or dependent would be entitled if the claim were paid under section 412(a) of the Act, notwithstanding any provision contained in the State workmen's compensation law which requires the computation of benefit amounts based upon the miner's average weekly or monthly wage.

§ 722.138 Offsets for Federal benefits prohibited.

No State's workmen's compensation law shall be included on the Secretary's list if such law requires that pneumoconiosis benefits payable to any individual shall be offset by any amount to which such individual is or may be entitled on account of total disability or death due to pneumoconiosis under any law of the United States.

§ 722.139 Lump sum awards; settlement.

No State workmen's compensation law shall be excluded from the Secretary's list solely on the grounds that such law permits lump sum awards, or commutation or settlement of claims or awards: *Provided,* That (a) such lump sum award or commutation or settlement is approved by an appropriate State agency; (b) such lump sum award, commutation, or settlement is equal to the present value of future benefits payments commuted, computed at no less than 4 percent true discount compounded annually; (c) accepted and reliable tables of probabilities are used for the purpose of

computing the present value of future benefits payments commuted and (d) no lump sum award, commutation, or settlement, shall be construed to deprive a miner of his right to future medical benefits or services under such State law.

§ 722.140 Protection of benefits.

No State workmen's compensation law shall be included on the Secretary's list unless such State law contains a provision or provisions:

(a) Which declare invalid any assignment or release of benefits or future benefits payable;

(b) Which exempt all current and future benefits from all claims of creditors, and from levy, execution, attachment, garnishment, or any other remedy for recovery or collection of a debt, which exemption may not be waived; and

(c) Which insure that any person entitled to benefits for total disability or death due to pneumoconiosis shall have a lien against the assets of the responsible insurance carrier or coal mine operator for such benefits without limit of amount, and shall, upon insolvency, bankruptcy, or reorganization in bankruptcy proceedings of the insurer or operator, or both, be entitled to preference and priority in the distribution of the assets of such insurer or operator, or both. This paragraph shall not be construed to require the creation of a statutory lien against the assets of any State fund.

§ 722.141 Payment periods.

No State workmen's compensation law shall be included on the Secretary's list unless such law provides that compensation payable on account of total disability or death due to pneumoconiosis shall be paid not less frequently than once each month.

§ 722.142 Prompt payment of benefits.

No State workmen's compensation law shall be included on the Secretary's list unless such law provides some means such as judicial enforcement whereby an eligible claimant shall have effective recourse to insure that benefits due such claimant are paid fully and promptly.

§ 722.143 Medical benefits.

(a) Section 422(a) of the Act by incorporating section 7(a) of the Longshoremen's Act (33 U.S.C. 907(a)) requires that medical services and supplies be furnished to a miner totally disabled by pneumoconiosis. No State law shall be included on the Secretary's list unless such State law guarantees that every miner who is totally disabled due to pneumoconiosis shall be furnished, at no cost to the miner, with such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the disability may require.

(b) No State law shall be included on the Secretary's list if such law places arbitrary time or dollar limitations on a totally disabled miner's entitlement to the medical benefits described in this section.

§ 722.144 Medical examinations, reexaminations.

No State workmen's compensation law shall be included on the Secretary's list unless such State law provides that medical examinations or reexaminations conducted in respect of a claim at the request or order of an insurance carrier, coal mine operator, employer, or State agency shall be conducted at the expense of the insurance carrier, coal mine operator, employer, or State agency as the case may be. In no event shall the cost of such examination or re-examination be chargeable to the claimant.

§ 722.145 Vocational rehabilitation.

(a) Section 422(a) of the Act, by incorporating section 39 of the Longshoremen's and Harbor Workers' Compensation Act requires the Secretary to arrange for and direct the vocational rehabilitation of miners totally disabled for work in or around a coal mine. No State workmen's compensation law shall be included on the Secretary's list unless such State law makes available to miners totally disabled for such work such vocational rehabilitation facilities as are provided by the State under its workmen's compensation programs to disabled employees in general.

(b) No State workmen's compensation law shall be included on the Secretary's list if the use of vocational rehabilitation facilities in such State would result in a partial or total loss of benefits to such miner.

ACTION BY THE SECRETARY

§ 722.146 Standards for review of a State workmen's compensation law.

(a) The standards for determining whether a State workmen's compensation law provides adequate coverage for total disability or death due to pneumoconiosis as set forth in this part are mandatory, in that compliance therewith is prerequisite to inclusion of any such law on the Secretary's list. Such standards have been determined to be the minimum requirements that a State workmen's compensation law must meet in order that the intent of section 421 of the Act be carried out. After review of the information submitted by a State pursuant to § 722.104 and any other information made available to the Department of Labor, the Secretary shall determine whether a State workmen's compensation law meets all of such requirements.

(b) Notwithstanding any other provision of this part, if it is shown, despite the language contained in a State workmen's compensation law, that because of judicial or administrative decision, or duly promulgated rules and regulations, or common practice in the State, such law does not provide adequate coverage for total disability or death due to pneumoconiosis, such law shall be excluded from the Secretary's list.

(c) Notwithstanding any other provision of this part, if it is found that any provision contained in a State's workmen's compensation laws or general laws serves or would be likely to serve to diminish the coverage available in such State for total disability or death due to pneumoconiosis, such State's workmen's compensation law may be excluded from the Secretary's list.

§ 722.147 Action subsequent to review.

(a) If it is found that a State workmen's compensation law during any period provides adequate coverage for total disability or death due to pneumoconiosis, such law shall be included for such period on the Secretary's list to be published in the FEDERAL REGISTER and set forth in § 722.152 pursuant to section 421(b)(1) of the Act. The appropriate State agency shall be notified of the Secretary's action.

(b) If it is found that a State workmen's compensation law submitted for consideration pursuant to § 722.103 does not provide adequate coverage for total disability or death due to pneumoconiosis during any period, the appropriate State agency shall be notified of such decision and, if such law has previously been on the Secretary's list, of the fact that the decision requires deletion of such law from the list during such period. Such notice shall contain a brief statement of reasons enumerating the provision or provisions of the State's law which are unacceptable.

(c) In the event of a denial of a request that a State workmen's compensation law be included on the Secretary's list, or of a decision to delete a previously listed law from the list, the appropriate State agency shall have the right to request the Secretary to reconsider his action. Such request shall be accompanied by a brief or memorandum in support thereof.

§ 722.148 Provisional approval.

The Secretary may, in his discretion, provisionally approve a State's request that its workmen's compensation law be included on the Secretary's list pending the final promulgation of rules and regulations or the effective date of certain amendments to the State's law. Notice of such provisional approval shall be given to the appropriate State agency, but such State's workmen's compensation law shall not be published on the Secretary's list in the FEDERAL REGISTER until such regulations or amendments are effective.

§ 722.149 Judicial review.

The action by the Secretary in including or failing to include any State workmen's compensation law on the Secretary's list shall be subject to judicial review exclusively in the U.S. Court of Appeals for the circuit in which the State is located or in the U.S. Court of Appeals for the District

of Columbia (see section 421(b)(2)(f) of the Act).

§ 722.150 Reports.

The Secretary shall from time to time require that each State which has been included on the Secretary's list submit reports, data, or other information to the Secretary concerning the administration and operation of the State's workmen's compensation law with respect to total disability or death due to pneumoconiosis.

§ 722.151 Removal from the Secretary's list.

At any time after a State's workmen's compensation law has been included on the Secretary's list such State's law may be removed from the list if it appears that under such law adequate coverage for total disability or death due to pneumoconiosis is not being provided. Such removal action shall be taken only after notice and an opportunity to be heard has been afforded such State. In the event a State's workmen's compensation law is removed from the Secretary's list the consequences of such removal on claims for pneumoconiosis benefits filed in that State shall be determined by the Secretary.

§ 722.152 The Secretary's list.

(a) In order to provide a ready reference source for any person interested in knowing at any given time which, if any, States' laws met the currently applicable criteria for approval, it has been determined that provision should be made for listing such States in the Code of Federal Regulations. Accordingly, the Secretary's list of those States having in effect a workmen's compensation law which provides adequate coverage for total disability or death due to pneumoconiosis, as published in the FEDERAL REGISTER pursuant to section 421(b)(1) of the Act, appears in paragraph (b) of this section. When first published on September 7, 1972 (37 FR 18076; see also 37 FR 21429), as provided by the Act, the document listed no such State because there was no State workmen's compensation law which had been found to provide adequate coverage for total disability or death due to pneumoconiosis. The Secretary's list shall be republished in the FEDERAL REGISTER with amendments from time to time as is necessary.

(b) The Secretary, upon examination of State workmen's compensation laws pursuant to the provisions of section 421 of the Federal Coal Mine Health and Safety Act of 1969, as amended, and §§ 722.101—722.151, has found that the workmen's compensation law of each of the following listed States, for the period from the date shown in the list until such date as the Secretary may make a contrary determination, provides adequate coverage for pneumoconiosis:

State	*Period commencing*
None	

PART 725—CLAIMS FOR BENEFITS UNDER PART C OF TITLE IV OF THE FEDERAL MINE SAFETY AND HEALTH ACT, AS AMENDED

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AUTHORITY: 5 U.S.C. 301, Reorganization Plan No. 6 of 1950, 15 FR 3174, 30 U.S.C. 901 et seq., 902(f), 925, 932, 934, 936, 945; 33 U.S.C. 901 et seq., Secretary's Order 7–87, 52 FR 48466, Employment Standards Order No. 90–02.

SOURCE: 43 FR 36772, Aug. 18, 1978, unless otherwise noted.

Subpart A—General

§ 725.1 Statutory provisions.

(a) *General.* Title IV of the Federal Mine Safety and Health Act of 1977, as amended by the Black Lung Benefits Reform Act of 1977, the Black Lung Benefits Revenue Act of 1977, the Black Lung Benefits Revenue Act of 1981 and the Black Lung Benefits Amendments of 1981, provides for the payment of benefits to a coal miner who is totally disabled due to pneumoconiosis (black lung disease) and to certain survivors of a miner who dies due to pneumoconiosis. For claims filed prior to January 1, 1982, certain survivors could receive benefits if the miner was totally (or for claims filed prior to June 30, 1982, in accordance with section 411(c)(5) of the Act, partially) disabled due to pneumoconiosis, or if the miner died due to pneumoconiosis.

(b) *Part B.* Part B of title IV of the Act provided that all claims filed between December 30, 1969, and June 30, 1973, are to be filed with, processed, and paid by the Secretary of Health, Education, and Welfare through the Social Security Administration; claims filed by the survivor of a miner before January 1, 1974, or within 6 months of the miner's death if death occurred before January 1, 1974, and claims filed by the survivor of a miner who was receiving benefits under part B of title IV of the Act at the time of death, if filed within 6 months of the miner's death, are also adjudicated and paid by the Social Security Administration.

(c) *Section 415.* Claims filed by a miner between July 1 and December 31, 1973, are adjudicated and paid under section 415. Section 415 provides that a claim filed between the appropriate dates shall be filed with and adjudicated by the Secretary of Labor under certain incorporated provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901 et seq.). A claim approved under section 415 is paid under part B of title IV of the Act for periods of eligibility occurring between July 1 and December 31, 1973, by the Secretary of Labor and for periods of eligibility thereafter, is paid by a coal mine operator which is determined liable for the claim or the Black Lung Disability Trust Fund if no operator is identified or if the miner's last coal mine employment terminated prior to January 1, 1970. An operator which may be found liable for a section 415 claim is notified of the claim and allowed to participate fully in the adjudication of such claim. A claim filed under section 415 is for all purposes considered as if it were a part C claim (see paragraph (d) of this section) and the provisions of part C of title IV of the Act are fully applicable to a section 415 claim except as is otherwise provided in section 415.

(d) *Part C.* Claims filed by a miner or survivor on or after January 1, 1974, are filed, adjudicated, and paid under the provisions of part C of title IV of the Act. Part C requires that a claim filed on or after January 1, 1974, shall be filed under an applicable approved State workers' compensation law, or if no such law has been approved by the Secretary of Labor, the claim may be filed with the Secretary of Labor under section 422 of the Act. Claims filed with the Secretary of Labor under part C are processed and adjudicated by the Secretary and paid by a coal mine operator. If the miner's last coal mine employment terminated before January 1, 1970, or if no responsible operator can be identified, benefits are paid by the Black Lung Disability Trust Fund. Claims adjudicated under part C are

subject to certain incorporated provisions of the Longshoremen's and Harbor Workers' Compensation Act.

(e) *Section 435.* Section 435 of the Act affords each person who filed a claim for benefits under part B, section 415, or part C, and whose claim had been denied or was still pending as of March 1, 1978, the effective date of the Black Lung Benefits Reform Act of 1977, the right to have his or her claim reviewed on the basis of the 1977 amendments to the Act, and under certain circumstances to submit new evidence in support of the claim.

(f) *Changes made by the Black Lung Benefits Reform Act of 1977.* In addition to those changes which are reflected in paragraphs (a)–(e) of this section, the Black Lung Benefits Reform Act of 1977 contains a number of significant amendments to the Act's standards for determining eligibility for benefits. Among these are:

(1) A provision which clarifies the definition of ''pneumoconiosis'' to include any ''chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment'';

(2) A provision which defines ''miner'' to include any person who works or has worked in or around a coal mine or coal preparation facility, and in coal mine construction or coal transportation under certain circumstances;

(3) A provision which limits the denial of a claim solely on the basis of employment in a coal mine;

(4) A provision which authorizes the Secretary of Labor to establish standards and develop criteria for determining total disability or death due to pneumoconiosis with respect to a part C claim;

(5) A new presumption which requires the payment of benefits to the survivors of a miner who was employed for 25 or more years in the mines under certain conditions;

(6) Provisions relating to the treatment to be accorded a survivor's affidavit, certain X-ray interpretations, and certain autopsy reports in the development of a claim; and

(7) Other clarifying, procedural, and technical amendments.

(g) *Changes made by the the Black Lung Benefits Revenue Act of 1977.* The Black Lung Benefits Revenue Act of 1977 established the Black Lung Disability Trust Fund which is financed by a specified tax imposed upon each ton of coal (except lignite) produced and sold or used in the United States after March 31, 1978. The Secretary of the Treasury is the managing trustee of the fund and benefits are paid from the fund upon the direction of the Secretary of Labor. The fund was made liable for the payment of all claims approved under section 415, part C and section 435 of the Act for all periods of eligibility occurring on or after January 1, 1974, with respect to claims where the miner's last coal mine employment terminated before January 1, 1970, or where individual liability can not be assessed against a coal mine operator due to bankruptcy, insolvency, or the like. The fund was also authorized to pay certain claims which a responsible operator has refused to pay within a reasonable time, and to seek reimbursement from such operator. The purpose of the Fund and the Black Lung Benefits Revenue Act of 1977 was to insure that coal mine operators, or the coal industry, will fully bear the cost of black lung disease for the present time and in the future. The Black Lung Benefits Revenue Act of 1977 also contained other provisions relating to the fund and authorized a coal mine operator to establish its own trust fund for the payment of certain claims.

(h) *Changes made by the Black Lung Benefits Amendments of 1981.* In addition to the change reflected in paragraph (a) of this section, the Black Lung Benefits Amendments of 1981 made a number of significant changes in the Act's standards for determining eligibility for benefits and concerning the payment of such benefits. The following changes are all applicable to claims filed on or after January 1, 1982:

(1) The Secretary of Labor may reread any X-ray submitted in support of a claim and may rely upon a second opinion concerning such an X-ray as a means of auditing the validity of the claim;

(2) The rebuttable presumption that the death of a miner with ten or more years employment in the coal mines, who died of a respirable disease, was

due to pneumoconiosis is no longer applicable;

(3) The rebuttable presumption that the total disability of a miner with fifteen or more years employment in the coal mines, who has demonstrated a totally disabling respiratory or pulmonary impairment, is due to pneumoconiosis is no longer applicable;

(4) In the case of deceased miners, where no medical or other relevant evidence is available, only affidavits from persons not eligible to receive benefits as a result of the adjudication of the claim will be considered sufficient to establish entitlement to benefits;

(5) Unless the miner was found entitled to benefits as a result of a claim filed prior to January 1, 1982, benefits are payable on survivors' claims filed on and after January 1, 1982, only when the miner's death was due to pneumoconiosis;

(6) Benefits payable under this part are subject to an offset on account of excess earnings by the miner; and

(7) Other technical amendments.

(i) *Changes made by the Black Lung Benefits Revenue Act of 1981.* The Black Lung Benefits Revenue Act of 1981 temporarily doubles the amount of the tax upon coal until the Trust Fund shall have repaid all advances received from the United States Treasury and the interest on all such advances. The Fund is also made liable for the payment of certain claims previously denied under the 1972 version of the Act and subsequently approved under section 435 and for the reimbursement of operators and insurers for benefits previously paid by them on such claims. With respect to claims filed on or after January 1, 1982, the Fund's authorization for the payment of interim benefits is limited to the payment of prospective benefits only. These changes also define the rates of interest to be paid to and by the Fund.

(j) *Longshoremen's Act provisions.* The adjudication of claims filed under sections 415, 422 and 435 of the Act is governed by various procedural and other provisions contained in the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended from time to time, which are incorporated within the Act by sections 415 and 422. The incorporated LHWCA provisions are applicable under the Act except as is otherwise provided by the Act or as provided by regulations of the Secretary. Although occupational disease benefits are also payable under the LHWCA, the primary focus of the procedures set forth in that Act is upon a time definite of traumatic injury or death. Because of this and other significant differences between a black lung and longshore claim, it is determined, in accordance with the authority set forth in section 422 of the Act, that certain of the incorporated procedures prescribed by the LHWCA must be altered to fit the circumstances ordinarily confronted in the adjudication of a black lung claim. The changes made are based upon the Department's experience in processing black lung claims since July 1, 1973, and all such changes are specified in this part or part 727 of this subchapter. No other departure from the incorporated provisions of the LHWCA is intended.

[43 FR 36772, Aug. 18, 1978, as amended at 48 FR 24289, May 31, 1983]

§ 725.2 Purpose and applicability of this part.

(a) It is the purpose of this part to set forth the procedures to be followed and standards to be applied in the filing, processing, adjudication, and payment of claims filed under part C of title IV of the Act.

(b) This part is applicable to all claims filed under part C of title IV of the Act on or after the effective date of this part and shall also be applicable to claims pending on the effective date of this part as provided in part 727 of this subchapter. This part is applicable to claims considered under section 435 of the Act and part 727 of this subchapter.

§ 725.3 Contents of this part.

(a) This subpart describes the statutory provisions which relate to claims considered under this part, the purpose and scope of this part, definitions and usages of terms applicable to this part, and matters relating to the availability of information collected by the Department of Labor in connection with the processing of claims.

(b) Subpart B contains criteria for determining who may be found entitled to benefits under this part and other

provisions relating to the conditions and duration of eligibility of a particular individual.

(c) Subpart C describes the procedures to be followed and action to be taken in connection with the filing of a claim under this part.

(d) Subpart D of this part sets forth the duties and powers of the persons designated by the Secretary of Labor to adjudicate claims, provisions relating to the rights of parties and representatives of parties, and the procedure to be followed in the informal processing and adjudication of a claim under this part.

(e) Subpart E describes the procedures to be followed if a hearing is required with respect to a claim.

(f) Subpart F contains provisions governing the identification of a coal mine operator which may be liable for the payment of a claim under this part.

(g) Subpart G contains provisions governing the payment of benefits with respect to an approved claim.

(h) Subpart H describes the statutory mechanisms provided for the enforcement of a coal mine operator's liability, sets forth the penalties which may be applied in the case of a defaulting coal mine operator, and describes the obligation of coal operators and their insurance carriers to file certain reports.

(i) Subpart I describes the right of certain beneficiaries to receive medical treatment benefits and vocational rehabilitation under the Act.

§ 725.4 Applicability of other parts in this title.

(a) *Part 718.* Part 718 of this subchapter, which contains the criteria and standards to be applied in determining whether a miner is or was totally disabled due to pneumoconiosis, or whether a miner died due to pneumoconiosis, shall be applicable to the determination of claims under this part. Claims filed after March 31, 1980, are subject to the revised part 718 as promulgated by the Secretary in accordance with section 402(f)(1) of the Act on February 29, 1980. The criteria contained in subpart C of part 727 of this subchapter are applicable in determining claims filed prior to April 1, 1980, under this part, and such criteria shall be applicable at all times with respect to claims filed under this part and under section 11 of the Black Lung Benefits Reform Act of 1977.

(b) *Parts 715, 717, and 720.* Parts 715, 717, and 720 of this subchapter, which established the procedures for the filing, processing, and payment of claims filed under section 415 of the Act, are repealed and pertinent provisions of these parts which retain significance are incorporated within this part as appropriate.

(c) *Part 726.* Part 726 of this subchapter, which sets forth the obligations imposed upon a coal operator to insure or self-insure its liability for the payment of benefits to certain eligible claimants, is applicable to this part as appropriate.

(d) *Part 727.* Part 727 of this subchapter, which governs the review, adjudication and payment of pending and denied claims under section 435 of the Act, is applicable to this part as provided in such part 727. The criteria contained in subpart C of part 727 for determining a claimant's eligibility for benefits shall be applicable under this part with respect to all claims filed before April 1, 1980, and to all claims filed under this part and under section 11 of the Black Lung Benefits Reform Act of 1977.

(e) *Part 410.* Part 410 of this title, which sets forth provisions relating to a claim for black lung benefits under part B of title IV of the Act, is inapplicable to this part except as is provided in this part, or in part 718 of this subchapter.

[43 FR 36772, Aug. 18, 1978, as amended at 48 FR 24290, May 31, 1983]

§ 725.101 Definitions and use of terms.

(a) *Definitions.* For purposes of this subchapter, except where the content clearly indicates otherwise, the following definitions apply:

(1) The *Act* means the Federal Coal Mine Health and Safety Act, Pub. L. 91–173, 83 Stat. 742, 30 U.S.C. 801–960, as amended by the Black Lung Benefits Act of 1972, the Mine Safety and Health Act of 1977, the Black Lung Benefits Reform Act of 1977, the Black Lung Benefits Revenue Act of 1977, the Black Lung Benefits Revenue Act of 1981, and

the Black Lung Benefits Amendments of 1981.

(2) The *Longshoremen's Act* or *LHWCA* means the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, c. 509, 44 Stat. 1424, 33 U.S.C. 901–950, as amended from time to time.

(3) The *Social Security Act* means the Social Security Act, Act of August 14, 1935, c. 531, 49 Stat. 620, 42 U.S.C. 301–431, as amended from time to time.

(4) A *workers' compensation law* means a law providing for payment of benefits to employees, and their dependents and survivors, for disability on account of injury, including occupational disease, or death, suffered in connection with their employment.

(5) *State* includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, and prior to January 3, 1959, and August 21, 1959, respectively, the territories of Alaska and Hawaii.

(6) *Department* means the United States Department of Labor.

(7) *Secretary* means the Secretary of Labor, United States Department of Labor, or a person, authorized by him or her to perform his or her functions under title IV of the Act.

(8) *Office* or *OWCP* means the Office of Workers' Compensation Programs, United States Department of Labor.

(9) *Director* means the Director, OWCP, or his or her designee.

(10) *Division* or *DCMWC* means the Division of Coal Mine Workers' Compensation in the OWCP, United States Department of Labor.

(11) *District Director* means a person appointed as provided in sections 39 and 40 of the LHWCA, or his or her designee, who is authorized to develop and adjudicate claims as provided in this subchapter (see § 725.350). These regulations substitute this term for the term Deputy Commissioner which is used in the statute. This substitution is for administrative purposes only and in no way affects the power or authority of the position as established in the statute.

(12) *Office of Administrative Law Judges* means the Office of Administrative Law Judges, U.S. Department of Labor.

(13) *Chief Administrative Law Judge* means the Chief Administrative Law Judge of the Office of Administrative Law Judges, U.S. Department of Labor, 800 K Street, NW., suite 400, Washington, DC 20001-8002.

(14) *Administrative law judge* means a person qualified under 5 U.S.C. 3105 to conduct hearings and adjudicate claims for benefits filed pursuant to section 415 and part C of the Act. Until March 1, 1979, it shall also mean an individual appointed to conduct such hearings and adjudicate such claims under Pub. L. 94–504.

(15) *Benefits Review Board* or *Board* means the Benefits Review Board, U.S. Department of Labor, an appellate tribunal appointed by the Secretary of Labor pursuant to the provisions of section 21(b)(1) of the LHWCA. See parts 801, 802 of this title.

(16) *Claim* means a written assertion of entitlement to benefits under section 415 or part C of title IV of the Act, submitted in a form and manner authorized by the provisions of this subchapter.

(17) *Claimant* means an individual who files a claim for benefits under this part.

(18) *Benefits* means all money or other benefits paid or payable under section 415 or part C of title IV of the Act on account of disability or death due to pneumoconiosis.

(19) *Beneficiary* means a miner or any surviving spouse, divorced spouse, child, parent, brother or sister, who is entitled to benefits under either section 415 or part C of title IV of the Act.

(20) *Pneumoconiosis* means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment (see part 718 of this subchapter).

(21) *Total disability* and *partial disability*, for purposes of this part, have the meaning given them as provided in part 718 of this subchapter.

(22) *The Nation's coal mines* means all coal mines located in any State.

(23) *Coal mine* means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, placed upon, under or above the surface of such land

by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite or anthracite from its natural deposits in the earth by any means or method, and in the work of preparing the coal so extracted, and includes custom coal preparation facilities.

(24) *Underground coal mine* means a coal mine in which the earth and other materials which lie above and around the natural deposit of coal (i.e., overburden) are not removed in mining; including all land, structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, appurtenant thereto.

(25) *Coal preparation* means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal, lignite or anthracite, and such other work of preparing coal as is usually done by the operator of a coal mine.

(26) *Miner* or *coal miner* means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. The term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment (see § 725.202(a)).

(27) *Operator* means any owner, lessee, or other person who operates, controls or supervises a coal mine, including a prior or successor operator as defined in section 422 of the Act and certain transportation and construction employers (see subpart F of this part).

(28) *Responsible operator* means an operator which has been determined to be liable for the payment of benefits to a claimant for periods of eligibility after December 31, 1973, with respect to a claim filed under section 415 or part C of title IV of the Act or reviewed under section 435 of the Act.

(29) *Person* means an individual, partnership, association, corporation, firm, subsidiary or parent of a corporation, or other organization or business entity.

(30) *Insurer* or *carrier* means any private company, corporation, mutual association, reciprocal or interinsurance exchange, or any other person or fund, including any State fund, authorized under the laws of a State to insure employers' liability under workers' compensation laws. The term also includes the Secretary of Labor in the exercise of his or her authority under section 433 of the Act.

(31) *Black Lung Disability Trust Fund* or the *Fund* means the Black Lung Disability Trust Fund established by the Black Lung Benefits Revenue Act of 1977, as amended by the Black Lung Benefits Revenue Act of 1981, for the payment of certain claims adjudicated under this part (see subpart G of this part).

(b) *Statutory terms.* The definitions contained in this section shall not be construed in derogation of terms of the Act.

(c) *Dependents and survivors.* Dependents and survivors are those persons described in subpart B of this part.

[43 FR 36772, Aug. 18, 1978, as amended at 48 FR 24290, May 31, 1983; 55 FR 28606, July 12, 1990, 56 FR 54708, Oct. 22, 1991]

§ 725.102 Disclosure of program information.

(a) All reports, records, or other documents filed with the OWCP with respect to claims are the records of the OWCP. The Director or his or her designee shall be the official custodian of those records maintained by the OWCP at its national office. The Deputy Commissioner shall be the official custodian of those records maintained at a district office.

(b) The official custodian of any record sought to be inspected shall permit or deny inspection in accordance with the Department of Labor's regulations pertaining thereto (see 29 CFR part 70). The original record in any such case shall not be removed from the Office of the custodian for such inspection. The custodian may, in his or her discretion, deny inspection of any record or part thereof which is of a character specified in 5 U.S.C. 552(b) if in his or her opinion such inspection may result in damage, harm, or harassment to the beneficiary or to any other

person. For special provisions concerning release of information regarding injured employees undergoing vocational rehabilitation, see § 702.508, of this title.

(c) Any person may request copies of records he or she has been permitted to inspect. Such requests shall be addressed to the official custodian of the records sought to be copied. The official custodian shall provide the requested copies under the terms and conditions specified in the Department of Labor's regulations relating thereto (see 29 CFR part 70).

(d) Any party to a claim (§ 725.360) or his or her duly authorized representative shall be permitted upon request to inspect the file which has been compiled in connection with such claim. Any party to a claim or representative of such party shall upon request be provided with a copy of any or all material contained in such claim file. A request for information by a party or representative made under this paragraph shall be answered within a reasonable time after receipt by the Office. Internal documents prepared by the deputy commissioner which do not constitute evidence of a fact which must be established in connection with a claim shall not be routinely provided or presented for inspection in accordance with a request made under this paragraph.

[43 FR 36772, Aug. 18, 1978, as amended at 48 FR 24290, May 31, 1983]

Subpart B—Persons Entitled to Benefits, Conditions, and Duration of Entitlement

§ 725.201 Who is entitled to benefits; contents of this subpart.

(a) Section 415 and part C of the Act provide for the payment of periodic benefits in accordance with this part to:

(1) A miner (see § 725.202) who is determined to be totally disabled due to pneumoconiosis; or

(2) The surviving spouse or surviving divorced spouse or, where neither exists, the child of a deceased miner, where the deceased miner;

(i) Was receiving benefits under section 415 or part C of title IV of the Act as a result of a claim filed prior to January 1, 1982; or

(ii) Is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death, or to have died due to pneumoconiosis. Survivors of miners whose claims are filed on or after January 1, 1982, must establish that the deceased miner's death was due to pneumoconiosis in order to establish their entitlement to benefits, except where entitlement is established under § 718.306 of part 718 on a survivor's claim filed prior to June 30, 1982, or;

(3) The child of a miner's surviving spouse who was receiving benefits under section 415 or part C of title IV of the Act at the time of such spouse's death; or

(4) The surviving dependent parents, where there is no surviving spouse or child, or the surviving dependent brothers or sisters, where there is no surviving spouse, child, or parent, of a miner, where the deceased miner;

(i) Was receiving benefits under section 415 or part C of title IV of the Act as a result of a claim filed prior to January 1, 1982; or

(ii) Is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death, or to have died due to pneumoconiosis. Survivors of miners whose claims are filed on or after January 1, 1982, must establish that the deceased miner's death was due to pneumoconiosis in order to establish their entitlement to benefits, except where entitlement is established under § 718.306 of part 718 on a survivor's claim filed prior to June 30, 1982.

(b) Section 411(c)(5) of the Act provides for the payment of benefits to the eligible survivors of a miner employed for 25 or more years in the mines prior to June 30, 1971, if the miner's death occurred on or before March 1, 1978, and if the claim was filed prior to June 30, 1982, unless it is established that at the time of death, the miner was not totally or partially disabled due to pneumoconiosis. For the purposes of this part the term ''total disability'' shall mean partial disability with respect to

a claim for which eligibility is established under section 411(c)(5) of the Act. See § 718.306 of part 718 which implements this provision of the Act.

(c) The provisions contained in this subpart describe the conditions of entitlement to benefits applicable to a miner, or a surviving spouse, child, parent, brother, or sister, and the events which establish or terminate entitlement to benefits.

(d) In order for an entitled miner or surviving spouse to qualify for augmented benefits because of one or more dependents, such dependents must meet relationship and dependency requirements with respect to such beneficiary prescribed by or pursuant to the Act. Such requirements are also set forth in this subpart.

[43 FR 36772, Aug. 18, 1978, as amended at 48 FR 24290, May 31, 1983]

CONDITIONS AND DURATION OF ENTITLEMENT

§ 725.202 Miner defined; condition of entitlement, miner.

(a) *Miner defined.* A ''miner'' for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. A coal mine construction or transportation worker shall be considered a miner to the extent such individual is or was exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. In the case of an individual employed in coal transportation or coal mine construction, there shall be a rebuttable presumption that such individual was exposed to coal mine dust during all periods of such employment occurring in or around a coal mine or coal preparation facility for purposes of:

(1) Determining whether such individual is or was a miner; (2) establishing the applicability of any of the presumptions described in section 411(c) of the Act and part 718 of this subchapter; and (3) determining the identity of a coal mine operator liable for the payment of benefits in accordance with § 725.493. The presumption may be rebutted by evidence which demonstrates:

(i) That the individual was not regularly exposed to coal mine dust during his or her employment in or around a coal mine or preparation facility; or (ii) that the individual was not regularly employed in or around a coal mine or coal preparation facility. An individual employed by a coal mine operator, regardless of the nature of such individual's employment, shall be considered a miner unless such individual was not employed in or around a coal mine or coal preparation facility.

A person who is or was a self-employed miner or independent contractor, and who otherwise meets the requirements of this paragraph, shall be considered a miner for the purposes of this part (see § 725.494).

(b) *Conditions of entitlement; miner.* An individual is eligible for benefits under this subchapter if the individual:

(1) Is a miner as defined in this section; and

(2) Is totally disabled due to pneumoconiosis (see part 718 of this subchapter; see also § 725.503A); and

(3) Has filed a claim for benefits in accordance with the provisions of this part.

§ 725.203 Duration of entitlement; miner.

(a) An individual is entitled to benefits as a miner for each month beginning with the first month in which all of the conditions for entitlement prescribed in § 725.202 are satisfied.

(b) The last month for which such individual is entitled to benefits is the month before the month during which either of the following events first occurs:

(1) The miner dies; or

(2) The miner's total disability ceases (see § 725.503A).

BENEFITS ON ACCOUNT OF LIVING DEPENDENTS (AUGMENTED BENEFITS)

§ 725.204 Determination of relationship; spouse.

For the purpose of augmenting benefits, an individual will be considered to be the spouse of a miner if:

(a) The courts of the State in which the miner is domiciled would find that such individual and the miner validly married; or

(b) The courts of the State in which the miner is domiciled would find, under the law they would apply in determining the devolution of the miner's intestate personal property, that the individual is the miner's spouse; or

(c) Under State law, such individual would have the right of a spouse to share in the miner's intestate personal property; or

(d)(1) Such individual went through a marriage ceremony with the miner resulting in a purported marriage between them and which, but for a legal impediment, would have been a valid marriage, unless the individual entered into the purported marriage with knowledge that it was not a valid marriage, or if such individual and the miner were not living in the same household in the month in which a request is filed that the miner's benefits be augmented because such individual qualifies as the miner's spouse. The provisions of this paragraph shall not apply, however, if the miner's benefits are or have been augmented under §725.520(c) because another person qualifies or has qualified as the miner's spouse and such other person is, or is considered to be, the spouse of such miner under paragraph (a), (b), or (c) of this section at the time such request is filed.

(2) The qualification of an individual for augmentation purposes under this paragraph shall end with the month before the month in which:

(i) The Office determines that the benefits of the miner should be augmented on account of another person, if such other person is (or is considered to be) the spouse of the miner under paragraph (a), (b), or (c) of this section, or

(ii) If the individual who previously qualified as a spouse for purposes of §725.520(c), entered into a valid marriage without regard to this paragraph, with a person other than the miner.

§725.205 Determination of dependency; spouse.

For the purposes of augmenting benefits, an individual who is the miner's spouse (see §725.204) will be determined to be dependent upon the miner if:

(a) The individual is a member of the same household as the miner (see §725.232); or

(b) The individual is receiving regular contributions from the miner for support (see §725.233(c)); or

(c) The miner has been ordered by a court to contribute to such individual's support (see §725.233(e)); or

(d) The individual is the natural parent of the son or daughter of the miner; or

(e) The individual was married to the miner (see §725.204) for a period of not less than 1 year.

[43 FR 36772, Aug. 18, 1978, as amended at 48 FR 24290, May 31, 1983]

§725.206 Determination of relationship; divorced spouse.

For the purposes of augmenting benefits with respect to any claim considered or reviewed under this part or part 727 of this subchapter, an individual will be considered to be the divorced spouse of a miner if the individual's marriage to the miner has been terminated by a final divorce on or after the 10th anniversary of the marriage unless, if such individual was married to and divorced from the miner more than once, such individual was married to the miner in each calendar year of the period beginning 10 years immediately before the date on which any divorce became final.

§725.207 Determination of dependency; divorced spouse.

For the purpose of augmenting benefits, an individual who is the miner's divorced spouse (§725.206) will be determined to be dependent upon the miner if:

(a) The individual is receiving at least one-half of his or her support from the miner (see §725.233(g)); or

(b) The individual is receiving substantial contributions from the miner pursuant to a written agreement (see §725.233 (c), (f)); or

(c) A court order requires the miner to furnish substantial contributions to the individual's support (see §725.233 (c), (e)).

[43 FR 36772, Aug. 18, 1978, as amended at 48 FR 24290, May 31, 1983]

§ 725.208 Determination of relationship; child.

As used in this section, the term ''beneficiary'' means only a surviving spouse entitled to benefits at the time of death (see § 725.212), or a miner. An individual will be considered to be the child of a beneficiary if:

(a) The courts of the State in which the beneficiary is domiciled (see § 725.231) would find, under the law they would apply, that the individual is the beneficiary's child; or

(b) The individual is the legally adopted child of such beneficiary; or

(c) The individual is the stepchild of such beneficiary by reason of a valid marriage of the individual's parent or adopting parent to such beneficiary; or

(d) The individual does not bear the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section, but would, under State law, have the same right as a child to share in the beneficiary's intestate personal property; or

(e) The individual is the natural son or daughter of a beneficiary but is not a child under paragraph (a), (b), or (c) of this section, and is not considered to be the child of the beneficiary under paragraph (d) of this section if the beneficiary and the mother or the father, as the case may be, of the individual went through a marriage ceremony resulting in a purported marriage between them which but for a legal impediment (see § 725.230) would have been a valid marriage; or

(f) The individual is the natural son or daughter of a beneficiary but is not a child under paragraph (a), (b), or (c) of this section, and is not considered to be the child of the beneficiary under paragraph (d) or (e) of this section, such individual shall nevertheless be considered to be the child of the beneficiary if:

(1) The beneficiary, prior to his or her entitlement to benefits, has acknowledged in writing that the individual is his or her son or daughter, or has been decreed by a court to be the parent of the individual, or has been ordered by a court to contribute to the support of the individual (see § 725.233(e)) because the individual is his or her son or daughter; or

(2) Such beneficiary is shown by satisfactory evidence to be the father or mother of the individual and was living with or contributing to the support of the individual at the time the beneficiary became entitled to benefits.

[43 FR 36772, Aug. 18, 1978, as amended at 48 FR 24290, May 31, 1983]

§ 725.209 Determination of dependency; child.

(a) For purposes of augmenting the benefits of a miner or surviving spouse, the term ''beneficiary'' as used in this section means only a miner or surviving spouse entitled to benefits (see § 725.202 and § 725.212). An individual who is the beneficiary's child (§ 725.208) will be determined to be, or to have been dependent on the beneficiary, if the child:

(1) Is unmarried; and

(2)(i) Is under 18 years of age; or

(ii) Is 18 years of age or older and is under a disability as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d); or

(iii) Is 18 years of age or older and is a student.

(b)(1) The term ''student'' means a ''full-time student'' as defined in section 202(d)(7) of the Social Security Act, 42 U.S.C. 402(d)(7) (see § 404.320(c) of this title), or an individual under 23 years of age who has not completed 4 years of education beyond the high school level and who is regularly pursuing a full-time course of study or training at an institution which is:

(i) A school, college, or university operated or directly supported by the United States, or by a State or local government or political subdivision thereof; or

(ii) A school, college, or university which has been accredited by a State or by a State-recognized or nationally-recognized accrediting agency or body; or

(iii) A school, college, or university not so accredited but whose credits are accepted, on transfer, by at least three institutions which are so accredited; or

(iv) A technical, trade, vocational, business, or professional school accredited or licensed by the Federal or a State government or any political subdivision thereof, providing courses of not less than 3 months' duration that

prepare the student for a livelihood in a trade, industry, vocation, or profession.

(2) A student will be considered to be ''pursuing a full-time course of study or training at an institution'' if the student is enrolled in a noncorrespondence course of at least 13 weeks duration and is carrying a subject load which is considered full-time for day students under the institution's standards and practices. A student beginning or ending a full-time course of study or training in part of any month will be considered to be pursuing such course for the entire month.

(3) A child is considered not to have ceased to be a student:

(i) During any interim between school years, if the interim does not exceed 4 months and the child shows to the satisfaction of the office that he or she has a bona fide intention of continuing to pursue a full-time course of study or training; or

(ii) During periods of reasonable duration in which, in the judgment of the office, the child is prevented by factors beyond the child's control from pursuing his or her education.

(4) A student whose 23d birthday occurs during a semester or other enrollment period in which such student is pursuing a full-time course of study or training shall continue to be considered a student until the end of such period, unless eligibility is otherwise terminated.

§ 725.210 Duration of augmented benefits.

Augmented benefits payable on behalf of a spouse or divorced spouse, or a child, shall begin with the first month in which the dependent satisfies the conditions of relationship and dependency set forth in this subpart. Augmentation of benefits on account of a dependent continues through the month before the month in which the dependent ceases to satisfy these conditions, except in the case of a child who qualifies as a dependent because such child is a student. In the latter case, benefits continue to be augmented through the month before the first month during no part of which such child qualifies as a student.

§ 725.211 Time of determination of relationship and dependency of spouse or child for purposes of augmentation of benefits.

With respect to the spouse or child of a miner entitled to benefits, and with respect to the child of a surviving spouse entitled to benefits, the determination as to whether an individual purporting to be a spouse or child is related to or dependent upon such miner or surviving spouse shall be based on the facts and circumstances present in each case, at the appropriate time.

SURVIVORS' ENTITLEMENT

§ 725.212 Condition of entitlement; surviving spouse or surviving divorced spouse.

(a) An individual who is the surviving spouse or surviving divorced spouse of a miner is eligible for benefits if such individual:

(1) Is not married;

(2) Was dependent on the miner at the pertinent time; and

(3) The deceased miner either:

(i) Was receiving benefits under section 415 or part C of title IV of the Act at the time of death as a result of a claim filed prior to January 1, 1982; or

(ii) Is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death or to have died due to pneumoconiosis. A surviving spouse or surviving divorced spouse of a miner whose claim is filed on or after January 1, 1982, must establish that the deceased miner's death was due to pneumoconiosis in order to establish entitlement to benefits, except where entitlement is established under § 718.306 of part 718 on a claim filed prior to June 30, 1982.

(Approved by the Office of Management and Budget under control number 1215–0087)

(Pub. L. No. 96–511)

[48 FR 24291, May 31, 1983, as amended at 49 FR 18295, Apr. 30, 1984]

§ 725.213 Duration of entitlement; surviving spouse or surviving divorced spouse.

(a) An individual is entitled to benefits as a surviving spouse, or as a surviving divorced spouse, for each month beginning with the first month in

which all of the conditions of entitlement prescribed in § 725.212 are satisfied.

(b) The last month for which such individual is entitled to such benefits is the month before the month in which either of the following events first occurs:

(1) The surviving spouse or surviving divorced spouse marries; or

(2) The surviving spouse or surviving divorced spouse dies; or

(3) Where the individual qualifies as the surviving spouse of a miner under § 725.204(d), such individual ceases to qualify as provided in that paragraph.

(Approved by the Office of Management and Budget under control number 1215–0087)

(Pub. L. No. 96–511)

[43 FR 36772, Aug. 18, 1978, as amended at 48 FR 24291, May 31, 1983; 49 FR 18295, Apr. 30, 1984]

§ 725.214 Determination of relationship; surviving spouse.

An individual shall be considered to be the surviving spouse of a miner if:

(a) The courts of the State in which the miner was domiciled (see § 725.231) at the time of his or her death would find that the individual and the miner were validly married; or

(b) The courts of the State in which the miner was domiciled (see § 725.231) at the time of the miner's death would find that the individual was the miner's surviving spouse; or

(c) Under State law, such individual would have the right of the spouse to share in the miner's intestate personal property; or

(d) Such individual went through a marriage ceremony with the miner resulting in a purported marriage between them and which but for a legal impediment (see § 725.230) would have been a valid marriage, unless such individual entered into the purported marriage with knowledge that it was not a valid marriage, or if such individual and the miner were not living in the same household at the time of the miner's death. The provisions of this paragraph shall not apply if another person is or has been entitled to benefits as the surviving spouse of the miner and such other person is, or is considered to be, the surviving spouse of such miner under paragraph (a), (b), or (c) of this section at the time such individual files a claim for benefits.

(Approved by the Office of Management and Budget under control number 1215–0087)

(Pub. L. No. 96–511)

[43 FR 36772, Aug. 18, 1978, as amended at 48 FR 24291, May 31, 1983; 49 FR 18295, Apr. 30, 1984]

§ 725.215 Determination of dependency; surviving spouse.

An individual who is the miner's surviving spouse (see § 725.214) shall be determined to have been dependent on the miner if, at the time of the miner's death:

(a) The individual was living with the miner (see § 725.232); or

(b) The individual was dependent upon the miner for support or the miner has been ordered by a court to contribute to such individual's support (see § 725.233); or

(c) The individual was living apart from the miner because of the miner's desertion or other reasonable cause; or

(d) The individual is the natural parent of the miner's son or daughter; or

(e) The individual had legally adopted the miner's son or daughter while the individual was married to the miner and while such son or daughter was under the age of 18; or

(f) The individual was married to the miner at the time both of them legally adopted a child under the age of 18; or

(g) (1) The individual was married to the miner for a period of not less than 9 months immediately before the day on which the miner died, unless the miner's death:

(i) Is accidental (as defined in paragraph (g)(2) of this section), or

(ii) Occurs in line of duty while the miner is a member of a uniformed service serving on active duty (as defined in § 404.1013(f) (2) and (3) of this title), and the surviving spouse was married to the miner for a period of not less than 3 months immediately prior to the day on which such miner died.

(2) For purposes of paragraph (g) (l) (i) of this section, the death of a miner is accidental if such individual received bodily injuries solely through violent, external, and accidental means, and as a direct result of the bodily injuries and independently of all other causes, dies not later than 3 months after the

day on which such miner receives such bodily injuries. The term ''accident'' means an event that was unpremeditated and unforeseen from the standpoint of the deceased individual. To determine whether the death of an individual did, in fact, result from an accident the adjudication officer will consider all the circumstances surrounding the casualty. An intentional and voluntary suicide will not be considered to be death by accident; however, suicide by an individual who is so incompetent as to be incapable of acting intentionally and voluntarily will be considered to be a death by accident. In no event will the death of an individual resulting from violent and external causes be considered a suicide unless there is direct proof that the fatal injury was self-inflicted.

(3) The provisions of this section shall not apply if the adjudication officer determines that at the time of the marriage involved, the miner would not reasonably have been expected to live for 9 months.

(Approved by the Office of Management and Budget under control number 1215–0087)

(Pub. L. No. 96–511)

[43 FR 36772, Aug. 18, 1978, as amended at 49 FR 18295, Apr. 30, 1984]

§ 725.216 Determination of a relationship; surviving divorced spouse.

An individual will be considered to be the surviving divorced spouse of deceased miner in a claim considered under this part or reviewed under part 727 of this subchapter, if such individual's marriage to the miner had been terminated by a final divorce on or after the 10th anniversary of the marriage unless, if such individual was married to and divorced from the miner more than once, such individual was married to such miner in each calendar year of the period beginning 10 years immediately before the date on which any divorce became final and ending with the year in which the divorce became final.

(Approved by the Office of Management and Budget under control number 1215–0087)

(Pub. L. No. 96–511)

[43 FR 36772, Aug. 18, 1978, as amended at 49 FR 18295, Apr. 30, 1984]

§ 725.217 Determination of dependency; surviving divorced spouse.

(a) An individual who is the miner's surviving divorced spouse (see § 725.216) shall be determined to have been dependent on the miner if, for the month before the month in which the miner died:

(1) The individual was receiving at least one-half of his or her support from the miner (see § 725.233(g)); or

(2) The individual was receiving substantial contributions from the miner pursuant to a written agreement (see § 725.233 (e) and (f)); or

(3) A court order required the miner to furnish substantial contributions to the individual's support (see § 275.233 (c) and (e)).

(Approved by the Office of Management and Budget under control number 1215–0087)

(Pub. L. No. 96–511)

[43 FR 36772, Aug. 18, 1978, as amended at 48 FR 24291, May 31, 1983; 49 FR 18295, Apr. 30, 1984]

§ 725.218 Conditions of entitlement; child.

(a) An individual is entitled to benefits where he or she meets the required standards of relationship and dependency under this subpart (see § 725.220 and § 725.221) and is the child of a deceased miner who:

(1) Was receiving benefits under section 415 or part C of title IV of the Act as a result of a claim filed prior to January 1, 1982, or

(2) Is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death, or to have died due to pneumoconiosis. A surviving dependent child of a miner whose claim is filed on or after January 1, 1982, must establish that the miner's death was due to pneumoconiosis in order to establish entitlement to benefits, except where entitlement is established under § 718.306 of part 718 on a claim filed prior to June 30, 1982.

(b) A child is not entitled to benefits for any month for which a miner, or

the surviving spouse or surviving divorced spouse of a miner, establishes entitlement to benefits.

(Approved by the Office of Management and Budget under control number 1215–0087)

(Pub. L. No. 96–511)

[43 FR 36772, Aug. 18, 1978, as amended at 48 FR 24291, May 31, 1983; 49 FR 18295, Apr. 30, 1984]

§ 725.219 Duration of entitlement; child.

(a) An individual is entitled to benefits as a child for each month beginning with the first month in which all of the conditions of entitlement prescribed in § 725.218 are satisfied.

(b) The last month for which such individual is entitled to such benefits is the month before the month in which any one of the following events first occurs:

(1) The child dies;

(2) The child marries;

(3) The child attains age 18; and

(i) Is not under a disability at that time, and

(ii) Is not a student (as defined in § 725.209(b)) during any part of the month in which the child attains age 18;

(4) If the child's entitlement is based on his or her status as a student, the earlier of:

(i) The first month during no part of which the individual is a student; or

(ii) The month in which the individual attains age 23 and is not under a disability at that time;

(5) If a child's entitlement is based on disability, the first month in no part of which such individual is under a disability.

(c) A child whose entitlement to benefits terminated with the month before the month in which the child attained age 18, or later, may thereafter (provided such individual is not married) again become entitled to such benefits upon filing application for such reentitlement, beginning with the first month after termination of benefits in which such individual is a student and has not attained the age of 23.

(Approved by the Office of Management and Budget under control number 1215–0087)

(Pub. L. No. 96–511)

[43 FR 36772, Aug. 18, 1978, as amended at 48 FR 24291, May 31, 1983; 49 FR 18295, Apr. 30, 1984

§ 725.220 Determination of relationship; child.

For purposes of determining whether an individual may qualify for benefits as the child of a deceased miner, the provisions of § 725.208 shall be applicable. As used in this section, the term ''beneficiary'' means only a surviving spouse entitled to benefits at the time of such surviving spouse's death (see § 725.212), or a miner. For purposes of a survivor's claim, an individual will be considered to be a child of a beneficiary if:

(a) The courts of the State in which such beneficiary is domiciled (see § 725.231) would find, under the law they would apply in determining the devolution of the beneficiary's intestate personal property, that the individual is the beneficiary's child; or

(b) Such individual is the legally adopted child of such beneficiary; or

(c) Such individual is the stepchild of such beneficiary by reason of a valid marriage of such individual's parent or adopting parent to such beneficiary; or

(d) Such individual does not bear the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section, but would, under State law, have the same right as a child to share in the beneficiary's intestate personal property; or

(e) Such individual is the natural son or daughter of a beneficiary but does not bear the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section, and is not considered to be the child of the beneficiary under paragraph (d) of this section, such individual shall nevertheless be considered to be the child of such beneficiary if the beneficiary and the mother or father, as the case may be, of such individual went through a marriage ceremony resulting in a purported marriage between them which but for a legal impediment (see § 725.230) would have been a valid marriage; or

(f) Such individual is the natural son or daughter of a beneficiary but does not have the relationship of child to

such beneficiary under paragraph (a), (b), or (c) of this section, and is not considered to be the child of the beneficiary under paragraph (d) or (e) of this section, such individual shall nevertheless be considered to be the child of such beneficiary if:

(1) Such beneficiary, prior to his or her entitlement to benefits, has acknowledged in writing that the individual is his or her son or daughter, or has been decreed by a court to be the father or mother of the individual, or has been ordered by a court to contribute to the support of the individual (see § 725.233(a)) because the individual is a son or daughter; or

(2) Such beneficiary is shown by satisfactory evidence to be the father or mother of the individual and was living with or contributing to the support of the individual at the time such beneficiary became entitled to benefits.

(Approved by the Office of Management and Budget under control number 1215–0087)

(Pub. L. No. 96–511)

[43 FR 36772, Aug. 18, 1978, as amended at 48 FR 24291, May 31, 1983; 49 FR 18295, Apr. 30, 1984]

§ 725.221 Determination of dependency; child.

For the purposes of determining whether a child was dependent upon a deceased miner, the provisions of § 725.209 shall be applicable, except that for purposes of determining the eligibility of a child who is under a disability as defined in section 223(d) of the Social Security Act, such disability must have begun before the child attained age 18, or in the case of a student, before the child ceased to be a student.

(Approved by the Office of Management and Budget under control number 1215–0087)

(Pub. L. No. 96–511)

[43 FR 36772, Aug. 18, 1978, as amended at 49 FR 18295, Apr. 30, 1984]

§ 725.222 Conditions of entitlement; parent, brother, or sister.

(a) An individual is eligible for benefits as a surviving parent, brother or sister if all of the following requirements are met:

(1) The individual is the parent, brother, or sister of a deceased miner;

(2) The individual was dependent on the miner at the pertinent time;

(3) Proof of support is filed within 2 years after the miner's death, unless the time is extended for good cause (§ 725.226);

(4) In the case of a brother or sister, such individual also:

(i) Is under 18 years of age; or

(ii) Is 18 years of age or older and is under a disability as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d), which began before such individual attained age 18, or in the case of a student, before the student ceased to be a student; or

(iii) Is a student (see § 725.209(b)); or

(iv) Is under a disability as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d), at the time of the miner's death;

(5) The deceased miner:

(i) Was entitled to benefits under section 415 or part C of title IV of the Act as a result of a claim filed prior to January 1, 1982; or

(ii) Is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death or to have died due to pneumoconiosis. A surviving dependent parent, brother or sister of a miner whose claim is filed on or after January 1, 1982, must establish that the miner's death was due to pneumoconiosis in order to establish entitlement to benefits, except where entitlement is established under § 718.306 of part 718 on a claim filed prior to June 30, 1982.

(b)(1) A parent is not entitled to benefits if the deceased miner was survived by a spouse or child at the time of such miner's death.

(2) A brother or sister is not entitled to benefits if the deceased miner was survived by a spouse, child, or parent at the time of such miner's death.

(Approved by the Office of Management and Budget under control number 1215–0087)

(Pub. L. No. 96–511)

[43 FR 36772, Aug. 18, 1978, as amended at 48 FR 24291, May 31, 1983; 49 FR 18295, Apr. 30, 1984]

§ 725.223 Duration of entitlement; parent, brother, or sister.

(a) A parent, sister, or brother is entitled to benefits beginning with the

month all the conditions of entitlement described in § 725.222 are met.

(b) The last month for which such parent is entitled to benefits is the month in which the parent dies.

(c) The last month for which such brother or sister is entitled to benefits is the month before the month in which any of the following events first occurs:

(1) The individual dies;

(2)(i) The individual marries or remarries; or

(ii) If already married, the individual received support in any amount from his or her spouse;

(3) The individual attains age 18, and

(i) Is not under a disability at that time, and (ii) Is not a student (see § 725.209(b)) during any part of the month in which such individual attains age 18;

(4) If the individual's entitlement is based on his or her status as a student, the earlier of:

(i) The first month during no part of which he or she is a student; or

(ii) The month in which he or she attains age 23 and is not under a disability at that time;

(5) If the individual's entitlement is based on disability, the first month in no part of which the individual is under a disability.

(Approved by the Office of Management and Budget under control number 1215–0087)

(Pub. L. No. 96–511)

[43 FR 36772, Aug. 18, 1978, as amended at 49 FR 18295, Apr. 30, 1984]

§ 725.224 Determination of relationship; parent, brother, or sister.

(a) An individual will be considered to be the parent, brother, or sister of a miner if the courts of the State in which the miner was domiciled (see § 225.231) at the time of death would find, under the law they would apply, that the individual is the miner's parent, brother, or sister.

(b) Where, under State law, the individual is not the miner's parent, brother, or sister, but would, under State law, have the same status (i.e., right to share in the miner's intestate personal property) as a parent, brother, or sister, the individual will be considered to be the parent, brother, or sister as appropriate.

§ 725.225 Determination of dependency; parent, brother, or sister.

An individual who is the miner's parent, brother, or sister will be determined to have been dependent on the miner if, during the 1-year period immediately prior to the miner's death:

(a) The individual and the miner were living in the same household (see § 725.232); and

(b) The individual was totally dependent on the miner for support (see § 725.233(h)).

[43 FR 36772, Aug. 18, 1978, as amended at 48 FR 24291, May 31, 1983]

§ 725.226 "Good cause" for delayed filing of proof of support.

(a) *What constitutes ''good cause.''* ''Good cause'' may be found for failure to file timely proof of support where the parent, brother, or sister establishes to the satisfaction of the Office that such failure to file was due to:

(1) Circumstances beyond the individual's control, such as extended illness, mental, or physical incapacity, or communication difficulties; or

(2) Incorrect or incomplete information furnished the individual by the Office; or

(3) Efforts by the individual to secure supporting evidence without a realization that such evidence could be submitted after filing proof of support.

(b) *What does not constitute ''good cause.''* ''Good cause'' for failure to file timely proof of support (see § 725.222(a)(3)) does not exist when there is evidence of record in the Office that the individual was informed that he or she should file within the prescribed period and he or she failed to do so deliberately or through negligence.

§ 725.227 Time of determination of relationship and dependency of survivors.

The determination as to whether an individual purporting to be an entitled survivor of a miner or beneficiary was related to, or dependent upon, the miner is made after such individual files a claim for benefits as a survivor. Such determination is based on the facts and circumstances with respect

to a reasonable period of time ending with the miner's death. A prior determination that such individual was, or was not, a dependent for the purposes of augmenting the miner's benefits for a certain period, is not determinative of the issue of whether the individual is a dependent survivor of such miner.

§ 725.228 Effect of conviction of felonious and intentional homicide on entitlement to benefits.

An individual who has been convicted of the felonious and intentional homicide of a miner of other beneficiary shall not be entitled to receive any benefits payable because of the death of such miner or other beneficiary, and such person shall be considered nonexistent in determining the entitlement to benefits of other individuals.

TERMS USED IN THIS SUBPART

§ 725.229 Intestate personal property.

References in this subpart to the ''same right to share in the intestate personal property'' of a deceased miner (or surviving spouse) refer to the right of an individual to share in such distribution in the individual's own right and not the right of representation.

§ 725.230 Legal impediment.

For purposes of this subpart, ''legal impediment'' means an impediment resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution or resulting from a defect in the procedure followed in connection with the purported marriage ceremony—for example, the solemnization of a marriage only through a religious ceremony in a country which requires a civil ceremony for a valid marriage.

§ 725.231 Domicile.

(a) For purposes of this subpart, the term ''domicile'' means the place of an individual's true, fixed, and permanent home.

(b) The domicile of a deceased miner or surviving spouse is determined as of the time of death.

(c) If an individual was not domiciled in any State at the pertinent time, the law of the District of Columbia is applied.

§ 725.232 Member of the same household—"living with," "living in the same household," and "living in the miner's household," defined.

(a) *Defined.* (1) The term ''member of the same household'' as used in section 402(a)(2) of the Act (with respect to a spouse); the term ''living with'' as used in section 402(e) of the Act (with respect to a surviving spouse); and the term ''living in the same household'' as used in this subpart, means that a husband and wife were customarily living together as husband and wife in the same place.

(2) The term ''living in the miner's household'' as used in section 412(a)(5) of the Act (with respect to a parent, brother, or sister) means that the miner and such parent, brother, or sister were sharing the same residence.

(b) *Temporary absence.* The temporary absence from the same residence of either the miner, or the miner's spouse, parent, brother, or sister (as the case may be), does not preclude a finding that one was ''living with'' the other, or that they were ''members of the same household.'' The absence of one such individual from the residence in which both had customarily lived shall, in the absence of evidence to the contrary, be considered temporary:

(1) If such absence was due to service in the Armed Forces of the United States; or

(2) If the period of absence from his or her residence did not exceed 6 months and the absence was due to business or employment reasons, or because of confinement in a penal institution or in a hospital, nursing home, or other curative institution; or

(3) In any other case, if the evidence establishes that despite such absence they nevertheless reasonably expected to resume physically living together.

(c) *Relevant period of time.* (1) The determination as to whether a surviving spouse had been ''living with'' the miner shall be based upon the facts and circumstances as of the time of the death of the miner.

(2) The determination as to whether a spouse is a ''member of the same household'' as the miner shall be based upon the facts and circumstances with respect to the period or periods of time

as to which the issue of membership in the same household is material.

(3) The determination as to whether a parent, brother, or sister was ''living in the miner's household'' shall take account of the 1-year period immediately prior to the miner's death.

§ 725.233 Support and contributions.

(a) *Support* defined. The term ''support'' includes food, shelter, clothing, ordinary medical expenses, and other ordinary and customary items for the maintenance of the person supported.

(b) *Contributions* defined. The term ''contributions'' refers to contributions actually provided by the contributor from such individual's property, or the use thereof, or by the use of such individual's own credit.

(c) *Regular contributions* and *substantial contributions* defined. The terms ''regular contributions'' and ''substantial contributions'' mean contributions that are customary and sufficient to constitute a material factor in the cost of the individual's support.

(d) *Contributions and community property.* When a spouse receives and uses for his or her support income from services or property, and such income, under applicable State law, is the community property of the wife and her husband, no part of such income is a ''contribution'' by one spouse to the other's support regardless of the legal interest of the donor. However, when a spouse receives and uses for support, income from the services and the property of the other spouse and, under applicable State law, such income is community property, all of such income is considered to be a contribution by the donor to the spouse's support.

(e) *Court order for support* defined. References to a support order in this subpart means any court order, judgement, or decree of a court of competent jurisdiction which requires regular contributions that are a material factor in the cost of the individual's support and which is in effect at the applicable time. If such contributions are required by a court order, this condition is met whether or not the contributions were actually made.

(f) *Written agreement* defined. The term ''written agreement'' in the phrase ''substantial contributions pursuant to a written agreement'', as used in this subpart means an agreement signed by the miner providing for substantial contributions by the miner for the individual's support. It must be in effect at the applicable time but it need not be legally enforceable.

(g) *One-half support* defined. The term ''one-half support'' means that the miner made regular contributions, in cash or in kind, to the support of a divorced spouse at the specified time or for the specified period, and that the amount of such contributions equalled or exceeded one-half the total cost of such individual's support at such time or during such period.

(h) *Totally dependent for support* defined. The term ''totally dependent for support'' as used in § 725.225(b) means that the miner made regular contributions to the support of the miner's parents, brother, or sister, as the case may be, and that the amount of such contributions at least equalled the total cost of such individual's support.

Subpart C—Filing of Claims

§ 725.301 Who may file a claim.

(a) Any person who believes he or she may be entitled to benefits under the Act may file a claim in accordance with this subpart.

(b) A claimant who has attained the age of 18, is mentally competent and physically able, may file a claim on his or her own behalf.

(c) If a claimant is unable to file a claim on his or her behalf because of a legal or physical impairment, the following rules shall apply:

(1) A claimant between the ages of 16 and 18 years who is mentally competent and not under the legal custody or care of another person, or a committee or institution, may upon filing a statement to the effect, file a claim on his or her own behalf. In any other case where the claimant is under 18 years of age, only a person, or the manager or principal officer of an institution having legal custody or care of the claimant may file a claim on his or her behalf.

(2) If a claimant over 18 years of age has a legally appointed guardian or

committee, only the guardian or committee may file a claim on his or her behalf.

(3) If a claimant over 18 years of age is mentally incompetent or physically unable to file a claim and is under the care of another person, or an institution, only the person, or the manager or principal officer of the institution responsible for the care of the claimant, may file a claim on his or her behalf.

(4) For good cause shown, the Office may accept a claim executed by a person other than one described in paragraphs (2) or (3) of this section.

(d) Except as provided in § 725.305 of this part, in order for a claim to be considered, the claimant must be alive at the time the claim is filed.

§ 725.302 Evidence of authority to file a claim on behalf of another.

(a) A person filing a claim on behalf of a claimant shall submit evidence of his or her authority to so act at the time of filing or at a reasonable time thereafter in accordance with the following:

(1) A legally appointed guardian or committee shall provide the Office with certification of appointment by a proper official of the court.

(2) Any other person shall provide a statement describing his or her relationship to the claimant, the extent to which he or she has care of the claimant, or his or her position as an officer of the institution of which the claimant is an inmate. The Office may, at any time, require additional evidence to establish the authority of any such person.

§ 725.303 Date and place of filing of claims.

(a) (1) Claims for benefits shall be delivered, mailed to, or presented at, any of the various district offices of the Social Security Administration, or any of the various offices of the Department of Labor authorized to accept claims, or, in the case of a claim filed by or on behalf of a claimant residing outside the United States, mailed or presented to any office maintained by the Foreign Service of the United States. A claim shall be considered filed on the day it is received by the office in which it is first filed.

(2) A claim submitted to a Foreign Service Office or any other agency or subdivision of the U.S. Government shall be forwarded to the Office and considered filed as of the date it was received at the Foreign Service Office or other governmental agency or unit.

(b) A claim submitted by mail shall be considered filed as of the date of delivery unless a loss or impairment of benefit rights would result, in which case a claim shall be considered filed as of the date of its postmark. In the absence of a legible postmark, other evidence may be used to establish the mailing date.

§ 725.304 Forms and initial processing.

(a) Claims shall be filed on forms prescribed and approved by the Office. The district office at which the claim is filed will assist claimants in completing their forms.

(b) If the place at which a claim is filed is an office of the Social Security Administration, such office shall forward the completed claim form to an office of the DCMWC, which is authorized to process the claim.

§ 725.305 When a written statement is considered a claim.

(a) The filing of a statement signed by an individual indicating an intention to claim benefits shall be considered to be the filing of a claim for the purposes of this part under the following circumstances:

(1) The claimant or a proper person on his or her behalf (see § 725.301) executes and files a prescribed claim form with the Office during the claimant's lifetime within the period specified in paragraph (b) of this section.

(2) Where the claimant dies within the period specified in paragraph (b) of this section without filing a prescribed claim form, and a person acting on behalf of the deceased claimant's estate executes and files a prescribed claim form within the period specified in paragraph (c) of this section.

(b) Upon receipt of a written statement indicating an intention to claim benefits, the Office shall notify the signer in writing that to be considered the claim must be executed by the

claimant or a proper party on his or her behalf on the prescribed form and filed with the Office within six months from the date of mailing of the notice.

(c) If before the notice specified in paragraph (b) of this section is sent, or within six months after such notice is sent, the claimant dies without having executed and filed a prescribed form, or without having had one executed and filed in his or her behalf, the Office shall upon receipt of notice of the claimant's death advise his or her estate, or those living at his or her last known address, in writing that for the claim to be considered, a prescribed claim form must be executed and filed by a person authorized to do so on behalf of the claimant's estate within six months of the date of the later notice.

(d) Claims based upon written statements indicating an intention to claim benefits not perfected in accordance with this section shall not be processed.

§ 725.306 Withdrawal of a claim.

(a) A claimant or an individual authorized to execute a claim on a claimant's behalf or on behalf of claimant's estate under § 725.305, may withdraw a previously filed claim provided that:

(1) He or she files a written request with the appropriate adjudication officer indicating the reasons for seeking withdrawal of the claim;

(2) The appropriate adjudication officer approves the request for withdrawal on the grounds that it is in the best interests of the claimant or his or her estate, and;

(3) Any benefits previously paid with respect to the claim are reimbursed.

(b) When a claim had been withdrawn under paragraph (a) of this section, the claim will be considered not to have been filed.

§ 725.307 Cancellation of a request for withdrawal.

At any time prior to approval, a request for withdrawal may be canceled by a written request of the claimant or a person authorized to act on the claimant's behalf or on behalf of the claimant's estate.

§ 725.308 Time limits for filing claims.

(a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Reform Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

(b) A miner who is receiving benefits under part B of title IV of the Act and who is notified by HEW of the right to seek medical benefits may file a claim for medical benefits under part C of title IV of the Act and this part. The Secretary of Health, Education, and Welfare is required to notify each miner receiving benefits under part B of this right. Notwithstanding the provisions of paragraph (a) of this section, a miner notified of his or her rights under this paragraph may file a claim under this part on or before December 31, 1980. Any claim filed after that date shall be untimely unless the time for filing has been enlarged for good cause shown.

(c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

[43 FR 36772, Aug. 18, 1978, as amended at 45 FR 44264, July 1, 1980]

§ 725.309 Duplicate claims.

(a) A claimant whose claim for benefits was previously approved under part B of title IV of the Act may file a claim for benefits under this part as provided in §§ 725.308(b) and 725.701A.

(b) A claimant who has filed a claim for benefits under both parts B and C of title IV of the Act or who has filed more than one claim for benefits under part C of title IV of the Act before March 1, 1978, and whose claims are pending or have been denied (§ 727.102 of this subchapter) shall have his or her

claims considered in accordance with § 727.103 of this subchapter.

(c) A claimant who filed a claim for benefits under part B of title IV of the Act or part C of title IV of the Act before March 1, 1978, and whose previous claim(s) are pending or have been finally denied, who files an additional claim under this part, shall have the later claim merged with any earlier claim subject to review under part 727 of this subchapter. If an earlier claim subject to review under part 727 of this subchapter has been denied after review, a new claim filed under this part shall also be denied, on the grounds of the prior denial, unless the deputy commissioner determines that there has been a material change in conditions or the later claim is a request for modification and the requirements of § 725.310 are met. If an earlier survivor's claim subject to review under part 727 of this subchapter has been denied, the new claim filed under this part shall also be denied unless the deputy commissioner determines that the later claim is a request for modification and the requirements of § 725.310 are met.

(d) In the case of a claimant who files more than one claim for benefits under this part, the later claim shall be merged with the earlier claim for all purposes if the earlier claim is still pending. If the earlier miner's claim has been finally denied, the later claim shall also be denied, on the grounds of the prior denial, unless the deputy commissioner determines that there has been a material change in conditions or the later claim is a request for modification and the requirements of § 725.310 are met. If an earlier survivor's claim filed under this part has been finally denied, the new claim filed under this part shall also be denied unless the deputy commissioner determines that the later claim is a request for modification and the requirements of § 725.310 are met.

(e) Notwithstanding any other provision of this part or part 727 of this subchapter, a person may exercise the right of review provided in paragraph (c) of § 727.103 at the same time such person is pursuing an appeal of a previously denied part B claim under the law as it existed prior to March 1, 1978. If the part B claim is ultimately approved as a result of the appeal, the claimant must immediately notify the Secretary of Labor and, where appropriate, the coal mine operator, and all duplicate payments made under part C shall be considered an overpayment and arrangements shall be made to insure the repayment of such overpayments to the fund or an operator, as appropriate.

(f) In a case involving duplicate claims, under no circumstances are duplicate benefits payable for concurrent periods of eligibility. Any duplicate benefits paid shall be subject to collection or offset under subpart G of this part.

§ 725.310 Modification of awards and denials.

(a) Upon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the deputy commissioner may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits.

(b) Modification proceedings shall be conducted in accordance with the provisions of this part as appropriate. Additional evidence may be submitted by any party or requested by the deputy commissioner. Modification proceedings shall not be initiated before an administrative law judge or the Benefits Review Board.

(c) At the conclusion of modification proceedings the deputy commissioner may issue a proposed decision and order (§ 725.418), forward the claim for a hearing (§ 725.421) or, if appropriate, deny the claim by reason of abandonment (§ 725.409).

(d) An order issued following the conclusion of modification proceedings may terminate, continue, reinstate, increase or decrease benefit payments or award benefits. Such order shall not affect any benefits previously paid, except that an order increasing or decreasing the amount of benefits payable may be made effective on the date from which benefits were determined payable by the terms of an earlier award. In the case of an award which is

decreased, any payment made in excess of the decreased rate shall be subject to collection or offset under subpart G of this part.

§ 725.311 Communications with respect to claims; time computations.

(a) Unless otherwise specified by this part, all requests, responses, notices, decisions, orders, or other communications required or permitted by this part shall be in writing.

(b) If required by this part, any document, brief, or other statement submitted in connection with the adjudication of a claim under this part shall be sent to each party to the claim by the submitting party. If proof of service is required with respect to any communication, such proof of service shall be submitted to the appropriate adjudication officer and filed as part of the claim record.

(c) Whenever any notice, document, brief or other statement is served by mail, 7 days shall be added to the time within which a reply or response is required to be submitted.

(d) In computing any period of time described in this part, by any applicable statute, or by the order of any adjudication officer, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period shall be included unless it is a Saturday, Sunday, or legal holiday, in which event the period extends until the next day which is not a Saturday, Sunday, or legal holiday. ''Legal holiday'' includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day and any other day appointed as a holiday by the President or the Congress of the United States.

Subpart D—Adjudication of Claims; Adjudication Officers

§ 725.350 Who are the adjudication officers.

(a) *General.* The persons authorized by the Secretary of Labor to accept evidence and decide claims on the basis of such evidence are called ''adjudication officers.'' This section describes the status of black lung claims adjudication officers.

(b) *Deputy commissioner.* The deputy commissioner is that official of the DCMWC or his designee who is authorized to perform functions with respect to the development, processing, and adjudication of claims in accordance with this part.

(c) *Administrative law judge.* An administrative law judge is that official appointed pursuant to 5 U.S.C. 3105 (or Pub. L. 94–504) who is qualified to preside at hearings under 5 U.S.C. 557 and is empowered by the Secretary to conduct formal hearings with respect to, and adjudicate, claims in accordance with this part. A person appointed under Public Law 94–504 shall not be considered an administrative law judge for purposes of this part for any period after March 1, 1979.

§ 725.351 Powers of adjudication officers.

(a) *Deputy commissioner.* The deputy commissioner is authorized to: (1) Make determinations with respect to claims as is provided in this part; (2) conduct conferences and informal discovery proceedings as provided in this part; (3) compel the production of documents by the issuance of a subpoena, with the written approval of the Director; (4) prepare documents for the signature of parties; (5) issue appropriate orders as provided in this part; (6) do all other things necessary to enable him or her to discharge the duties of the office.

(b) *Administrative Law Judge.* An administrative law judge is authorized to: (1) conduct formal hearings in accordance with the provisions of this part; (2) administer oaths and examine witnesses; (3) compel the production of documents and appearance of witnesses by the issuance of subpoenas; (4) issue decisions and orders with respect to claims as provided in this part; and (5) do all other things necessary to enable him or her to discharge the duties of the office.

(c) If any person in proceedings before an adjudication officer disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the

same, or neglects to produce, after having been ordered to do so, any pertinent book, paper or document, or refuses to appear after having been subpoenaed, or upon appearing refuses to take the oath as a witness, or after having taken the oath refuses to be examined according to law, the deputy commissioner with the approval of the Director, or the administrative law judge responsible for the adjudication of the claim, shall certify the facts to the Federal district court having jurisdiction in the place in which he or she is sitting (or to the U.S. District Court for the District of Columbia if he or she is sitting in the District) which shall thereupon in a summary manner hear the evidence as to the acts complained of, and, if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same condition as if the doing of the forbidden act had occurred with reference to the process or in the presence of the court.

§ 725.352 Disqualification of adjudication officer.

(a) No adjudication officer shall conduct any proceedings in a claim in which he or she is prejudiced or partial, or where he or she has any interest in the matter pending for decision. A decision to withdraw from the consideration of a claim shall be within the discretion of the adjudication officer. If that adjudication officer withdraws, another officer shall be designated by the Director or the Chief Administrative Law Judge, as the case may be, to complete the adjudication of the claim.

(b) No adjudication officer shall be permitted to appear or act as a representative of a party under this part while such individual is employed as an adjudication officer. No adjudication officer shall be permitted at any time to appear or act as a representative in connection with any case or claim in which he or she was personally involved. No fee or reimbursement shall be awarded under this part to an individual who acts in violation of this paragraph.

(c) No adjudication officer shall act in any claim involving a party which employed such adjudication officer within one year before the adjudication of such claim.

(d) Notwithstanding paragraph (a) of this section, no adjudication officer shall be permitted to act in any claim involving a party who is related to the adjudication officer by consanguinity or affinity within the third degree as determined by the law of the place where such party is domiciled. Any action taken by an adjudication officer in knowing violation of this paragraph shall be void.

PARTIES AND REPRESENTATIVES

§ 725.360 Parties to proceedings.

(a) Except as provided in § 725.361, no person other than the Secretary of Labor and authorized personnel of the Department of Labor shall participate at any stage in the adjudication of a claim for benefits under this part, unless such person is determined by the appropriate adjudication officer to qualify under the provisions of this section as a party to the claim. The following persons shall be parties:

(1) The claimant;

(2) A person other than a claimant, authorized to execute a claim on such claimant's behalf under § 725.301;

(3) Any coal mine operator notified under § 725.412 of its possible liability for the claim;

(4) Any insurance carrier of such operator; and

(5) The Director in all proceedings relating to a claim for benefits under this part.

(b) A widow, child, parent, brother, or sister, or the representative of a decedent's estate, who makes a showing in writing that his or her rights with respect to benefits may be prejudiced by a decision of an adjudication officer, may be made a party.

(c) Any coal mine operator or prior operator or insurance carrier which has not been notified under § 725.412 and which makes a showing in writing that its rights may be prejudiced by a decision of an adjudication officer may be made a party.

(d) Any other individual may be made a party if that individual's rights with respect to benefits may be prejudiced by a decision to be made.

§ 725.361 Party amicus curiae.

At the discretion of the Chief Administrative Law Judge or the administrative law judge assigned to the case, a person or entity which is not a party may be allowed to participate amicus curiae in a formal hearing only as to an issue of law. A person may participate amicus curiae in a formal hearing upon written request submitted with supporting arguments prior to the hearing. If the request is granted, the administrative law judge hearing the case will inform the party of the extent to which participation will be permitted. The request may, however, be denied summarily and without explanation.

§ 725.362 Representation of parties.

(a) Except for the Secretary of Labor, whose interests shall be represented by the Solicitor of Labor or his or her designee, each of the parties may appoint an individual to represent his or her interest in any proceeding for determination of a claim under this part. Such appointment shall be made in writing or on the record at the hearing. A written notice appointing a representative shall be signed by the party or his or her legal guardian and shall be sent to the Office or, for representation at a formal hearing, to the Chief Administrative Law Judge. In any case, such representative must be qualified under § 725.363. No authorization for representation or agreement between a claimant and representative as to the amount of a fee, filed with the Social Security Administration in connection with a claim under part B of title IV of the Act, shall be valid under this part. A claimant who has previously authorized a person to represent him or her in connection with a claim originally filed under part B of title IV may renew such authorization by filing a statement to such effect with the Office or appropriate adjudication officer.

(b) Any party may waive his or her right to be represented in the adjudication of a claim. If an adjudication officer determines, after an appropriate inquiry has been made, that a claimant who has been informed of his or her right to representation does not wish to obtain the services of a representative, such adjudication officer shall proceed to consider the claim in accordance with this part, unless it is apparent that the claimant is, for any reason, unable to continue without the help of a representative. However, it shall not be necessary for an adjudication officer to inquire as to the ability of a claimant to proceed without representation in any adjudication taking place without a hearing. The failure of a claimant to obtain representation in an adjudication taking place without a hearing shall be considered a waiver of the claimant's right to representation. However, at any time during the processing or adjudication of a claim, any claimant may revoke such waiver and obtain a representative.

§ 725.363 Qualification of representative.

(a) *Attorney.* Any attorney in good standing who is admitted to practice before a court of a State, territory, district, or insular possession, or before the Supreme Court of the United States or other Federal court and is not, pursuant to any provision of law, prohibited from acting as a representative, may be appointed as a representative.

(b) *Other person.* With the approval of the adjudication officer, any other person may be appointed as a representative so long as that person is not, pursuant to any provision of law, prohibited from acting as a representative.

§ 725.364 Authority of representative.

A representative, appointed and qualified as provided in §§ 725.362 and 725.363, may make or give on behalf of the party he or she represents, any request or notice relative to any proceeding before an adjudication officer, including formal hearing and review, except that such representative may not execute a claim for benefits, unless he or she is a person designated in § 725.301 as authorized to execute a claim. A representative shall be entitled to present or elicit evidence and make allegations as to facts and law in any proceeding affecting the party represented and to obtain information with respect to the claim of such party

to the same extent as such party. Notice given to any party of any administrative action, determination, or decision, or request to any party for the production of evidence shall be sent to the representative of such party and such notice or request shall have the same force and effect as if it had been sent to the party represented.

§ 725.365 Approval of representative's fees; lien against benefits.

No fee charged for representation services rendered to a claimant with respect to any claim under this part shall be valid unless approved under this subpart. No contract or prior agreement for a fee shall be valid. In cases where the obligation to pay the attorney's fee is upon the claimant, the amount of the fee awarded may be made a lien upon the benefits due under an award and the adjudication officer shall fix, in the award approving the fee, such lien and the manner of payment of the fee. Any representative who is not an attorney may be awarded a fee for services under this subpart, except that no lien may be imposed with respect to such representative's fee.

§ 725.366 Fees for representatives.

(a) A representative seeking a fee for services performed on behalf of a claimant shall make application therefor to the deputy commissioner, administrative law judge, or appropriate appellate tribunal, as the case may be, before whom the services were performed. The application shall be filed and served upon the claimant and all other parties within the time limits allowed by the deputy commissioner, administrative law judge, or appropriate appellate tribunal. The application shall be supported by a complete statement of the extent and character of the necessary work done, and shall indicate the professional status (e.g., attorney, paralegal, law clerk, lay representative or clerical) of the person performing such work, and the customary billing rate for each such person. The application shall also include a listing of reasonable unreimbursed expenses, including those for travel, incurred by the representative or an employee of a representative in establishing the claimant's case. Any fee requested under this paragraph shall also contain a description of any fee requested, charged, or received for services rendered to the claimant before any State or Federal court or agency in connection with a related matter.

(b) Any fee approved under paragraph (a) of this section shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested. No fee approved shall include payment for time spent in preparation of a fee application. No fee shall be approved for work done on claims filed between December 30, 1969, and June 30, 1973, under part B of title IV of the Act, except for services rendered on behalf of the claimant in regard to the review of the claim under section 435 of the Act and part 727 of this subchapter.

(c) In awarding a fee, the appropriate adjudication officer shall consider, and shall add to the fee, the amount of reasonable and unreimbursed expenses incurred in establishing the claimant's case. Reimbursement for travel expenses incurred by an attorney shall be determined in accordance with the provisions of § 725.459(a). No reimbursement shall be permitted for expenses incurred in obtaining medical or other evidence which has previously been submitted to the Office in connection with the claim.

(d) Upon receipt of a request for approval of a fee, such request shall be reviewed and evaluated by the appropriate adjudication officer and a fee award issued. Any party may request reconsideration of a fee awarded by the adjudication officer. A revised or modified fee award may then be issued, if appropriate.

(e) Each request for reconsideration or review of a fee award shall be in writing and shall contain supporting statements or information pertinent to any increase or decrease requested. If a fee awarded by a deputy commissioner

is disputed, such award shall be appealable directly to the Benefits Review Board. In such a fee dispute case, the record before the Board shall consist of the order of the deputy commissioner awarding or denying the fee, the application for a fee, any written statement in opposition to the fee and the documentary evidence contained in the file which verifies or refutes any item claimed in the fee application.

(Approved by the Office of Management and Budget under control number 1215–0115)

[43 FR 36772, Aug. 18, 1978, as amended at 47 FR 14696, Apr. 6, 1982]

§ 725.367 Payment of a claimant's attorney's fee by responsible operator.

(a) If an operator declines to pay any benefits on or before the 30th day after receiving written notice of its liability for a claim on the ground that there is no liability for benefits within the provisions of the Act, and the person seeking benefits shall thereafter have utilized the services of an attorney in the successful prosecution of the claim, there shall be awarded, in addition to the award of benefits, in an order, a reasonable attorney's fee against the operator or carrier in an amount approved by the deputy commissioner, administrative law judge, Board, or court as the case may be, which shall be paid promptly and directly by the operator or carrier to the claimant's attorney in a lump sum after the order becomes final.

(b) Section 205(a) of the Black Lung Benefits Amendments of 1981, Pub. L. 97–119, amended section 422 of the Act and relieved operators and carriers from liability for the payment of benefits on certain claims. Payment of benefits on those claims was made the responsibility of the Trust Fund. The claims subject to this transfer of liability are described in §725.496 of this part. On claims subject to the transfer of liability described above the Trust Fund will pay all fees and costs which have been or will be awarded to claimant's attorneys which were or would have become the liability of an operator or carrier but for the enactment of the 1981 Amendments and which have not already been paid by such operator or carrier. Section 9501(d)(7) of the Internal Revenue Code, which was also enacted as a part of the 1981 Amendments to the Act, expressly prohibits the Trust Fund from reimbursing an operator or carrier for any attorney fees or costs which it has paid on cases subject to the transfer of liability provisions.

[48 FR 24291, May 31, 1983]

§ 725.401 Claims development—general.

After a claim has been received by the deputy commissioner, the deputy commissioner shall take such action as is necessary to develop, process, and make determinations with respect to the claim as provided in this subpart.

§ 725.402 Approved State workers' compensation law.

If a deputy commissioner determines that any claim filed under this part is one subject to adjudication under a workers' compensation law approved under part 722 of this subchapter, he or she shall advise the claimant of this determination and of the Act's requirement that the claim must be filed under the applicable State workers' compensation law. The deputy commissioner shall then prepare a proposed decision and order dismissing the claim for lack of jurisdiction pursuant to §725.418 and proceed as appropriate.

§ 725.403 Requirement to file under State workers' compensation law—Section 415 claims.

(a) No benefits shall be payable to or on behalf of a claimant who has filed a claim under section 415 of part B of title IV of the Act, for any period of eligibility occurring between July 1, and December 31, 1973, unless the claimant has filed and diligently pursued a claim for benefits under an applicable State workers' compensation law. A State workers' compensation claim need not be filed where filing would be futile. It shall be determined that the filing of a State claim would be futile when:

(1) The period within which the claim may be filed under such law has expired; or

(2) Pneumoconiosis as defined in part 718 of this subchapter is not compensable under such law; or

(3) The maximum amount of compensation or the maximum number of compensation payments allowable under such law has already been paid; or

(4) The claimant does not meet one or more conditions of eligibility for workers' compensation payments under applicable State law; or

(5) The claimant otherwise establishes to the satisfaction of the Office that the filing of a claim under State law would be futile.

(b) Where the Office determines that a claimant is required to file a State claim under this section, the Office shall so notify the claimant. Such notice shall instruct the claimant to file a State claim within 30 days of such notice. If no such State claim is filed within the 30-day period, no benefits shall be payable under this part to the claimant for any period between July 1, and December 31, 1973.

(c) The failure of a claimant to comply with paragraph (a) of this section shall not absolve any operator of its liability for the payment of benefits to a claimant for periods of eligibility occurring on or after January 1, 1974.

(d) The deputy commissioner may determine that a claimant is ineligible for benefits under section 415 of part B of title IV of the Act without requiring the claimant to file a claim under a State workers' compensation law.

§ 725.404 Development of evidence—general.

(a) *Employment history.* Each claimant shall furnish the deputy commissioner with a complete and detailed history of the coal miner's employment and, upon request, supporting documentation.

(b) *Matters of record.* Where it is necessary to obtain proof of age, marriage or termination of marriage, death, family relationship, dependency (see subpart B of this part), or any other fact which may be proven as a matter of public record, the claimant shall furnish such proof to the deputy commissioner upon request.

(c) *Documentary evidence.* If a claimant is required to submit documents to the deputy commissioner, the claimant shall submit either the original, a certified copy or a clear readable copy thereof. The Deputy commissioner or administrative law judge may require the submission of an original document or certified copy thereof, if necessary.

(d) *Submission of insufficient evidence.* In the event a claimant submits insufficient evidence regarding any matter, the deputy commissioner shall inform the claimant of what further evidence is necessary and request that such evidence be submitted within a specified reasonable time which may, upon request, be extended for good cause.

§ 725.405 Development of medical evidence; scheduling of medical examinations and tests.

(a) Upon receipt of a claim, the deputy commissioner shall ascertain whether the claim was filed by or on account of a miner as defined in § 725.202(a), and in the case of a claim filed on account of a deceased miner, whether the claim was filed by an eligible survivor of such miner as defined in subpart B of this part.

(b) In the case of a claim filed by or on behalf of a miner, the deputy commissioner shall, where necessary, schedule the claimant for a medical examination and testing under § 725.406.

(c) In the case of a claim filed by or on behalf of a survivor of a miner, the deputy commissioner shall obtain whatever medical evidence is necessary and available for the development and evaluation of the claim.

(d) The deputy commissioner shall, where appropriate, collect other evidence necessary to establish:

(1) The nature and duration of the miner's employment; and

(2) All other matters relevant to the determination of the claim.

(e) If at any time during the processing of the claim by the deputy commissioner, the evidence establishes that the claimant is not entitled to benefits under the Act, the deputy commissioner may terminate evidentiary development of the claim and proceed as appropriate.

§ 725.406 Medical examinations and tests.

(a) Medical examinations and tests authorized by the deputy commissioner shall be conducted, if possible, in the vicinity of the miner's residence by

physicians or in medical facilities selected from a list compiled by the Secretary, or by a physician or medical facility approved by the deputy commissioner at the miner's request.

(b) If any medical examination or test conducted under paragraph (a) of this section is not administered or reported in compliance with the provisions of part 718 of this subchapter, the deputy commissioner shall schedule the miner for further examination and testing where necessary and appropriate.

(c) The cost of any medical examination or test authorized under this section, including the cost of travel to and from the examination, shall be paid by the fund. No reimbursement for overnight accommodations shall be authorized unless the deputy commissioner determines that an adequate testing facility is unavailable within one day's round trip travel by automobile from the miner's residence. The fund shall be reimbursed for such payments by an operator, if any, found liable for the payment of benefits to the claimant.

§ 725.407 Additional medical evidence.

(a) If, at any time after the completion of initial medical examinations and tests, unresolved medical questions remain, the deputy commissioner may cause the claimant to be examined by a physician selected by the deputy commissioner.

(b) Any miner dissatisfied with the results of the medical examinations or tests conducted under § 725.406 may obtain further medical examinations or tests and submit them to the deputy commissioner. Such further examinations or tests shall be reimbursable by the fund, or by a responsible coal operator where appropriate, if the claimant is finally adjudicated entitled to benefits and if such further examinations or tests were relevant to the determination of the claim.

(c) If additional medical evidence is obtained in accordance with paragraph (a) of this section, the deputy commissioner may order the physician selected to retest or reexamine the miner to do so without the presence or participation of any other physician who previously examined the miner, and without benefit of the conclusions of any other physician who has examined the miner.

§ 725.408 Refusal to submit to medical examinations or tests.

If an adjudication officer determines that a miner has unreasonably refused to submit to medical examinations or tests scheduled under §§ 725.406 or 725.407(a), all evidentiary development of the claim shall be suspended and the adjudication officer shall proceed to deny the claim by reason of abandonment (§ 725.409) or by dismissal (§ 725.465) as is appropriate.

§ 725.409 Denial of a claim by reason of abandonment.

(a) A claim may be denied at any time by the deputy commissioner by reason of abandonment where the claimant fails:

(1) To undergo a required medical examination without good cause; or,

(2) To submit evidence sufficient to make a determination of the claim; or,

(3) To pursue the claim with reasonable diligence.

(b) If the deputy commissioner determines that a denial by reason of abandonment is appropriate, he or she shall notify the claimant of the reasons for such denial and of the action which must be taken to avoid a denial by reason of abandonment. If there is no response to the notice within 30 days after such notice is sent, the claim shall be considered denied by reason of abandonment. If the claimant responds in a timely fashion, indicating a desire to pursue the claim, by requesting a hearing or indicating the intent to submit additional evidence, the deputy commissioner shall, if a hearing is requested, proceed in accordance with § 725.412 or allow a reasonable time of not less than 60 days for the claimant to take the specified remedial action. If the claimant completes the action requested within the time allowed, the claim shall be developed, processed and adjudicated as specified in this part. If the claimant does not fully comply with the action requested by the deputy commissioner, the deputy commissioner shall so notify the claimant. If the claimant does not request a hearing or fully comply with the action requested by the deputy commissioner

within 30 days of such notification, the claim shall be considered denied by reason of abandonment, except that a new claim may be filed at any time and new evidence submitted where the requirements of § 725.310 are not met.

ADJUDICATION BY THE DEPUTY COMMISSIONER

§ 725.410 Initial findings by the deputy commissioner.

(a) Based upon the evidence developed, the deputy commissioner may make an initial finding with respect to the claim.

(b) If the evidence supports an initial finding of eligibility, and it has been determined that a coal mine operator may be liable for the claim, the deputy commissioner shall proceed in accordance with § 725.412. If no operator can be identified, the deputy commissioner shall proceed in accordance with § 725.411.

(c) If the evidence submitted does not support an initial finding of eligibility, the deputy commissioner shall so notify the claimant in writing. This notification shall specify the reasons why the claim cannot be approved, the additional evidence necessary to establish entitlement, the right of the claimant to submit additional evidence, and the right to request a hearing. Within 60 days from the mailing of such notice, unless such period is extended by the deputy commissioner for good cause shown, the claimant may submit new evidence or request a hearing. If the claimant:

(1) Takes no action within the specified 60 day period, the claim shall be considered denied by reason of abandonment (see § 725.409).

(2) Submits new evidence within the specified 60 day period, the deputy commissioner shall reconsider the initial finding, taking into account the additional evidence submitted. If the new evidence supports a finding of entitlement the deputy commissioner shall proceed in accordance with paragraph (b) of this section. If the new evidence does not support a finding of entitlement, the deputy commissioner shall notify the claimant in writing of this fact and the reasons therefor, and that he or she may request a hearing within 60 days after receipt of such notice unless the period is extended by the deputy commissioner for good cause shown. If no hearing is requested, the claim shall be deemed denied by reason of abandonment (see § 725.409).

(d) Unless an earlier operator identification has been made, if a hearing is requested under paragraph (c) of this section, the deputy commissioner shall identify the coal mine operator, if any, which may be liable for the payment of benefits to the claimant and proceed in accordance with § 725.412. If no such operator can be identified, the deputy commissioner may schedule a conference (see § 725.416) or refer the claim to the Office of Administrative Law Judges for appropriate proceedings.

§ 725.411 Adjudication upon initial findings of eligibility and no operator responsibility.

Where the deputy commissioner has found that the claimant is eligible and that there is no operator responsible for the payment of benefits, the deputy commissioner shall issue a proposed decision and order including findings of fact and conclusions of law as required by § 725.418 and authorize the payment of benefits. The claimant shall have 30 days after the date of issuance of the proposed decision and order within which to reject any or all of its terms. If the claimant does not reject the proposed decision and order, either in whole or in part, within this 30-day period, it will become final and effective. If for any reason the claimant rejects a proposed decision and order, the deputy commissioner may take such action as is appropriate including adjustment of the benefits to the level authorized by the uncontested portion of the proposed decision and order, if appropriate.

§ 725.412 Identification and notification of responsible operator.

(a) At any time during the processing of a claim under this part, after sufficient evidence has been made available to the deputy commissioner, the deputy commissioner may identify a coal miner operator (see § 725.491) which may be liable for the payment of the claim in accordance with the criteria contained in subpart F of this part.

Such identification shall be made as soon after the filing of the claim as the evidence obtained permits. If the claim is subject to review under part 727 of this subchapter, the deputy commissioner may proceed to make initial findings (§ 725.410) with respect to a claim before identifying a potentially liable coal mine operator. In the case of a claim subject to review under part 727 of the subchapter which is denied by reason of abandonment (see § 725.409), the deputy commissioner may decline to identify and notify an operator, unless a timely request for a hearing is made by the claimant.

(b) After the deputy commissioner identifies an operator which may be liable for payment of benefits, the deputy commissioner shall notify such operator in writing. Such notification shall include a copy of the claimant's claim form and a copy of all documentary evidence pertaining to the claim obtained by the deputy commissioner, if any, and the initial findings of the deputy commissioner, if any. All documents sent to an operator in accordance with this paragraph shall also be provided by the deputy commissioner to the claimant or his or her authorized representative.

(c) If within one year after the final adjudication of a claim, the adjudication officer determines that an operator which may be liable for the payment of benefits has not been notified under this section, such adjudication officer shall give notice of possible liability and an opportunity to respond to such operator. The adjudication officer shall then take such further action on the claim as may be appropriate. There shall be no time limit applicable to a later identification of an operator under this paragraph if the operator fraudulently concealed its identity as an employer of the miner.

(d) If, in any case, there is a dispute between two or more operators as to which may be liable for the payment of benefits to the claimant, all such operators shall be notified under this section and the issue of which operator is liable shall be determined by the appropriate adjudication officer.

§ 725.413 Operator's response to notification.

(a) Within 30 days after receipt of notification issued under § 725.412, unless such period is extended by the deputy commissioner for good cause shown, or in the interest of justice, a notified operator shall indicate an intent to accept or contest liability. If notice is given to the operator after initial findings have been made, the operator shall indicate its agreement or disagreement with each such finding. If notice is given to the operator before initial findings have been made, the operator shall indicate agreement or disagreement with the operator's identification as a potentially liable coal mine operator. An operator's response to notification shall be in writing and shall be sent to the deputy commissioner, the claimant, and all other parties to the claim.

(b)(1) If the operator accepts liability for the claim after initial findings have been made, the deputy commissioner shall issue a proposed decision and order under § 725.418.

(2) If the operator contests its liability or any of the initial findings of the deputy commissioner, if any, or if the deputy commissioner has determined the claimant to be ineligible for benefits, the deputy commissioner shall proceed to adjudicate the claim in accordance with this subpart.

(3) If the operator fails to respond within the specified period, such operator shall be deemed to have accepted the initial findings of the deputy commissioner when made and shall not, except as provided in § 725.463, be permitted to raise issues or present evidence with respect to issues inconsistent with the initial findings in any further proceeding conducted with respect to the claim. In a case where an operator has failed to respond to notification, such failure shall be considered a waiver of such operator's right to contest the claim, unless the operator's failure to respond to notice is excused for good cause shown, and the deputy commissioner may proceed to issue a proposed decision and order pursuant to § 725.418, undertake further development, hold a conference, or refer the claim for a hearing.

(c) Any operator or carrier may in writing designate an office or person authorized to receive notice of a claim on behalf of such operator or carrier. All such notices to the operator or carrier shall thereafter be sent to the designated office or person.

§ 725.414 Development of operator's evidence, claimant's rebuttal evidence.

(a) If an operator notified of its possible liability for a claim after the deputy commissioner has made initial findings (§ 725.410) with respect to the claim contests the claim, such operator shall be allowed a reasonable time, to be determined by the deputy commissioner from the date on which the notice of contest is sent, within which to submit to the deputy commissioner and exchange with all other parties all available evidence relevant to any contested issue in the claim. During this period, a notified operator may have the miner examined by a physician selected by such operator, except that no miner shall be required to travel more than 100 miles from his or her place of residence for the purpose of submitting to a medical examination requested by an operator, unless a trip of greater distance is authorized in writing by the deputy commissioner.

(b) If an operator is notified of its possible liability for a claim before the deputy commissioner has made initial findings with respect to the claim or if no initial findings are made, and such operator indicates its intent to contest the claim, such operator shall promptly undertake the development of its evidence, including any medical evidence which may be obtained, if the operator seeks to have the miner examined by a physician which it selects. Any evidence obtained by an operator shall be sent to the deputy commissioner and all other parties to the claim. On the basis of the operator's evidence and all other evidence submitted to the deputy commissioner, the deputy commissioner may make initial findings with respect to the claim or may take such other action as is appropriate. If the deputy commissioner makes an initial finding that the claimant is ineligible for benefits, the deputy commissioner shall proceed to consider the claim as provided in § 725.410(c). If the deputy commissioner makes an initial finding that the claimant is eligible for benefits and that the notified operator is liable for such benefits, the parties shall be so notified. Within 30 days from the date on which notice of the deputy commissioner's initial findings of eligibility and liability is sent to the parties, each party shall either accept or contest any or all of such initial findings and shall, except as provided in paragraph (d) of this section, submit any available evidence not previously submitted, to the deputy commissioner. The deputy commissioner shall then proceed to adjudicate the claim under § 725.415. The failure by an operator to respond to initial findings of eligibility made under this paragraph shall have the same consequences as an operator's failure to respond to notice of a claim (see § 725.413(b)(3)).

(c) The report of any medical examination or test conducted under this section, or any other evidence submitted, shall be submitted to the deputy commissioner and sent to the other parties to the claim within the applicable period set forth in this section, unless the deputy commissioner enlarges such period for good cause shown or in the interest of justice.

(d) Upon receipt of a medical report obtained by an operator under this section, a claimant shall, upon request, be allowed a reasonable time, as determined by the deputy commissioner from the date on which the operator's report is received, to obtain additional evidence in support of the claim. Such evidence shall be obtained, submitted to the deputy commissioner, and exchanged with the other parties within the period allowed, unless the period is enlarged by the deputy commissioner for good cause shown.

(e) (1) Any documentary evidence obtained by a party during the time a claim is pending before a deputy commissioner, which is withheld from the deputy commissioner or any other party to the claim, shall not be admitted in any later proceedings held with respect to the claim in the absence of extraordinary circumstances, unless

the admission of such evidence is requested by the Director or such other party.

(2) If an operator notified of a claim does not undertake a good faith effort to develop its evidence while the claim is pending before the deputy commissioner, the deputy commissioner shall proceed to adjudicate the claim in accordance with §725.415. A notified operator which does not undertake a good faith effort to develop its evidence before the deputy commissioner shall be considered to have waived its right to either have the claimant examined by a physician of its choosing or have the claimant's evidence submitted for review by a physician of its choosing.

§725.415 Action by the deputy commissioner after development of operator's evidence.

(a) At the end of the period permitted under §725.414 for the submission of evidence, the deputy commissioner shall review the claim on the basis of all evidence submitted.

(b) After review of all evidence submitted, the deputy commissioner may schedule a conference in accordance with §725.416, issue a proposed decision and order in accordance with §725.418, forward the claim to the Office of Administrative Law Judges in accordance with §725.421, or take such other action as the deputy commissioner considers appropriate.

§725.416 Conferences.

(a) At the conclusion of the period permitted by §725.414 for the submission of evidence, the deputy commissioner may conduct an informal conference in any claim where it appears that such conference will assist in the voluntary resolution of any issue raised with respect to the claim. The conference proceedings shall not be stenographically reported and sworn testimony shall not be taken.

(b) The deputy commissioner shall notify the parties of a definite time and place for the conference and may in his or her discretion, or on the motion of any party, cancel or reschedule a conference.

(c) Any representative of an operator, of an operator's insurance carrier, or of a claimant must have sufficient authority to stipulate facts or issues or agree to a final dispositon of the claim.

(d) Procedures to be followed at a conference shall be within the discretion of the deputy commissioner. In the case of a conference involving an unrepresented claimant the deputy commissioner shall fully inform the claimant of the consequences of any agreement the claimant is asked to sign. If it is apparent that the unrepresented claimant does not understand the nature or effect of the proceedings, the deputy commissioner shall not permit the execution of any stipulation or agreement in the claim unless it is clear that the best interests of the claimant are served thereby.

§725.417 Action at the conclusion of conference.

(a) At the conclusion of a conference, the deputy commissioner shall prepare a stipulation of contested and uncontested issues which shall be signed by the parties and the deputy commissioner. If a hearing is conducted with respect to the claim, this stipulation shall be submitted to the Office of Administrative Law Judges and placed in claim record.

(b) In any case, where appropriate, the deputy commissioner may permit a reasonable time for the submission of additional evidence following a conference.

(c) Within 20 days after the termination of all conference proceedings, the deputy commissioner shall prepare and send to the parties a memorandum of conference, on a form prescribed by the Office, summarizing the conference and including the following:

(1) Date, time and place of conference;

(2) Names, addresses, telephone numbers, and status (i.e., claimant, attorney, operator, carrier's representative, etc.);

(3) Issues discussed at conference;

(4) Additional material presented (i.e., medical reports, employment reports, marriage certificates, birth certificates, etc.);

(5) Issues resolved at conference; and

(6) Deputy commissioner's recommendation.

(d) Each party shall, in writing, either accept or reject, in whole or in

part, the deputy commissioner's recommendation, stating the reasons for such rejection. If no reply is received within 30 days from the date on which the recommendation was sent to parties, the recommendation shall be deemed accepted.

§ 725.418 Proposed decision and order.

(a) A proposed decision and order is a document, issued by the deputy commissioner after the evidentiary development of the claim is completed and all contested issues, if any, are joined, which purports to resolve a claim on the basis of the evidence submitted to or obtained by the deputy commissioner. A proposed decision and order shall be considered a final adjudication of a claim only as provided in § 725.419. A proposed decision and order may be issued by the deputy commissioner in any claim and at any time during the adjudication of a claim if:

(1) Issuance is authorized or required by this part; or,

(2) The deputy commissioner determines that its issuance will expedite the adjudication of the claim.

(b) A proposed decision and order shall contain findings of fact and conclusions of law and an appropriate order shall be served on all parties to the claim.

§ 725.419 Response to proposed decision and order.

(a) Within 30 days after the date of issuance of a proposed decision and order, any party may, in writing, request a revision of the proposed decision and order or a hearing. If a hearing is requested, the deputy commissioner shall refer the claim to the Office of Administrative Law Judges (see § 725.421).

(b) Any response made by a party to a proposed decision and order shall specify the findings and conclusions with which the responding party disagrees, and shall be served on the deputy commissioner and all other parties to the claim.

(c) If a timely request for revision of a proposed decision and order is made, the deputy commissioner may amend the proposed decision and order, as circumstances require, and serve the revised proposed decision and order on all parties or take such other action as is appropriate. If a revised proposed decision and order is issued, each party to the claim shall have 30 days from the date of issuance of that revised proposed decision and order within which to request a hearing.

(d) If no response to a proposed decision and order is sent to the deputy commissioner within the period described in paragraph (a) of this section, or if no response to a revised proposed decision and order is sent to the deputy commissioner within the period described in paragraph (c) of this section, the proposed decision and order shall become a final decision and order, which is effective upon the expiration of the applicable 30-day period. Once a proposed decision and order or revised proposed decision and order becomes final and effective, all rights to further proceedings with respect to the claim shall be considered waived, except as provided in § 725.310.

§ 725.420 Initial determinations.

(a) Section 9501(d)(1)(A)(1) of the Internal Revenue Code provides that the Black Lung Disability Trust Fund shall begin the payment of benefits on behalf of an operator in any case in which the operator liable for such payments ''has not commenced payment of such benefits within 30 days after the date of an initial determination of eligibility by the Secretary * * *.'' For claims filed on or after January 1, 1982, the payment of such interim benefits from the Fund is limited to ''benefits accruing after the date of such initial determination * * *.''

(b) Except as provided in § 725.415 of this subpart, after the deputy commissioner has determined that a claimant is eligible for benefits, on the basis of all evidence submitted by a claimant and operator, and has determined that a hearing will be necessary to resolve the claim, the deputy commissioner shall in writing so inform the parties and direct the operator to begin the payment of benefits to the claimant in accordance with § 725.522. The date on which this writing is sent to the parties shall be considered the date of initial determination of the claim.

(c) If a notified operator refuses to commence payment of a claim within

30 days from the date on which an initial determination is made under this section, benefits shall be paid by the fund to the claimant in accordance with §725.522, and the operator shall be liable to the fund, if such operator is determined liable for the claim, for all benefits paid by the fund on behalf of such operator, and, in addition, such penalties and interest as are appropriate.

[43 FR 36772, Aug. 18, 1978, as amended at 48 FR 24292, May 31, 1983]

§ 725.421 Referral of a claim to the Office of Administrative Law Judges.

(a) In any claim for which a formal hearing is requested or ordered, and with respect to which the deputy commissioner has completed development and adjudication without having resolved all contested issues in the claim, the deputy commissioner shall refer the claim to the Office of Administrative Law Judges for a hearing. If the deputy commissioner with jurisdiction over the claim is located at any place outside Washington, DC, such deputy commissioner shall forward a claim with respect to which a hearing is required by this part to the DCMWC in Washington, DC, which shall refer the claim to the Office of Administrative Law Judges for appropriate proceedings.

(b) In any case referred to the Office of Administrative Law Judges under this section, the deputy commissioner shall transmit to that office the following documents, which shall be placed in the record at the hearing subject to the objection of any party:

(1) Copies of the claim form or forms; (2) any statement, document, or pleading submitted by a party to the claim; (3) a copy of the notification to an operator of its possible liability for the claim; (4) all evidence submitted to the deputy commissioner under this part; (5) any written stipulation of law or fact or stipulation of contested and uncontested issues entered into by the parties; (6) any pertinent forms submitted to the deputy commissioner; (7) the statement by the deputy commissioner of contested and uncontested issues in the claim; and (8) the deputy commissioner's initial determination of eligibility or other documents necessary to establish the right of the fund to reimbursement, if appropriate. Copies of the transmittal notice shall also be sent to all parties to the claim.

(c) A party may at any time request and obtain from the deputy commissioner copies of documents transmitted to the Office of Administrative Law Judges under paragraph (b) of this section. If the party has previously been provided with such documents, additional copies may be sent to the party upon the payment of a copying fee to be determined by the deputy commissioner.

[43 FR 36772, Aug. 18, 1978, as amended at 48 FR 24292, May 31, 1983]

§ 725.422 Legal assistance.

The Secretary or his or her designee may, upon request, provide a claimant with legal assistance in processing a claim under the Act. Such assistance may be made available to a claimant in the discretion of the Solicitor of Labor or his or her designee at any time prior to or during the time in which the claim is being adjudicated and shall be furnished without charge to the claimant. Representation of a claimant in adjudicatory proceedings shall not be provided by the Department of Labor unless it is determined by the Solicitor of Labor that such representation is in the best interests of the black lung benefits program. In no event shall representation be provided to a claimant in a claim with respect to which the claimant's interests are adverse to those of the Secretary of Labor or the fund.

Subpart E—Hearings

§ 725.450 Right to a hearing.

Any party to a claim (see §725.360) shall have a right to a hearing concerning any contested issue of fact or law unresolved by the deputy commissioner. There shall be no right to a hearing until the processing and adjudication of the claim by the deputy commissioner has been completed. There shall be no right to a hearing in a claim with respect to which a determination of the claim made by the deputy commissioner has become final and effective in accordance with this part.

§ 725.451 Request for hearing.

After the completion of proceedings before the deputy commissioner, or as is otherwise indicated in this part, any party may in writing request a hearing on any contested issue of fact or law. A deputy commissioner may on his or her own initiative refer a case for hearing. If a hearing is requested, or if a deputy commissioner determines that a hearing is necessary to the resolution of any issue, the claim shall be referred to the Chief Administrative Law Judge for a hearing under § 725.421.

§ 725.452 Type of hearing; parties.

(a) A hearing held under this part shall be conducted by an administrative law judge designated by the Chief Administrative Law Judge. Except as otherwise provided by this part, all hearings shall be conducted in accordance with the provisions of 5 U.S.C. 554 et seq.

(b) All parties to a claim shall be permitted to participate fully at a hearing held in connection with such claim.

(c) A full evidentiary hearing need not be conducted if a party moves for summary judgment and the administrative law judge determines that there is no genuine issue as to any material fact and that the moving party is entitled to the relief requested as a matter of law. All parties shall be entitled to respond to the motion for summary judgment prior to decision thereon.

§ 725.453 Notice of hearing.

All parties shall be given at least 30 days written notice of the date and place of a hearing and the issues to be resolved at the hearing. Such notice shall be sent to each party or representative by certified mail.

§ 725.453A Time and place of hearing.

(a) The Chief Administrative Law Judge shall assign a definite time and place for a formal hearing, and shall, where possible, schedule the hearing to be held at a place within 75 miles of the claimant's residence unless an alternate location is requested by the claimant.

(b) If the claimant's residence is not in any State, the Chief Administrative Law Judge may, in his or her discretion, schedule the hearing in the country of the claimant's residence.

(c) The Chief Administrative Law Judge or the administrative law judge assigned the case may in his or her discretion direct that a hearing with respect to a claim shall begin at one location and then later be reconvened at another date and place.

§ 725.454 Change of time and place for hearing; transfer of cases.

(a) The Chief Administrative Law Judge or administrative law judge assigned the case may change the time and place for a hearing, either on his or her own motion or for good cause shown by a party. The administrative law judge may adjourn or postpone the hearing, or reopen the hearing for the receipt of additional evidence, for good cause shown, at any time prior to the mailing to the parties of the decision in the case. Unless otherwise agreed, at least 10 days notice shall be given to the parties of any change in the time or place of hearing.

(b) The Chief Administrative Law Judge may for good cause shown transfer a case from one administrative law judge to another.

§ 725.455 Hearing procedures; generally.

(a) *General.* The purpose of any hearing conducted under this subpart shall be to resolve contested issues of fact or law. Except as provided in § 725.421(b)(8), any findings or determinations made with respect to a claim by a deputy commissioner shall not be considered by the administrative law judge.

(b) *Evidence.* The administrative law judge shall at the hearing inquire fully into all matters at issue, and shall not be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, except as provided by 5 U.S.C. 554 and this subpart. The administrative law judge shall receive into evidence the testimony of the witnesses and parties, the evidence submitted to the Office of Administrative Law Judges by the deputy commissioner under § 725.421, and such

additional evidence as may be submitted in accordance with the provisions of this subpart. The administrative law judge may entertain the objections of any party to the evidence submitted under this section.

(c) *Procedure.* The conduct of the hearing and the order in which allegations and evidence shall be presented shall be within the discretion of the administrative law judge and shall afford the parties an opportunity for a fair hearing.

§ 725.456 Introduction of documentary evidence.

(a) All documents transmitted to the Office of Administrative Law Judges under § 725.421 shall be placed into evidence by the administrative law judge as exhibits of the Director, subject to objection by any party.

(b)(1) Any other documentary material, including medical reports, which was not submitted to the deputy commissioner, may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties at least 20 days before a hearing is held in connection with the claim.

(2) Documentary evidence, which is not exchanged with the parties in accordance with this paragraph, may be admitted at the hearing with the written consent of the parties or on the record at the hearing, or upon a showing of good cause why such evidence was not exchanged in accordance with this paragraph. If documentary evidence is not exchanged in accordance with paragraph (b)(1) of this section and the parties do not waive the 20-day requirement or good cause is not shown, the administrative law judge shall either exclude the late evidence from the record or remand the claim to the deputy commissioner for consideration of such evidence.

(3) A medical report which is not made available to the parties in accordance with paragraph (b)(1) of this section shall not be admitted into evidence in any case unless the hearing record is kept open for at least 30 days after the hearing to permit the parties to take such action as each considers appropriate in response to such evidence. If, in the opinion of the administrative law judge, evidence is withheld from the parties for the purpose of delaying the adjudication of the claim, the administrative law judge may exclude such evidence from the hearing record and close the record at the conclusion of the hearing.

(4) Notwithstanding any other provision of this paragraph, documentary evidence other than medical reports which is presented or discovered in connection with the testimony of a witness at the hearing may be admitted into the hearing record, subject to the objection of any party.

(c) All medical records and reports submitted by any party shall be considered by the administrative law judge in accordance with the quality standards contained in part 718 of this subchapter as amended from time to time.

(d) Documentary evidence which is obtained by any party during the time a claim is pending before the deputy commissioner, and which is withheld by such party until the claim is forwarded to the Office of Administrative Law Judges shall, notwithstanding paragraph (b) of this section, not be admitted into the hearing record in the absence of extraordinary circumstances, unless such admission is requested by any other party to the claim (see § 725.414(e)).

(e) If, during the course of a hearing, it is determined by the administrative law judge that the documentary evidence submitted in accordance with this section is incomplete as to any issue which must be adjudicated, the administrative law judge may, in his or her discretion, remand the claim to the deputy commissioner with instructions to develop only such additional evidence as is required, or allow the parties a reasonable time to obtain and submit such evidence, before the termination of the hearing.

[43 FR 36772, Aug. 18, 1978, as amended at 48 FR 24292, May 31, 1983]

§ 725.457 Witnesses.

(a) Witnesses at the hearing shall testify under oath or affirmation. The administrative law judge and the parties may question witnesses with respect to any matters relevant and material to any contested issue. Any party who intends to present the testimony of an

expert witness at a hearing shall so notify all other parties to the claim at least 10 days before the hearing. The failure to give notice of the appearance of an expert witness in accordance with this paragraph, unless notice is waived by all parties, shall preclude the presentation of testimony by such expert witness.

(b) No person shall be required to appear as a witness in any proceeding before an administrative law judge at a place more than 100 miles from his or her place of residence, unless the lawful mileage and witness fee for 1 day's attendance is paid in advance of the hearing date.

§ 725.458 Deposition; interrogatories.

The testimony of any witness or party may be taken by deposition or interrogatory according to the rules of practice of the Federal district court for the judicial district in which the case is pending (or of the U.S. District Court for the District of Columbia if the case is pending in the District or outside the United States), except that at least 30 days prior notice of any deposition shall be given to all parties unless such notice is waived. No post-hearing deposition or interrogatory shall be permitted unless authorized by the administrative law judge upon the motion of a party to the claim.

§ 725.459 Witness fees.

(a) A witness summoned to hearing before an administrative law judge, or whose deposition is taken, shall receive the same fees and mileage as witnesses in courts of the United States. Except as provided in paragraph (c) of this section, such fees shall be paid by the party summoning the witness.

(b) No claimant shall be required to bear the financial responsibility for producing an expert witness for cross-examination if such expert witness, regardless of his or her availability to attend the hearing, has previously submitted depositions, interrogatories, or medical reports. Such expert witness, if he or she is required to attend the hearing, respond to interrogatories or give a deposition, shall be summoned and shall have his or her expert witness fee paid by the party who summons such witness.

(c) If a claimant is determined entitled to benefits, there may be assessed as costs against a responsible operator, if any, fees and mileage for necessary witnesses attending the hearing at the request of the claimant. Both the necessity for the witness and the reasonableness of the fees of any expert witness shall be approved by the administrative law judge. The amounts awarded against a responsible operator as attorney's fees, or costs, fees and mileage for witnesses, shall not in any respect affect or diminish benefits payable under the Act.

§ 725.459A Oral argument and written allegations.

The parties, upon request, may be allowed a reasonable time for the presentation of oral argument at the hearing. Briefs or other written statements or allegations as to facts or law may be filed by any party with the permission of the administrative law judge. Copies of any brief or other written statement shall be filed with the administrative law judge and served on all parties by the submitting party.

§ 725.460 Consolidated hearings.

When two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the Chief Administrative Law Judge may, upon motion by any party or on his or her own motion, order that a consolidated hearing be conducted. Where consolidated hearings are held, a single record of the proceedings shall be made and the evidence introduced in one claim may be considered as introduced in the others, and a separate or joint decision shall be made, as appropriate.

§ 725.461 Waiver of right to appear and present evidence.

(a) If all parties waive their right to appear before the administrative law judge, it shall not be necessary for the administrative law judge to give notice of, or conduct, an oral hearing. A waiver of the right to appear shall be made in writing and filed with the Chief Administrative Law Judge or the administrative law judge assigned to hear the case. Such waiver may be withdrawn

by a party for good cause shown at any time prior to the mailing of the decision in the claim. Even though all of the parties have filed a waiver of the right to appear, the administrative law judge may, nevertheless, after giving notice of the time and place, conduct a hearing if he or she believes that the personal appearance and testimony of the party or parties would assist in ascertaining the facts in issue in the claim. Where a waiver has been filed by all parties, and they do not appear before the administrative law judge personally or by representative, the administrative law judge shall make a record of the relevant documentary evidence submitted in accordance with this part and any further written stipulations of the parties. Such documents and stipulations shall be considered the evidence of record in the case and the decision shall be based upon such evidence.

(b) Except as provided in §725.456(a), the unexcused failure of any party to attend a hearing shall constitute a waiver of such party's right to present evidence at the hearing, and may result in a dismissal of the claim (see §725.465).

§725.462 Withdrawal of controversion of issues set for formal hearing; effect.

A party may, on the record, withdraw his or her controversion of any or all issues set for hearing. If a party withdraws his or her controversion of all issues, the administrative law judge shall remand the case to the deputy commissioner for the issuance of an appropriate order.

§725.463 Issues to be resolved at hearing; new issues.

(a) Except as otherwise provided in this section, the hearing shall be confined to those contested issues which have been identified by the deputy commissioner (see §725.421) or any other issue raised in writing before the deputy commissioner.

(b) An administrative law judge may consider a new issue only if such issue was not reasonably ascertainable by the parties at the time the claim was before the deputy commissioner. Such new issue may be raised upon application of any party, or upon an administrative law judge's own motion, with notice to all parties, at any time after a claim has been transmitted by the deputy commissioner to the Office of Administrative Law Judges and prior to decision by an administrative law judge. If a new issue is raised, the administrative law judge may, in his or her discretion, either remand the case to the deputy commissioner with instructions for further proceedings, hear and resolve the new issue, or refuse to consider such new issue.

(c) If a new issue is to be considered by the administrative law judge, a party may, upon request, be granted an appropriate continuance.

§725.464 Record of hearing.

All hearings shall be open to the public and shall be mechanically or stenographically reported. All evidence upon which the administrative law judge relies for decision shall be contained in the transcript of testimony, either directly or by appropriate reference. All medical reports, exhibits, and any other pertinent document or record, either in whole or in material part, introduced as evidence, shall be marked for identification and incorporated into the record.

§725.465 Dismissals for cause.

(a) The administrative law judge may, at the request of any party, or on his or her own motion, dismiss a claim:

(1) Upon the failure of the claimant or his or her representative to attend a hearing without good cause;

(2) Upon the failure of the claimant to comply with a lawful order of the administrative law judge; or

(3) Where there has been a prior final adjudication of the claim or defense to the claim under the provisions of this subchapter and no new evidence is submitted (except as provided in part 727 of this subchapter).

(b) A party who is not a proper party to the claim (see §725.360) shall be dismissed by the administrative law judge.

(c) In any case where a dismissal of a claim, defense, or party is sought, the administrative law judge shall issue an order to show cause why the dismissal should not be granted and afford all

parties a reasonable time to respond to such order. After the time for response has expired, the administrative law judge shall take such action as is appropriate to rule on the dismissal, which may include an order dismissing the claim, defense or party.

(d) No claim shall be dismissed in a case with respect to which payments prior to final adjudication have been made to the claimant in accordance with § 725.522, except upon the motion or written agreement of the Director.

§ 725.466 Order of dismissal.

(a) An order dismissing a claim shall be served on the parties in accordance with § 725.477. The dismissal of a claim shall have the same effect as a decision and order disposing of the claim on its merits, except as provided in paragraph (b) of this section. Such order shall advise the parties of their right to request review by the Benefits Review Board.

(b) Where the Chief Administrative Law Judge or the presiding administrative law judge issues a decision and order dismissing the claim after a show cause proceeding, the deputy commissioner shall terminate any payments being made to the claimant under § 725.522, and the order of dismissal shall, if appropriate, order the claimant to reimburse the Fund for all benefits paid to the claimant.

§ 725.475 Termination of hearings.

Hearings are officially terminated when all the evidence has been received, witnesses heard, pleadings and briefs submitted to the administrative law judge, and the transcript of the proceedings has been printed and delivered to the administrative law judge.

§ 725.476 Issuance of decision and order.

Within 20 days after the official termination of the hearing (see § 725.475), the administrative law judge shall issue a decision and order with respect to the claim making an award to the claimant, rejecting the claim, or taking such other action as is appropriate.

§ 725.477 Form and contents of decision and order.

(a) Orders adjudicating claims for benefits shall be designated by the term ''decision and order'' or ''supplemental decision and order'' as appropriate, followed by a descriptive phrase designating the particular type of order, such as ''award of benefits,'' ''rejection of claim,'' ''suspension of benefits,'' ''modification of award.''

(b) A decision and order shall contain a statement of the basis of the order, the names of the parties, findings of fact, conclusions of law, and an award, rejection or other appropriate paragraph containing the action of the administrative law judge, his or her signature and the date of issuance. A decision and order shall be based upon the record made before the administrative law judge.

§ 725.478 Filing and service of decision and order.

On the date of issuance of a decision and order under § 725.477, the administrative law judge shall serve the decision and order on all parties to the claim by certified mail. On the same date, the original record of the claim shall be returned to the DCMWC in Washington, DC, and the decision and order shall be considered to be filed in the office of the deputy commissioner. Immediately upon receipt of a decision and order awarding benefits, the deputy commissioner shall compute the amount of benefits due, including any interest or penalties, and the amount of reimbursement owed the Fund, if any, and so notify the parties. Any computation made by the deputy commissioner under this paragraph shall strictly observe the terms of the award made by the administrative judge.

§ 725.479 Finality of decisions and orders.

(a) A decision and order shall become effective when filed in the office of the deputy commissioner (see § 725.478), and unless proceedings for suspension or setting aside of such order are instituted within 30 days of such filing, the order shall become final at the expiration of the 30th day after such filing (see § 725.481).

(b) Any party may, within 30 days after the filing of a decision and order under §725.478, request a reconsideration of such decision and order by the administrative law judge. The procedures to be followed in the reconsideration of a decision and order shall be determined by the administrative law judge.

(c) The time for appeal to the Benefits Review Board shall be suspended during the consideration of a request for reconsideration. After the administrative law judge has issued and filed a denial of the request for reconsideration, or a revised decision and order in accordance with this part, any dissatisfied party shall have 30 days within which to institute proceedings to set aside the new decision and order or affirmance of the original decision and order.

§725.480 Modification of decisions and orders.

(a) A party who is dissatisfied with a decision and order which has become final in accordance with §725.479 may request a modification of the decision and order if the conditions set forth in §725.310 are met.

§725.481 Right to appeal to the Benefits Review Board.

Any party dissatisfied with a decision and order issued by an administrative law judge may, before the decision and order becomes final (see §725.479), appeal the decision and order to the Benefits Review Board. A notice of appeal shall be filed with the Board. Proceedings before the Board shall be conducted in accordance with part 802 of this title.

§725.482 Judicial review.

(a) Any person adversely affected or aggrieved by a final order of the Benefits Review Board may obtain a review of that order in the U.S. court of appeals for the circuit in which the injury occurred by filing in such court within 60 days following the issuance of such Board order a written petition praying that the order be modified or set aside. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless the court finds that irreparable injury would otherwise ensue to an operator or carrier.

(b) The Director, Office of Workers' Compensation Program, as designee of the Secretary of Labor responsible for the administration and enforcement of the Act, shall be considered the proper party to appear and present argument on behalf of the Secretary of Labor in all review proceedings conducted pursuant to this part and the Act, either as petitioner or respondent.

§725.483 Costs in proceedings brought without reasonable grounds.

If a United States court having jurisdiction of proceedings regarding any claim or final decision and order, determines that the proceedings have been instituted or continued before such court without reasonable ground, the costs of such proceedings shall be assessed against the party who has so instituted or continued such proceedings.

Subpart F—Responsible Coal Mine Operators

GENERAL PROVISIONS

§725.490 Statutory provisions and scope.

(a) One of the major purposes of the black lung benefits amendments of 1977 was to provide a more effective means of transferring the responsibility for the payment of benefits from the Federal government to the coal industry with respect to claims filed under this part. In furtherance of this goal, a Black Lung Disability Trust Fund financed by the coal industry was established by the Black Lung Benefits Revenue Act of 1977. The primary purpose of the Fund is to pay benefits with respect to all claims in which the last coal mine employment of the miner on whose account the claim was filed occurred before January 1, 1970. With respect to most claims in which the miner's last coal mine employment occurred after January 1, 1970, individual coal mine operators will be liable for the payment of benefits. The 1981

amendments to the Act relieved individual coal mine operators from the liability for payment of certain special claims involving coal mine employment on or after January 1, 1970, where the claim was previously denied and subsequently approved under section 435 of the Act. See § 725.496 for a detailed description of these special claims. Where no such operator exists or the operator determined to be liable is in default in any case, the Fund shall pay the benefits due and seek reimbursement as is appropriate. See also § 725.420 for the Fund's role in the payment of interim benefits in certain contested cases. In addition, the Black Lung Benefits Reform Act of 1977 amended certain provisions affecting the scope of coverage under the Act and describing the effects of particular corporate transactions on the liability of operators.

(b) The provisions of this subpart define the term ''operator,'' prescribe the manner in which the identity of an operator which may be liable for the payment of benefits—referred to herein as a ''responsible operator''—will be determined, and briefly describe the obligations of operators to secure the payment of benefits. (See also part 726 of this subchapter.)

[43 FR 36772, Aug. 18,1978, as amended at 48 FR 24292, May 31,1983]

§ 725.491 Operator defined.

(a) In accordance with section 3(d) of the Act, an operator for purposes of this part is ''any owner, lessee or other person who operates, controls, or supervises a coal mine or any independent contractor performing services or construction at such mine.'' In accordance with sections 402(d) and 422(b) of the Act, certain other employers, including those engaged in coal mine construction, maintenance, and transportation, shall also be considered to be operators for purposes of this part. An independent contractor or self-employed miner, construction worker, coal preparation worker, or transportation worker may also be considered a coal mine operator for purpose of this part. It is Congress' intent that any employer of a miner as defined in § 725.202(a) shall, to the extent appropriate, be considered an operator for for the purposes of this part, and the provisions of this part shall be construed in accordance with this intent.

(b)(1) In determining which operator or other employer is the employer of a particular miner, primary consideration shall be given to the identity of the employer which is directly responsible for the supervision, operation and control of the mine or mines or other facilities where the miner was employed. However, Congress has made it clear that such supervision or control may be directly or indirectly exercised. Therefore, in appropriate cases where, for example, the individual or business entity most directly connected with the mine site is not capable of assuming liability for the payment of benefits (§ 725.492(d)) or is no longer in business and such individual or business entity is a subsidiary of a parent company, a member of a joint venture, a partner in a partnership, or is substantially owned or controlled by another business entity, such parent entity or other member of a joint venture or partner or controlling business entity may be considered an operator for purposes of this part, regardless of the nature of its business activities.

(2) Where a coal mine is leased, and the lease empowers the lessor to make decisions with respect to the terms and conditions under which coal is to be extracted or prepared, such as, but not limited to, the manner of extraction or preparation or the amount of coal to be produced, the lessor may be considered an operator with respect to employees of the lessee. An individual land owner or others who lease coal lands or mineral rights, who have never been coal mine operators or are not in the regular business of leasing coal mines, shall not be considered a coal mine operator in accordance with the terms of this section. Where a lessor previously operated a coal mine, it may be considered an operator with respect to employees of any lessee of such mine, particularly where the leasing arrangement was executed or renewed after the effective date of this part and does not require the lessee to secure benefits provided by the Act.

(3) In any claim in which the liability of a lessor for claims arising out of employment with a lessee is brought into

question, the lessee shall be considered primarily liable for the claim, and the liability of the lessor may be established only after it has been determined that the lessee is unable to provide for the payment of benefits to a successful claimant. In any case involving the liability of a lessor for a claim arising out of employment with a lessee, any determination of lessor liability shall be made on the basis of the facts present in the case in consideration of the terms and intent of the act and this part.

(4) A former coal mine operator which has become a lessor of coal miner shall be liable for approved claims arising out of coal mine employment with such lessor during the time the lessor was a coal mine operator, if such employment terminated on or after January 1, 1970, and the conditions for liability contained in §725.492 are met.

(c) (1) An independent contractor which performs or performed services or engages or engaged in construction at a mine or preparation or transportation facility may be held liable for the payment of benefits under this part as a coal mine operator with respect to its employees who work or have worked in or around a coal mine or coal preparation or transportation facility in the extraction, preparation, or transportation of coal or in coal mine construction in any period during which such employees were exposed to coal dust during their employment with such contractor. Such contractor's status as an operator shall not be contingent upon the amount or percentage of its work or business related to activities in or around a mine, nor upon the number or percentage of its employees engaged in such activities.

(2) (i) Any individual who works or has worked as a sole proprietor, a partner in a partnership, a member of a family business or who is otherwise self-employed in or around a coal mine or coal preparation or transportation facility in the extraction, preparation, or transportation of coal or in coal mine construction during any period such individual was exposed to coal dust may be considered an operator under this part.

(ii) A self-employed operator, depending upon the facts of the case, may be considered an employee of any other operator, person, or business entity which substantially controls, supervises, or is financially responsible for the activities of the self-employed operator.

(iii) For the purposes of this part, a lessor of a coal mine which leases such mine to a self-employed operator shall be considered the employer of such self-employed operator and its employees if the lease or agreement is executed or renewed after the effective date of this part and such lease or agreement does not require the lessee to guarantee the payment of benefits which may be required under this part.

§ 725.492 Responsible operator defined.

(a) A ''responsible operator'' is the operator which is determined liable for the payment of benefits under this part for any period after December 31, 1973. In order for an employer to be considered a responsible operator in any case, the following shall be established:

(1) The miner's disability or death shall have arisen at least in part out of employment in or around a mine or other facility during a period when the mine or facility was operated by such operator, except as provided in §725.493(a)(2);

(2) The operator shall have been an operator of a coal mine or other facility for any period after June 30, 1973;

(3) The miner's employment with the operator or other employer shall have included at least 1 working day (§725.493(b)) after December 31, 1969; and

(4) The operator or the employer shall be capable of assuming its liability for the payment of continuing benefits under this part, through any of the following means:

(i) By obtaining a policy or contract of insurance under section 423 of the Act and part 726 of this subchapter; or

(ii) By qualifying as a self-insurer under section 423 of the Act and part 726 of this subchapter; or

(iii) By possessing any assets that may be available for the payment of benefits under this part or through an action under subpart H of this part.

(b) In the absence of evidence to the contrary, a showing that a business or corporate entity exists shall be deemed sufficient evidence of an operator's capability of assuming liability under this part.

(c) For the purposes of determining whether an employer is or was an operator or other employer covered by the Act which may be found liable for the payment of benefits to an employee of such employer under this part, there shall be a rebuttable presumption that during the course of an individual's employment such individual was regularly and continuously exposed to coal dust during the course of employment. The presumption may be rebutted by a showing that the employee was not exposed to coal dust for significant periods during such employment.

For purposes of §725.493(a), a year of coal mine employment may be established by accumulating intermittent periods of coal mine employment.

§ 725.493 Criteria for identifying a responsible operator.

(a)(1) Subject to the provisions of paragraphs (a)(2) and (3) of this section, and provided that the conditions of §725.492(a)(2) through (a)(4) are met, the operator or other employer with which the miner had the most recent periods of cumulative employment of not less than 1 year, as determined in accordance with paragraph (b) of this section, shall be the responsible operator.

(2)(i) Except as otherwise provided in this paragraph, if the operator described in paragraph (a)(1) of this section was an operator of a mine or mines or the owner of the assets thereof on or after January 1, 1970, (a ''prior operator'') and on or after January 1, 1970, transferred such mine or mines or substantially all of the assets thereof to another operator (a ''successor operator''), such successor operator shall be liable for and shall secure the payment of all benefits which would have been payable by the prior operator with respect to miners previously employed by such prior operator as if the acquisition had not occurred and the prior operator had continued to be a coal mine operator. A lessor of a coal mine may be considered a prior or successor operator in accordance with this subpart.

(ii) The stated congressional objective supporting section 422(i) of the Act is to prevent a coal operator from circumventing liability under this part by entering into corporate or other business transactions which make the assessment of liability against that operator a financial or legal impossibility. Accordingly, a prior operator under paragraph (a)(2)(i) of this section, which transfers a mine or mines or substantially all the assets thereof, shall remain primarily liable for the payment of benefits under this part predicated on employment with the prior operator if such prior operator meets the conditions of §725.492(a)(2) and (a)(4). If the conditions in §725.492(a)(2) and (a)(4) are not met, the successor operator shall, if appropriate, be liable for the payment of such benefits.

(iii) Except as is provided in paragraph (a)(2)(ii) of this section, if the operator described in paragraph (a)(1) of this section is a prior operator which, on or after January 1, 1970, transferred its coal mining business or substantially all the assets thereof to a successor operator, or if such business or assets was subsequently transferred to a successsor of such successor operator, such successor operator which has most recently acquired the coal mining operations in question or substantially all of the assets thereof shall be deemed the responsible operator if it meets the conditions of §725.492(a)(2) and (a)(4). If such successor operator fails to meet such conditions, any prior operator or any operator in the chain of succession, beginning with the most recent operator, which acquired the coal mining business in question or substantially all of the assets thereof on or after January 1, 1970, and which meets the conditions of §725.492(a)(2) and (a)(4), may be determined to be the responsible operator. Wherever possible the employer of the miner shall be considered the responsible operator. However, any successor operator may be determined to be the responsible operator with respect to a claim whether or not the miner on whose total disability or death the claim is predicated was employed by such successor operator for any period of time.

(3) For purposes of paragraph (a)(2) of this section, the following shall apply to corporate reorganizations, liquidations, and such other transactions as are enumerated in this section, occurring on or after January 1, 1970:

(i) If an operator ceases to exist by reason of a reorganization which involves a change in identity, form, or place of business or organization, however effected, the resulting entity shall be treated as the operator to which this section applies;

(ii) If an operator ceases to exist by reason of a liquidation into a parent or successor corporation, the parent or successor corporation shall be treated as the operator to which this section applies;

(iii) If an operator ceases to exist by reason of a sale of substantially all its assets, merger, consolidation, or division, the successor operator or corporation, or business entity shall be treated as the operator to which this section applies.

(4) If there is no operator which meets the conditions of paragraphs (a)(1) or (2) of this section, the responsible operator shall be considered to be the operator with which the miner had the latest periods of cumulative employment of not less than 1 year, subject to the provisions of paragraph (a)(2) of this section and provided that the conditions of § 725.492(a)(2)–(a)(4) are met.

(5) No determination of responsibility made under paragraphs (a)(1)–(b)(4) of this section shall be construed to limit the authority of the Secretary to determine that any individual or business entity is an operator under the Act.

(6) In the event an operator or other employer is determined to be a responsible operator under the provisions of paragraphs (a)(1)–(b)(4) of this section, there shall be a rebuttable presumption that the miner's pneumoconiosis arose in whole or in part out of his or her employment with such operator. Unless this presumption is rebutted, the responsible operator shall be liable to pay benefits to the claimant on account of the disability or death of the miner in accordance with this part. A miner's pneumoconiosis, or disability therefrom, shall be considered to have arisen in whole or in part out of work in or around a mine if such work contributed to or aggravated the progression or advancement of a miner's loss of ability to perform his or her regular coal mine employment or comparable employment.

(b) From the evidence presented, the identity of the operator or other employer with which the miner had the most recent periods of cumulative employment of not less than 1 year and, to the extent the evidence permits, the beginning and ending dates of such periods, shall be ascertained. For purposes of this section, a year of employment means a period of 1 year, or partial periods totalling 1 year, during which the miner was regularly employed in or around a coal mine by the operator or other employer. Regular employment may be established on the basis of any evidence presented, including the testimony of a claimant or other witnesses, and shall not be contingent upon a finding of a specific number of days of employment within a given period. However, if an operator or other employer proves that the miner was not employed by it for a period of at least 125 working days, such operator or other employer shall be determined to have established that the miner was not regularly employed for a cumulative year by such operator or employer for the purposes of paragraph (a) of this section. A ''working day'' means any day or part of a day for which a miner received pay for work as a miner (see § 725.202(a)).

§ 725.494 Insurance coverage.

(a) Any operator which may be liable for the payment of benefits under this part shall secure such liability pursuant to section 423 of the act by:

(1) Qualifying as a self-insurer or establishing a qualified self-insurance trust as provided in part 726 of this chapter; or

(2) Insuring and keeping insured the payment of such benefits with an authorized insurance carrier or fund in accordance with the provisions of part 726 of this subchapter.

(b) A coal mine construction or transportation employer which is not also a coal mine operator shall not be required to purchase insurance or qualify as a self-insurer in accordance with

this part and part 726 of this subchapter. However, such employer shall be liable for the payment of benefits to any of its employees who are exposed to coal dust in the course of their employment, if eligibility is established under this part or part 727 of this subchapter and it is determined that such employer is a responsible operator within the meaning of this part. An employer other than a coal mine operator which may be liable for the payment of benefits under this part or part 727 of this subchapter shall take such action as may be appropriate to guarantee the discharge of such liability. In connection with the liability of an employer described in this paragraph, the deputy commissioner or other adjudication officer may require a deposit of security in accordance with § 725.606. A coal mine construction or transportation employer which also operates a coal mine or coal preparation facility shall not be excused from its obligation to purchase insurance or self-insure its potential liability under the act with respect to all covered employees, as described in paragraph (a) of this section. Any attempt by a coal mine operator to alter its corporate structure or reassign employees within such structure for the purpose of avoiding the insurance obligations of the act shall be considered void for the purpose of determining whether such operator is in compliance with the insurance requirements of the act, or is the employer of such employees.

§ 725.495 Penalty for failure to insure.

(a) Any employer required to secure the payment of benefits under the act and § 725.494 which fails to secure such benefits shall be subject to a civil penalty to be assessed by the Secretary of Labor of not more than $1,000 for each day during which such failure occurs; and in any case where such employer is a corporation, the president, secretary, and treasurer thereof shall be also severally liable for such civil penalty as herein provided for the failure of such corporation to secure the payment of benefits; and such president, secretary, and treasurer shall be severally personally liable, jointly with such corporation, for any payments or other benefit which may accrue under the act in respect to any injury which may occur to any employee of such corporation while it shall so fail to secure the payment of benefits as required by the act.

(b) If the Director determines that an operator has not fully discharged its insurance obligations imposed by the act, the Director shall notify the operator of its violation, and if corrective action is not taken within a reasonable time specified by the Director, the Director shall forward the case to the Chief Administrative Law Judge for appropriate proceedings. The administrative law judge assigned the case shall schedule and conduct a hearing with respect to the liability of the operator for the penalty described in this section. A penalty hearing conducted in accordance with this paragraph shall be subject to the provisions of 5 U.S.C. 554 and proceedings shall be determined in the discretion of the administrative law judge.

(c) An action may be commenced under this section at any time after information supporting such action becomes known to the Director.

(d) In determining the amount of any penalty assessed under this section, the administrative law judge shall consider the circumstances of the failure of an operator to comply with paragraph (a) of this section and shall, in the absence of mitigating circumstances, assess the maximum penalty allowed.

(e) Any penalty owed under this section shall be paid to the fund and may be enforced by the Secretary on behalf of the fund as appropriate.

(f) An appeal from a decision issued by an administrative law judge under this section shall be taken in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. 553 *et seq.* The Board shall not have jurisdiction to consider an appeal of a case adjudicated under this part.

§ 725.496 Special claims transferred to the Trust Fund.

(a) The 1981 amendments to the Act amended section 422 of the Act and transferred liability for payment of certain special claims from operators and carriers to the Trust Fund. These provisions apply to claims which were denied before March 1, 1978, and which

have been or will be approved in accordance with section 435 of the Act.

(b) Section 402(i) of the Act defines three classes of denied claims subject to the transfer provisions:

(1) Claims filed with and denied by the Social Security Administration before March 1, 1978:

(2) Claims filed with the Department of Labor in which the claimant was notified by the Department of an administrative or informal denial before March 1, 1977, and in which the claimant did not within one year of such notification either:

(i) Request a hearing; or

(ii) Present additional evidence; or

(iii) Indicate an intention to present additional evidence; or

(iv) Request a modification or reconsideration of the denial on the ground of a change in conditions or because of a mistake in a determination of fact;

(3) Claims filed with the Department of Labor and denied under the law in effect prior to the enactment of the Black Lung Benefits Reform Act of 1977, that is, before March 1, 1978, following a formal hearing before an administrative law judge or administrative review before the Benefits Review Board or review before a United States Court of Appeals.

(c) Where more than one claim was filed with the Social Security Administration and/or the Department of Labor prior to March 1, 1978, by or on behalf of a miner or a surviving dependent of a miner, unless such claims were required to be merged by the agency's regulations, the procedural history of each such claim must be considered separately to determine whether the claim is subject to the transfer of liability provisions.

(d) For a claim filed with and denied by the Social Security Administration prior to March 1, 1978, to come within the transfer provisions, such claim must have been or must be approved under the provisions of section 435 of the Act. No claim filed with and denied by the Social Security Administration is subject to the transfer of liability provisions unless a request was made by or on behalf of the claimant for review of such denied claim under section 435. Such review must have been requested by the filing of a valid election card or other equivalent document with the Social Security Administration in accordance with section 435(a) and its implementing regulations at 20 CFR 410.700–410.707.

(e) Where a claim filed with the Department of Labor prior to March 1, 1977, was subjected to repeated administrative or informal denials, the last such denial issued during the pendency of the claim determines whether the claim is subject to the transfer of liability provisions.

(f) Where a miner's claim comes within the transfer of liability provisions of the 1981 amendments the Trust Fund is also liable for the payment of any benefits to which the miner's dependent survivors are entitled after the miner's death. However, if the survivor's entitlement was established on a separate claim not subject to the transfer of liability provisions prior to approval of the miner's claim under section 435, the party responsible for the payment of such survivors' benefits shall not be relieved of that responsibility because the miner's claim was ultimately approved and found subject to the transfer of liability provisions.

[48 FR 24292, May 31, 1983]

§ 725.497 Procedures in special claims transferred to the Trust Fund.

(a) *General.* It is the purpose of this section to define procedures to expedite the handling and disposition of claims affected by the benefit liability transfer provisions of section 205 of the Black Lung Benefits Amendments of 1981.

(b) *Action by the Department.* The OWCP shall, in accordance with the criteria contained in §725.496, review each claim which is or may be affected by the provisions of section 205 of the Black Lung Benefits Amendments of 1981. Any party to a claim, adjudication officer, or adjudicative body may request that such a review be conducted and that the record be supplemented with any additional documentation necessary for an informed consideration of the transferability of the claim. Where the issue of the transferability of the claim can not be resolved by agreement of the parties and the evidence of record is not sufficient

for a resolution of the issue, the hearing record may be reopened or the case remanded for the development of the additional evidence concerning the procedural history of the claim necessary to such resolution. Such determinations shall be made on an expedited basis.

(c) *Dismissal of operators.* If it is determined that a coal mine operator or insurance carrier which previously participated in the consideration or adjudication of any claim, may no longer be found liable for the payment of benefits to the claimant by reason of section 205 of the Black Lung Benefits Amendments of 1981, such operator or carrier shall be promptly dismissed as a party to the claim. The dismissal of an operator or carrier shall be concluded at the earliest possible time and in no event shall an operator or carrier participate as a necessary party in any claim for which only the Trust Fund may be liable.

(d) *Procedure following dismissal of an operator.* After it has been determined that an operator or carrier must be dismissed as a party in any claim in accordance with this section, the Director shall take such action as is authorized by the Act to bring about the proper and expeditious resolution of the claim in light of all relevant medical and other evidence. Action to be taken in this regard by the Director may include, but is not limited to, the assignment of the claim to the Black Lung Disability Trust Fund for the payment of benefits, the reimbursement of benefits previously paid by an operator or carrier if appropriate, the defense of the claim on behalf of the Trust Fund, or proceedings authorized by § 725.310.

(e) Any claimant whose claim has been subsequently denied in a modification proceeding will be entitled to expedited review of the modification decision. Where a formal hearing was previously held, the claimant may waive his right to a further hearing and ask that a decision be made on the record of the prior hearing, as supplemented by any additional documentary evidence which the parties wish to introduce and briefs of the parties, if desired. In any case in which the claimant waives his right to a second hearing, a decision and order must be issued within 30 days of the date upon which the parties agree the record has been completed.

[48 FR 24293, May 31, 1983]

Subpart G—Payment of Benefits

§ 725.501 Payment provisions generally.

The provisions of this subpart govern the payment of benefits to claimants whose claims are approved for payment under section 415 and part C of title IV of the act or approved after review under section 435 of the act and part 727 of this subchapter.

§ 725.502 Manner of payment, payment periods.

(a) Benefits under the act shall be paid periodically, promptly, and directly to the person entitled thereto or his or her representative payee (see § 725.510).

(b) Benefits are payable for monthly periods and shall be paid to an eligible claimant beginning with the month during which eligibility begins and shall terminate with the month before the month during which eligibility terminates. If a claimant dies in the first month during which all requirments for eligibility are met, benefits shall be paid for that month.

(c) Except as is otherwise provided in this part, all past due benefits shall be paid during the month in which the first benefit payment is made.

§ 725.503 Date from which benefits are payable.

(a) In accordance with the provisions of section 6(a) of the Longshoremen's Act as incorporated by section 422(a) of the act, and except as provided in § 725.503A, the provisions of this section shall be applicable in determining the date from which benefits are payable to an eligible claimant.

(b) In the case of a miner who is totally disabled due to pneumoconiosis, benefits are payable to such miner beginning with the month of onset of total disability. Where the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed, or the

month during which the claimant elected review under part 727 of this subchapter.

(c) Except as is provided in part 727 of this subchapter, in the case of a survivor of a miner who died due to or while totally disabled by pneumoconiosis, benefits shall be payable beginning with the month of the miner's death, or January 1, 1974, whichever is later.

(d) No benefits shall be payable with respect to a claim filed between July 1 and December 31, 1973 (a section 415 claim), for any period of eligibility prior to July 1, 1973 (or January 1, 1974 if the claim is approved under part 727 of this subpart), nor shall any benefits be payable with respect to such claim pursuant to the provisions of section 415 of part B of title IV of the act for any period of eligibility after December 31, 1973. Where in the case of a section 415 claim, eligibility continues beyond December 31, 1973, benefits for periods of eligibility occurring after such date shall be payable under part C of title IV of the act.

(e) No benefits shall be payable with respect to a claim filed after December 31, 1973 (a part C claim), for any period of eligibility occurring before January 1, 1974.

(f) Each decision and order awarding benefits shall indicate the month from which benefits are payable to the eligible claimant.

§ 725.503A Payments to a claimant employed as a miner.

(a) In the case of a claimant who is employed as a miner (see § 725.202(a)) at the time of a final determination of such miner's eligibility for benefits, no benefits shall be payable unless:

(1) The miner's eligibility is established under section 411(c)(3) of the act; or (2) the miner terminates his or her coal mine employment within 1 year from the date of the final determination of the claim.

(b) If the eligibility of a working miner is established under section 411(c)(3) of the act, benefits shall be payable as is otherwise provided in this part. If eligibility cannot be established under section 411(c)(3), and the miner continues to be employed as a miner in any capacity for a period of less than 1 year after a final determination of the claim, benefits shall be payable beginning with the month during which the miner ends his or her coal mine employment. If the miner's employment continues for more than 1 year after a final determination of eligibility, such determination shall be considered a denial of benefits on the basis of the miner's continued employment, and the miner may seek benefits only as provided in § 725.310, if applicable, or by filing a new claim under this part. The provisions of subparts D and E of this part shall be applicable to claims considered under this section as is appropriate.

(c) In any case where the miner returns to coal mine or comparable and gainful work, the payments to such miner shall be suspended and no benefits shall be payable (except as provided in section 411(c)(3) of the act) for the period during which the miner continues to work. If the miner again terminates employment, the deputy commissioner may require the miner to submit to further medical examination before authorizing the payment of benefits.

§ 725.504 Payees.

Benefits may be paid, as appropriate, to a beneficiary, to a qualified dependent, or to a representative authorized under this subpart to receive payments on behalf of such beneficiary or dependent.

§ 725.505 Payment on behalf of another; "legal guardian" defined.

Benefits are paid only to the beneficiary, his or her representative payee (see § 725.510) or his or her legal guardian. As used in this section, ''legal guardian'' means an individual who has been appointed by a court of competent jurisdiction or otherwise appointed pursuant to law to assume control of and responsibility for the care of the beneficiary, the management of his or her estate, or both.

§ 725.506 Guardian for minor or incompetent.

An adjudication officer may require that a legal guardian or representative be appointed to receive benefit payments payable to any person who is

mentally incompetent or a minor and to exercise the powers granted to, or to perform the duties otherwise required of such person under the act.

§ 725.510 Representative payee.

(a) If the deputy commissioner determines that the best interests of a beneficiary are served thereby, the deputy commissioner may certify the payment of such beneficiary's benefits to a representative payee.

(b) Before any amount shall be certified for payment to any representative payee for or on behalf of a beneficiary, such representative payee shall submit to the deputy commissioner such evidence as may be required of his or her relationship to, or his or her responsibility for the care of, the beneficiary on whose behalf payment is to be made, or of his or her authority to receive such a payment. The deputy commissioner may, at any time thereafter, require evidence of the continued existence of such relationship, responsibility, or authority. If a person requesting representative payee status fails to submit the required evidence within a reasonable period of time after it is requested, no further payments shall be certified to him or her on behalf of the beneficiary unless the required evidence is thereafter submitted.

(c) All benefit payments made to a representative payee shall be available only for the use and benefit of the beneficiary, as defined in § 725.511.

§ 725.511 Use and benefit defined.

(a) Payments certified to a representative payee shall be considered as having been applied for the use and benefit of the beneficiary when they are used for the beneficiary's current maintenance—i.e., to replace current income lost because of the disability of the beneficiary. Where a beneficiary is receiving care in an institution, current maintenance shall include the customary charges made by the institution and charges made for the current and foreseeable needs of the beneficiary which are not met by the institution.

(b) Payments certified to a representative payee which are not needed for the current maintenance of the beneficiary, except as they may be used under § 725.512, shall be conserved or invested on the beneficiary's behalf. Preferred investments are U.S. savings bonds which shall be purchased in accordance with applicable regulations of the U.S. Treasury Department (31 CFR part 315). Surplus funds may also be invested in accordance with the rules applicable to investment of trust estates by trustees. For example, surplus funds may be deposited in an interest or dividend bearing account in a bank or trust company or in a savings and loan association if the account is either federally insured or is otherwise insured in accordance with State law requirements. Surplus funds deposited in an interest or dividend bearing account in a bank or trust company or in a savings and loan association must be in a form of account which clearly shows that the representative payee has only a fiduciary, and not a personal, interest in the funds. The preferred forms of such accounts are as follows:

Name of beneficiary _____
by (Name of representative payee) representative payee,
or (Name of beneficiary)
by (Name of representative payee) trustee.

U.S. savings bonds purchased with surplus funds by a representative payee for an incapacitated adult beneficiary should be registered as follows: (Name of beneficiary) (Social Security No.), for whom (Name of payee) is representative payee for black lung benefits.

§ 725.512 Support of legally dependent spouse, child, or parent.

If current maintenance needs of a beneficiary are being reasonably met, a relative or other person to whom payments are certified as representative payee on behalf of the beneficiary may use part of the payments so certified for the support of the legally dependent spouse, a legally dependent child, or a legally dependent parent of the beneficiary.

§ 725.513 Accountability; transfer.

(a) The deputy commissioner may require a representative payee to submit periodic reports including a full accounting of the use of all benefit payments certified to a representative payee. If a requested report or accounting is not submitted within the time

allowed, the deputy commissioner shall terminate the certification of the representative payee and thereafter payments shall be made directly to the beneficiary. A certification which is terminated under this section may be reinstated for good cause, provided that all required reports are supplied to the deputy commissioner.

(b) A representative payee who has conserved or invested funds from payments under this part shall, upon the direction of the deputy commissioner, transfer any such funds (including interest) to a successor payee appointed by the deputy commissioner or, at the option of the deputy commissioner, shall transfer such funds to the Office for recertification to a successor payee or the beneficiary.

§ 725.514 Certification to dependent of augmentation portion of benefit.

(a) If the basic benefit of a miner or of a surviving spouse is augmented because of one or more dependents, and it appears to the deputy commissioner that the best interests of such dependent would be served thereby, or that the augmented benefit is not being used for the use and benefit (as defined in this subpart) of the augmentee, the deputy commissioner may certify payment of the amount of such augmentation (to the extent attributable to such dependent) to such dependent directly, or to a legal guardian or a representative payee for the use and benefit of such dependent.

(b) Any request to the deputy commissioner to certify separate payment of the amount of an augmentation in accordance with paragraph (a) of this section shall be in writing on such form and in accordance with such instructions as are prescribed by the Office.

(c) The deputy commissioner shall specify the terms and conditions of any certification authorized under this section and may terminate any such certification where appropriate.

(d) Any payment made under this section, if otherwise valid under the Act, is a complete settlement and satisfaction of all claims, rights, and interests in and to such payment, except that such payment shall not be construed to abridge the rights of any party to recoup any overpayment made.

§ 725.515 Assignment and exemption from claims of creditors.

Except as provided by the act and this part, no assignment, release, or commutation of benefits due or payable under this part shall be valid, and all benefits shall be exempt from claims of creditors and from levy, execution, and attachment or other remedy or recovery or collection of a debt, which exemption may not be waived.

BENEFIT RATES

§ 725.520 Computation of benefits.

(a) *Basic rate.* The amount of benefits payable to a beneficiary for a month is determined, in the first instance, by computing the ''basic rate.'' The basic rate is equal to 37½ percent of the monthly pay rate for Federal employees in GS–2, step 1. That rate for a month is determined by:

(1) Ascertaining the lowest annual rate of pay (step 1) for Grade GS–2 of the General Schedule applicable to such month (see 5 U.S.C. 5332);

(2) Ascertaining the monthly rate thereof by dividing the amount determined in paragraph (a)(1) of this section by 12; and

(3) Ascertaining the basic rate under the Act by multiplying the amount determined in paragraph (a)(2) of this section by 0.375 (that is, by 37½ percent).

(b) *Basic benefit.* When a miner or surviving spouse is entitled to benefits for a month for which he or she has no dependents who qualify under this part and when a surviving child of a miner or spouse, or a parent, brother, or sister of a miner, is entitled to benefits for a month for which he or she is the only beneficiary entitled to benefits, the amount of benefits to which such beneficiary is entitled is equal to the basic rate as computed in accordance with this section (raised, if not a multiple of 10 cents, to the next high multiple of 10 cents). This amount is referred to as the ''basic benefit.''

(c) *Augmented benefit.* (1) When a miner or surviving spouse is entitled to benefits for a month for which he or she has one or more dependents who qualify under this part, the amount of

benefits to which such miner or surviving spouse is entitled is increased. This increase is referred to as an ''augmentation.''

(2) The benefits of a miner or surviving spouse are augmented to take account of a particular dependent beginning with the first month in which such dependent satisfies the conditions set forth in this part, and continues to be augmented through the month before the month in which such dependent ceases to satisfy the conditions set forth in this part, except in the case of a child who qualifies as a dependent because he or she is a student. In the latter case, such benefits continue to be augmented through the month before the first month during no part of which he or she qualifies as a student.

(3) The basic rate is augmented by 50 percent for one such dependent, 75 percent for two such dependents, and 100 percent for three or more such dependents.

(d) *Survivor benefits.* As used in this section, ''survivor'' means a surviving child of a miner or surviving spouse, or a surviving parent, brother, or sister of a miner, who establishes entitlement to benefits under this part.

(e) *Computation and rounding.* (1) Any computation prescribed by this section is made to the third decimal place.

(2) Monthly benefits are payable in multiples of 10 cents. Therefore, a monthly payment of amounts derived under paragraph (c)(3) of this section which is not a multiple of 10 cents is increased to the next higher multiple of 10 cents.

(3) Since a fraction of a cent is not a multiple of 10 cents, such an amount which contains a fraction in the third decimal place is raised to the next higher multiple of 10 cents.

(f) *Eligibility based on the coal mine employment of more than one miner.* Where an individual, for any month, is entitled (and/or qualifies as a dependent for purposes of augmentation of benefits) based on the disability or death due to pneumoconiosis arising out of the coal mine employment of more than one miner, the benefit payable to or on behalf of such individual shall be at a rate equal to the highest rate of benefits for which entitlement is established by reason of eligibility as a beneficiary, or by reason of his or her qualification as a dependent for augmentation of benefit purposes.

[43 FR 36772, Aug. 18, 1978, as amended at 48 FR 24293, May 31, 1983]

§ 725.521 Commutation of payments; lump sum awards.

(a) Whenever the deputy commissioner determines that it is in the interest of justice, the liability for benefits or any part thereof as determined by a final adjudication, may, with the approval of the Director, be discharged by the payment of a lump sum equal to the present value of future benefit payments commuted, computed at 4 percent true discount compounded annually.

(b) Applications for commutation of future payments of benefits shall be made to the deputy commissioner in the manner prescribed by the deputy commissioner. If the deputy commissioner determines that an award of a lump sum payment of such benefits would be in the interest of justice, he or she shall refer such application, together with the reasons in support of such determination, to the Director for consideration.

(c) The Director shall, in his or her discretion, grant or deny the application for commutation of payments. Such decision may be appealed to the Benefits Review Board.

(d) The computation of all commutations of such benefits shall be made by the OWCP. For this purpose the file shall contain the date of birth of the person on whose behalf commutation is sought, as well as the date upon which such commutation shall be effective.

(e) For purposes of determining the amount of any lump sum award, the probability of the death of the disabled miner and/or other persons entitled to benefits before the expiration of the period during which he or she is entitled to benefits, shall be determined in accordance with the most current United States Life Tables, as developed by the Department of Health, Education, and Welfare, and the probability of the remarriage of a surviving spouse shall be determined in accordance with the remarriage tables of the Dutch Royal Insurance Institution. The probability of

the happening of any other contingency affecting the amount or duration of the compensation shall be disregarded.

(f) In the event that an operator or carrier is adjudicated liable for the payment of benefits, such operator or carrier shall be notified of and given an opportunity to participate in the proceedings to determine whether a lump sum award shall be made. Such operator or carrier shall, in the event a lump sum award is made, tender full and prompt payment of such award to the claimant as though such award were a final payment of monthly benefits. Except as provided in paragraph (g) of this section, such lump sum award shall forever discharge such operator or carrier from its responsibility to make monthly benefit payments under the act to the person who has requested such lump-sum award. In the event that an operator or carrier is adjudicated liable for the payment of benefits, such operator or carrier shall not be liable for any portion of a commuted or lump sum award predicated upon benefits due any claimant prior to January 1, 1974.

(g) In the event a lump-sum award is approved under this section, such award shall not operate to discharge an operator carrier, or the Fund from any responsibility imposed by the act for the payment of medical benefits to an eligible miner.

§ 725.522 Payments prior to final adjudication.

(a) Unless a stay of payments is ordered by the Board or appropriate court under section 21 of the LHWCA, the payment of benefits to a claimant who has been determined eligible therefor by a deputy commissioner, administrative law judge, the Board, or a court shall commence within no more than 30 days following an initial determination of eligibility by such deputy commissioner, or the filing of an award of benefits by such administrative law judge, Board, or court, notwithstanding the pendency of further proceedings before an admininstrative law judge or an appeal to the Board or court.

(b) If an operator or carrier has been initially determined liable for the payment of benefits to an eligible claimant by the deputy commissioner (see § 725.420), or ordered to pay benefits by an administrative law judge, the Board, or an appropriate court, and such operator or carrier fails or refuses to commence the payment of benefits (including all past due benefits and medical expenses) within the 30-day period specified in paragraph (a) of this section, the fund shall commence the payments due and owing and shall continue such payments as appropriate. In the event that the fund undertakes the payment of benefits on behalf of an operator or carrier, the provisions of §§ 725.601–725.608 shall be applicable to such operator or carrier.

(c) If benefit payments are commenced prior to the final adjudication of the claim and it is later determined by an administrative law judge, the Board, or court that the claimant was ineligible to receive such payments, such payments shall be considered overpayments pursuant to § 725.540 of this subpart which may be recovered in accordance with the provisions of this subpart.

Special Provisions for Operator Payments

§ 725.530 Operator payments; generally.

(a) An operator or carrier which has been determined liable for the payment of benefits to a claimant by the deputy commissioner, or ordered to pay such benefits by an administrative law judge, the Board, or a court, or an operator who has agreed that it is liable for the payment of benefits to a claimant, shall commence the payment of benefits (including past due benefits, medical costs, penalties and interest, if any) within 30 days of such determination, order, or agreement. Thereafter, monthly benefit payments shall be made for the duration of the claimant's eligibility. Arrangements for the payment of medical costs shall be made by such operator or carrier in accordance with the provisions of subpart I of this part.

(b) Benefit payments made by an operator or carrier shall be made directly to the person entitled thereto or a representative payee if authorized by the

deputy commissioner. The payment of a claimant's attorney's fee, if any is awarded, shall be made directly to such attorney. Reimbursement of the fund, including interest, shall be paid directly to the Secretary on behalf of the fund.

§ 725.531 Receipt for payment.

Any individual receiving benefits under the act in his or her own right, or as a representative payee, or as the duly appointed agent for the estate of a deceased beneficiary, shall execute receipts for benefits paid by any operator which shall be produced by such operator for inspection whenever the deputy commissioner requires. A canceled check shall be considered adequate receipt of payment for purposes of this section. No operator or carrier shall be required to retain receipts for payments made for more than 5 years after the date on which such receipt was executed.

(Approved by the Office of Management and Budget under control number 1215–0124)

(Pub. L. No. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[43 FR 36772, Aug. 18, 1978, as amended at 47 FR 145, Jan. 5, 1982]

§ 725.532 Suspension, reduction, or termination of payments.

(a) No suspension, reduction, or termination in the payment of benefits is permitted unless authorized by the deputy commissioner, administrative law judge, Board, or court. No suspension, reduction, or termination shall be authorized except upon the occurrence of an event which terminates a claimant's eligibility for benefits (see subpart B of this part) or as is otherwise provided in subpart C of this part, §§ 725.306 and 725.310, or this subpart see also §§ 725.533–725.546).

(b) Any unauthorized suspension in the payment of benefits by an operator or carrier shall be treated as provided in subpart H.

(c) Unless suspension, reduction, or termination of benefits payments is required by an administrative law judge, the Benefits Review Board or a court, the deputy commissioner, after receiving notification of the occurrence of an event that would require the suspension, reduction, or termination of benefits, shall follow the procedures for the determination of claims set forth in subparts D and E.

[43 FR 36772, Aug. 18, 1978, as amended at 48 FR 24293, May 31, 1983]

Increases and Reductions of Benefits

§ 725.533 Modification of benefits amounts; general.

(a) Under certain circumstances the amount of monthly benefits as computed in § 725.520 or lump-sum award (§ 725.521) shall be modified to determine the amount actually to be paid to a beneficiary. With respect to any benefits payable for all periods of eligibility after January 1, 1974, a reduction of the amount of benefits payable shall be required on account of:

(1) Any compensation or benefits received under any State workers' compensation law because of death or partial or total disability due to pneumoconiosis; or

(2) Any compensation or benefits received under or pursuant to any Federal law including part B of title IV of the act because of death or partial or total disability due to pneumoconiosis; or

(3) In the case of benefits to a parent, brother, or sister as a result of a claim filed at any time or benefits payable on a miner's claim which was filed on or after January 1, 1982, the excess earnings from wages and from net earnings from self-employment (see § 410.530 of this title) of such parent, brother, sister, or miner, respectively; or

(4) The fact that a claim for benefits from an additional beneficiary is filed, or that such claim is effective for a payment during the month of filing, or a dependent qualifies under this part for an augmentation portion of a benefit of a miner or widow for a period in which another dependent has previously qualified for an augmentation.

(b) With respect to periods of eligibility occurring after June 30, 1973, but before January 1, 1974, benefits shall be reduced in months of eligibility occurring during such period only:

(1) By an amount equal to any payment received under the workers' compensation, unemployment compensation, or disability insurance laws of any State on account of the disability or death of the miner due to pneumoconiosis; and

(2) On account of excess earnings under section 203 (b) through (l) of the Social Security Act; and

(3) For failure to report earnings from work in employment and self-employment within the prescribed period of time; and

(4) By reason of the fact that a claim for benefits from an additional beneficiary is filed, or that such a claim is effective for a month prior to the month of filing, or a dependent qualifies under this part or this chapter for an augmentation portion of a benefit of a miner or surviving spouse for a month for which another dependent has previously qualified for an augmentation.

(c) With respect to claims filed between July 1 and December 31, 1973, and paid for periods of eligibility occurring during such period, there shall be no retroactive adjustment of benefits paid in light of the amendments enacted by the Black Lung Benefits Reform Act of 1977 insofar as such amendments affect events which cause a reduction in benefits.

(d) An adjustment in a beneficiary's monthly benefit may be required because an overpayment or underpayment has been made to such beneficiary (see §§ 725.540–725.546).

(e) A suspension of a beneficiary's monthly benefits may be required when the Office has information indicating that reductions on account of excess earnings may reasonably be expected.

(f) Monthly benefit rates are payable in multiples of 10 cents. Any monthly benefit rate which, after the applicable computations, augmentations, and reductions is not a multiple of 10 cents, is increased to the next higher multiple of 10 cents. Since a fraction of a cent is not a multiple of 10 cents, a benefit rate which contains such a fraction in the third decimal is raised to the next higher multiple of 10 cents.

(g) Any individual entitled to a benefit, who is aware of any circumstances which could affect entitlement to benefits, eligibility for payment, or the amount of benefits, or result in the termination, suspension, or reduction of benefits, shall promptly report these circumstances to the Office. The Office may at any time require an individual receiving, or claiming entitlement to, benefits, either on his or her own behalf or on behalf of another, to submit a written statement giving pertinent information bearing upon the issue of whether or not an event has occurred which would cause such benefit to be terminated, or which would subject such benefit to reductions or suspension under the provisions of the Act. The failure of an individual to submit any such report or statement, properly executed, to the Office shall subject such benefit to reductions, suspension, or termination as the case may be.

[43 FR 36772, Aug. 18, 1978, as amended at 48 FR 24293, May 31, 1983]

EDITORIAL NOTE: Section 725.533(a)(3) revised at 48 FR 24293, May 31, 1983, contains information collection requirements which are not effective until approved by the Office of Management and Budget. Notice of approval will be published in the Federal Register.

§ 725.534 Reduction of State benefits.

No benefits under section 415 of part B of title IV of the Act shall be payable to the residents of a State which, after December 31, 1969, reduces the benefits payable to persons eligible to receive benefits under section 415 of the Act under State laws applicable to its general work force with regard to workers' compensation (including compensation for occupational disease), unemployment compensation, or disability insurance benefits which are funded in whole or in part out of employer contributions.

§ 725.535 Reduction; receipt of State or Federal benefit.

(a) As used in this section the term ''State or Federal benefit'' means a payment to an individual on account of total or partial disability or death due to pneumoconiosis only under State or Federal laws relating to workers' compensation. With respect to a claim for which benefits are payable for any month between July 1 and December

31, 1973, ''State benefit'' means a payment to a beneficiary made on account of disability or death due to pneumoconiosis under State laws relating to workers' compensation (including compensation for occupational disease), unemployment compensation, or disability insurance.

(b) Benefit payments to a beneficiary for any month are reduced (but not below zero) by an amount equal to any payments of State or Federal benefits received by such beneficiary for such month.

(c) Where a State or Federal benefit is paid periodically but not monthly, or in a lump sum as a commutation of or a substitution for periodic benefits, the reduction under this section is made at such time or times and in such amounts as the Office determines will approximate as nearly as practicable the reduction required under paragraph (b) of this section. In making such a determination, a weekly State or Federal benefit is multiplied by 4⅓ and a biweekly benefit is multiplied by 2⅙ to ascertain the monthly equivalent for reduction purposes.

(d) Amounts paid or incurred or to be incurred by the individual for medical, legal, or related expenses in connection with this claim for State or Federal benefits (defined in paragraph (a) of this section) are excluded in computing the reduction under paragraph (b) of this section, to the extent that they are consistent with State or Federal Law. Such medical, legal, or related expenses may be evidenced by the State or Federal benefit awards, compromise agreement, or court order in the State or Federal benefit proceedings, or by such other evidence as the Office may require. Such other evidence may consist of:

(1) A detailed statement by the individual's attorney, physician, or the employer's insurance carrier; or:

(2) Bills, receipts, or canceled checks; or

(3) Other evidence indicating the amount of such expenses; or

(4) Any combination of the foregoing evidence from which the amount of such expenses may be determinable. Such expenses shall not be excluded unless established by evidence as required by the Office.

§ 725.536 Reductions; excess earnings.

In the case of a surviving parent, brother, or sister, whose claim was filed at any time, or of a miner whose claim was filed on or after January 1, 1982, benefit payments are reduced as appropriate by an amount equal to the deduction which would be made with respect to excess earnings under the provisions of sections 203 (b), (f), (g), (h), (j), and (l) of the Social Security Act (42 U.S.C. 403 (b), (f), (g), (h), (j), and (l)), as if such benefit payments were benefits payable under section 202 of the Social Security Act (42 U.S.C. 402) (see §§ 404.428–404.456 of this title).

[48 FR 24293, May 31, 1983]

EDITORIAL NOTE: Section 725.536 revised at 48 FR 24293, May 31, 1983, contains information collection requirements which are not effective until approved by the Office of Management and Budget. Notice of approval will be published in the FEDERAL REGISTER.

§ 725.537 Reductions; retroactive effect of an additional claim for benefits.

Beginning with the month in which a person other than a miner files a claim and becomes entitled to benefits, the benefits of other persons entitled to benefits with respect to the same miner, are adjusted downward, if necessary, so that no more than the permissible amount of benefits (the maximum amount for the number of beneficiaries involved) will be paid.

§ 725.538 Reductions; effect of augmentation of benefits based on subsequent qualification of individual.

(a) Ordinarily, a written request that the benefits of a miner or surviving spouse be augmented on account of a qualified dependent is made as part of the claim for benefits. However, it may also be made thereafter.

(b) In the latter case, beginning with the month in which such a request is filed on account of a particular dependent and in which such dependent qualifies for augmentation purposes under this part, the augmented benefits attributable to other qualified dependents (with respect to the same miner or surviving spouse), if any, are adjusted downward, if necessary, so that the permissible amount of augmented benefits (the maximum amount for the

number of dependents involved) will not be exceeded.

(c) Where, based on the entitlement to benefits of a miner or surviving spouse, a dependent would have qualified for augmentation purposes for a prior month of such miner's or surviving spouse's entitlement had such request been filed in such prior month, such request is effective for such prior month. For any month before the month of filing such request, however, otherwise correct benefits previously certified by the Office may not be changed. Rather the amount of the augmented benefit attributable to the dependent filing such request in the later month is reduced for each month of the retroactive period to the extent that may be necessary. This means that for each month of the retroactive period, the amount payable to the dependent filing the later augmentation request is the difference, if any, between:

(1) The total amount of augmented benefits certified for payment for other dependents for that month, and

(2) The permissible amount of augmented benefits (the maximum amount for the number of dependents involved) payable for the month for all dependents, including the dependent filing later.

§ 725.539 More than one reduction event.

If a reduction for receipt of State or Federal benefits and a reduction on account of excess earnings are chargeable to the same month, the benefit for such month is first reduced (but not below zero) by the amount of the State or Federal benefits, and the remainder of the benefit for such month, if any, is then reduced (but not below zero) by the amount of excess earnings chargeable to such month.

OVERPAYMENTS; UNDERPAYMENTS

§ 725.540 Overpayments.

(a) *General.* As used in this subpart, the term ''overpayment'' includes:

(1) Payment where no amount is payable under this part;

(2) Payment in excess of the amount payable under this part;

(3) A payment under this part which has not been reduced by the amounts required by the Act (see § 725.533);

(4) A payment under this part made to a resident of a State whose residents are not entitled to benefits (see §§ 725.402 and 725.403);

(5) Payment resulting from failure to terminate benefits to an individual no longer entitled thereto;

(6) Duplicate benefits paid to a claimant on account of concurrent eligibility under this part and part 410 or 727 of this title or as provided in § 725.309.

(b) *Overpaid beneficiary is living.* If the beneficiary to whom an overpayment was made is living at the time of a determination of such overpayment, is entitled to benefits at the time of the overpayment, or at any time thereafter becomes so entitled, no benefit for any month is payable to such individual, except as provided in paragraph (c) of this section, until an amount equal to the amount of the overpayment has been withheld or refunded.

(c) *Adjustment by withholding part of a monthly benefit.* Adjustment under paragraph (b) of this section may be effected by withholding a part of the monthly benefit payable to a beneficiary where it is determined that:

(1) Withholding the full amount each month would deprive the beneficiary of income required for ordinary and necessary living expenses;

(2) The overpayment was not caused by the beneficiary's intentionally false statement or representation, or willful concealment of, or deliberate failure to furnish, material information; and

(3) Recoupment can be effected in an amount of not less than $10 a month and at a rate which would not unreasonably extend the period of adjustment.

(d) *Overpaid beneficiary dies before adjustment.* If an overpaid beneficiary dies before adjustment is completed under the provisions of paragraph (b) of this section, recovery of the overpayment shall be effected through repayment by the estate of the deceased overpaid beneficiary, or by withholding of amounts due the estate of such deceased beneficiary, or both.

§ 725.541 Notice of waiver of adjustment or recovery of overpayment.

Whenever a determination is made that more than the correct amount of payment has been made, notice of the provisions of section 204(b) of the Social Security Act regarding waiver of adjustment or recovery shall be sent to the overpaid individual, to any other individual against whom adjustment or recovery of the overpayment is to be effected, and to any operator or carrier which may be liable to such overpaid individual.

§ 725.542 When waiver of adjustment or recovery may be applied.

There shall be no adjustment or recovery of an overpayment in any case where an incorrect payment has been made with respect to an individual:

(a) Who is without fault, and where

(b) Adjustment or recovery would either:

(1) Defeat the purpose of title IV of the Act, or

(2) Be against equity and good conscience.

§ 725.543 Standards for waiver of adjustment or recovery.

The standards for determining the applicability of the criteria listed in § 725.542 shall be the same as those applied by the Social Security Administration under §§ 410.561–410.561h of this title.

§ 725.544 Collection and compromise of claims for overpayment.

(a) *General effect of the Federal Claims Collection Act of 1966.* In accordance with the Federal Claims Collection Act of 1966 and applicable regulations, claims by the Office against an individual for recovery of an overpayment under this part not exceeding the sum of $20,000, exclusive of interest, may be compromised, or collection suspended or terminated, where such individual or his or her estate does not have the present or prospective ability to pay the full amount of the claim within a reasonable time (see paragraph (c) of this section), or the cost of collection is likely to exceed the amount of recovery (see paragraph (d) of this section), except as provided under paragraph (b) of this section.

(b) *When there will be no compromise, suspension, or termination of collection of a claim for overpayment.* (1) In any case where the overpaid individual is alive, a claim for overpayment will not be compromised, nor will there be suspension or termination of collection of the claim by the Office, if there is an indication of fraud, the filing of a false claim, or misrepresentation on the part of such individual or on the part of any other party having any interest in the claim.

(2) In any case where the overpaid individual is deceased:

(i) A claim for overpayment in excess of $5,000 will not be compromised, nor will there be suspension or termination of collection of the claim by the Office if there is an indication of fraud, the filing of a false claim, or misrepresentation on the part of such deceased individual; and

(ii) A claim for overpayment, regardless of the amount, will not be compromised, nor will there be suspension or termination of collection of the claim by the Office if there is an indication that any person other than the deceased overpaid individual had a part in the fraudulent action which resulted in the overpayment.

(c) *Inability to pay claim for recovery of overpayment.* In determining whether the overpaid individual is unable to pay a claim for recovery of an overpayment under this part, the Office shall consider the individual's age, health, present and potential income (including inheritance prospects), assets (e.g., real property, savings account), possible concealment or improper transfer of assets, and assets or income of such individual which may be available in enforced collection proceedings. The Office will also consider exemptions available to such individual under the pertinent State or Federal law in such proceedings. In the event the overpaid individual is deceased, the Office shall consider the available assets of the estate, taking into account any liens or superior claims against the estate.

(d) *Cost of collection or litigative probabilities.* Where the probable costs of recovering an overpayment under this part would not justify enforced collection proceedings for the full amount of

the claim, or where there is doubt concerning the Office's ability to establish its claim as well as the time which it will take to effect such collection, a compromise or settlement for less than the full amount may be considered.

(e) *Amount of compromise.* The amount to be accepted in compromise of a claim for overpayment under this part shall bear a reasonable relationship to the amount which can be recovered by enforced collection proceedings, giving due consideration to the exemption available to the overpaid individual under State or Federal law and the time which collection will take.

(f) *Payment.* Payment of the amount the Office has agreed to accept as a compromise in full settlement of a claim for recovery of an overpayment under this part shall be made within the time and in the manner set by the Office. A claim for the overpayment shall not be considered compromised or settled until the full payment of the compromised amount has been made within the time and manner set by the Office. Failure of the overpaid individual or his or her estate to make such payment as provided shall result in reinstatement of the full amount of the overpayment less any amounts paid prior to such default.

(Approved by the Office of Management and Budget under control number 1215–0144)

(Pub. L. No. 96–511)

[43 FR 36772, Aug. 18, 1978, as amended at 49 FR 18295, Apr. 30, 1984]

§ 725.545 Underpayments.

(a) *General.* As used in this subpart, the term ''underpayment'' includes a payment in an amount less than the amount of the benefit due for such month, and nonpayment where some amount of such benefits is payable.

(b) *Underpaid individual is living.* If an individual to whom an underpayment was made is living, the deficit represented by such underpayment shall be paid to such individual either in a single payment (if he or she is not entitled to a monthly benefit or if a single payment is requested by the claimant in writing) or by increasing one or more monthly benefit payments to which such individual becomes entitled.

(c) *Underpaid individual dies before adjustment of underpayment.* If an individual to whom an underpayment was made dies before receiving payment of the deficit or negotiating the check or checks representing payment of the deficit, such payment shall be distributed to the living person (or persons) in the highest order of priority as follows:

(1) The deceased individual's surviving spouse who was either:

(i) Living in the same household with the deceased individual at the time of such individual's death; or

(ii) In the case of a deceased miner, entitled for the month of death to black lung benefits as his or her surviving spouse or surviving divorced spouse.

(2) In the case of a deceased miner or spouse his or her child entitled to benefits as the surviving child of such miner or surviving spouse for the month in which such miner or spouse died (if more than one such child, in equal shares to each such child).

(3) In the case of a deceased miner, his parent entitled to benefits as the surviving parent of such miner for the month in which such miner died (if more than one such parent, in equal shares to each such parent).

(4) The surviving spouse of the deceased individual who does not qualify under paragraph (c)(1) of this section.

(5) The child or children of the deceased individual who do not qualify under paragraph (c)(2) of this section (if more than one such child, in equal shares to each such child).

(6) The parent or parents of the deceased individual who do not qualify under paragraph (c)(3) of this section (if more than one such parent, in equal shares to each such parent).

(7) The legal representative of the estate of the deceased individual as defined in paragraph (e) of this section.

(d) *Deceased beneficiary.* In the event that a person, who is otherwise qualified to receive payments as the result of a deficit caused by an underpayment under the provisions of paragraph (c) of this section, dies before receiving payment or before negotiating the check or checks representing such payment, his or her share of the underpayment shall be divided among the remaining living person(s) in the same order or

priority. In the event that there is (are) no other such person(s), the underpayment shall be paid to the living person(s) in the next lower order of priority under paragraph (c) of this section.

(e) *Definition of legal representative.* The term ''legal representative,'' for the purpose of qualifying for receipt of an underpayment, generally means the executor or the administrator of the estate of the deceased beneficiary. However, it may also include an individual, institution or organization acting on behalf of an unadministered estate, provided the person can give the Office good acquittance (as defined in paragraph (f) of this section). The following persons may qualify as legal representative for purposes of this section, provided they can give the Office good acquittance:

(1) A person who qualifies under a State's ''small estate'' statute; or

(2) A person resident in a foreign country who under the laws and customs of that country, has the right to receive assets of the estate; or

(3) A public administrator; or

(4) A person who has the authority under applicable law to collect the assets of the estate of the deceased beneficiary.

(f) *Definition of ''good acquittance.''* A person is considered to give the Office ''good acquittance'' when payment to that person will release the Office from further liability for such payment.

§ 725.546 Relation to provisions for reductions or increases.

The amount of an overpayment or an underpayment is the difference between the amount to which the beneficiary was actually entitled and the amount paid. Overpayment and underpayment simultaneously outstanding against the same beneficiary shall first be adjusted against one another before adjustment pursuant to the other provisions of this subpart.

§ 725.547 Applicability of overpayment and underpayment provisions to operator or carrier.

(a) The provisions of this subpart relating to overpayments and underpayments shall be applicable to overpayments and underpayments made by responsible operators or their insurance carriers, as appropriate. However, if an overpayment has been made by an operator, the provisions of §§ 725.541–725.544 shall not be applicable.

(b) No operator or carrier may make an adjustment of an overpayment without prior application to, and approval by, the Office which shall exercise full supervisory authority over the adjustment of all overpayments.

(c) In any case involving either overpayments or underpayments, the Office may take any necessary action, and deputy commissioners may issue appropriate orders to protect the rights of the parties.

(d) Disputes arising out of orders so issued shall be resolved by the procedures set out in subpart E of this part.

Subpart H—Enforcement of Liability; Reports

§ 725.601 Enforcement generally.

(a) The Act, together with certain incorporated provisions from the Longshoremen's and Harbor Workers' Compensation Act, contains a number of provisions which subject an operator or other employer, claimants and others to penalties for failure to comply with certain provisions of the Act, or failure to commence and continue prompt periodic payments to a beneficiary.

(b) It is the policy and intent of the Department to vigorously enforce the provisions of this part through the use of the remedies provided by the Act. Accordingly, if an operator refuses to pay benefits with respect to a claim for which the operator has been adjudicated liable, the Director shall invoke and execute the lien on the property of the operator as described in § 725.603. Enforcement of this lien shall be pursued in an appropriate U.S. district court. If the Director determines that the remedy provided by § 725.603 may not be sufficient to guarantee the continued compliance with the terms of an award or awards against the operator, the Director shall in addition seek an injunction in the U.S. district court to prohibit future noncompliance by the operator and such other relief as the court considers appropriate (see § 725.604). If an operator unlawfully suspends or terminates the payment of

benefits to a claimant, the deputy commissioner shall declare the award in default and proceed in accordance with §725.605. In all cases payments in addition to compensation (see §725.607) and interest (see §725.608) shall be sought by the Director or awarded by the deputy commissioner.

(c) In certain instances the remedies provided by the Act are concurrent; that is, more than one remedy might be appropriate in any given case. In such a case, the Director shall select the remedy or remedies appropriate for the enforcement action. In making this selection, the Director shall consider the best interests of the claimant as well as those of the Fund.

§725.602 Reimbursement of the fund.

(a) In any case in which the fund has paid benefits, including medical benefits, on behalf of an operator or other employer which is determined liable therefore, or liable for a part thereof, such operator or other employer shall simultaneously with the first payment of benefits made to the beneficiary, reimburse the fund (with interest) for the full amount of all benefit payments made by the fund with respect to the claim.

(b) In any case where benefit payments have been made by the fund, the fund shall be subrogated to the rights of the beneficiary. The Secretary of Labor may, as appropriate, exercise such subrogation rights.

§725.603 Payments by the fund on behalf of an operator; liens.

(a) If an amount is paid out of the fund to an individual entitled to benefits under this part or part 727 of this subchapter on behalf of an operator or other employer which is or was required to pay or secure the payment of all or a portion of such amount (see §725.522), the operator or other employer shall be liable to the United States for repayment to the fund of the amount of benefits properly attributable to such operator or other employer.

(b) If an operator or other employer liable to the fund refuses to pay, after demand, the amount of such liability, there shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such operator or other employer. The lien arises on the date on which such liability is finally determined, and continues until it is satisfied or becomes unenforceable by reason of lapse of time.

(c) (1) Except as otherwise provided under this section, the priority of the lien shall be determined in the same manner as under section 6323 of the Internal Revenue Code of 1954.

(2) In the case of a bankruptcy or insolvency proceeding, the lien imposed under this section shall be treated in the same manner as a lien for taxes due and owing to the United States for purposes of the Bankruptcy Act or section 3466 of the Revised Statutes (31 U.S.C. 191).

(3) For purposes of applying section 6323(a) of the Internal Revenue Code of 1954 to determine the priority between the lien imposed under this section and the Federal tax lien, each lien shall be treated as a judgment lien arising as of the time notice of such lien is filed.

(4) For purposes of the section, notice of the lien imposed hereunder shall be filed in the same manner as under section 6323(f) (disregarding paragraph (4) thereof) and (g) of the Internal Revenue Code of 1954.

(5) In any case where there has been a refusal or neglect to pay the liability imposed under this section, the Secretary of Labor may bring a civil action in a district court of the United States to enforce the lien of the United States under this section with respect to such liability or to subject any property, of whatever nature, of the operator, or in which it has any right, title, or interest, to the payment of such liability.

(6) The liability imposed by this paragraph may be collected at a proceeding in court if the proceeding is commenced within 6 years after the date upon which the liability was finally determined, or prior to the expiration of any period for collection agreed upon in writing by the operator and the United States before the expiration of such 6-year period. This period of limitation shall be suspended for any period during which the assets of the operator are in the custody or control of any court of the United

States, or of any State, or the District of Columbia, and for 6 months thereafter, and for any period during which the operator is outside the United States if such period of absence is for a continuous period of at least 6 months.

§ 725.604 Enforcement of final awards.

Notwithstanding the provisions of § 725.603, if an operator or other employer or its officers or agents fails to comply with an order awarding benefits that has become final, any beneficiary of such award or the deputy commissioner may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the U.S. District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such operator or other employer or its officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such operator or other employer and its officers or agents compliance with the order.

§ 725.605 Defaults.

(a) Except as is otherwise provided in this part, no suspension, termination or other failure to pay benefits awarded to a claimant is permitted. If an employer found liable for the payment of such benefits fails to make such payments within 30 days after any date on which such benefits are due and payable, the person to whom such benefits are payable may, within one year after such default, make application to the deputy commissioner for a supplementary order declaring the amount of the default.

(b) If after investigation, notice and hearing as provided in subparts D and E of this part, a default is found, the deputy commissioner or the administrative law judge, if a hearing is requested, shall issue a supplementary order declaring the amount of the default, if any. In cases where a lump-sum award has been made, if the payment in default is an installment, the deputy commissioner or administrative law judge, may, in his or her discretion, declare the whole of the award as the amount in default. The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the operator has its principal place of business or maintains an office or for the judicial district in which the injury occurred. In case such principal place of business or office is in the District of Columbia, a copy of such supplementary order may be filed with the clerk of the U.S. District Court for the District of Columbia. Such supplementary order shall be final and the court shall, upon the filing of the copy, enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. Review of the judgment may be had as in civil suits for damages at common law. Final proceedings to execute the judgment may be had by writ of execution in the form used by the court in suits at common law in actions of assumpsit. No fee shall be required for filing the supplementary order nor for entry of judgment thereon, and the applicant shall not be liable for costs in a proceeding for review of the judgment unless the court shall otherwise direct. The court shall modify such judgment to conform to any later benefits order upon presentation of a certified copy thereof to the court.

(c) In cases where judgment cannot be satisfied by reason of the employer's insolvency or other circumstances precluding payment, the deputy commissioner shall make payment from the fund, and in addition, provide any necessary medical, surgical, and other treatment required by subpart I of this part. A defaulting employer shall be liable to the Fund for payment of the amounts paid by the fund under this section; and for the purpose of enforcing this liability, the fund shall be subrogated to all the rights of the person receiving such payments or benefits.

§ 725.606 Security for the payment of benefits.

Whenever an adjudication officer deems it advisable, he or she may require any operator or other employer to make a deposit with the Treasurer of the United States to secure the

prompt and convenient payment of benefits to eligible claimants. Payments may be made from such deposit, or such deposit may be returned to an operator or other employer, only upon the order of such adjudication officer. The adjudication officer shall require the deposit of security pursuant to this section in any case where an operator or other liable employer is uninsured or has failed to secure the payment of benefits.

§ 725.607 Payments in addition to compensation.

(a) If any benefits payable under the terms of (1) an award by a deputy commissioner (§ 725.419(d)), (2) a decision and order filed and served by an administrative law judge (§ 725.478), or (3) a decision filed by the Board or a U.S. court of appeals, are not paid by an operator or other employer ordered to make such payments within 10 days after such payments become due, there shall be added to such unpaid benefits an amount equal to 20 percent thereof, which shall be paid to the claimant at the same time as, but in addition to, such benefits, unless review of the order making such award is sought as provided in section 21 of the LHWCA and an order staying payments has been issued.

(b) If, on account of an operator's or other employer's failure to pay benefits as provided in paragraph (a) of this section, benefit payments are made by the fund, the eligible claimant shall nevertheless be entitled to receive such additional compensation to which he or she may be eligible under paragraph (a) of this section, with respect to all amounts paid by the fund on behalf of such operator or other employer.

(c) The fund shall not be liable for payments in addition to compensation under any circumstances.

§ 725.608 Interest.

(a) If an operator or other employer fails or refuses to pay any or all benefits due under the terms of an initial determination by a deputy commissioner (§ 725.420), a decision and order filed and served by an administrative law judge (§ 725.478) or a decision filed by the Board or a United States court of appeals, including any penalty awarded in addition to benefits in accordance with § 725.607, such operator shall be liable for simple annual interest on all past due benefits computed from the date on which such benefits were due and payable, in addition to such operator's or other employer's liability as is otherwise provided in this part. On claims filed on or after January 1, 1982, in which the payment of retroactive benefits has been withheld pending final adjudication of liability in accordance with section 422(d) of the Act as amended, interest on such withheld retroactive benefit payments shall begin to accumulate 30 days after the date of the first determination that such an award should be made. The first determination that such an award should be made may be a deputy commissioner's initial determination of entitlement, an award made by an administrative law judge or a decision by the Board or a court, whichever is the first such determination of entitlement made upon the claim. Except as provided in paragraph (b) of this section, interest payments owed under this paragraph shall be made directly to the beneficiary. However, an operator or other employer shall have no obligation to pay interest except with respect to benefits which it has either agreed to pay or it has been directed to pay by an order which has become final.

(b) If an operator or other employer fails or refuses to pay any or all benefits due pursuant to an award of benefits or an initial determination of eligibility made by the deputy commissioner and the Fund undertakes such payments, such operator or other employer shall be liable to the Fund for simple annual interest on all payments made by the Fund for which such operator is determined liable, computed from the first date on which such benefits are paid by the Fund, in addition to such operator's liability to the Fund, as is otherwise provided in this part. Interest payments owed pursuant to this paragraph shall be paid directly to the Fund.

(c) The rates of interest applicable to paragraphs (a) and (b) of this section shall be computed as follows:

(1) For all amounts outstanding prior to January 1, 1982, the rate shall be 6% simple annual interest;

(2) For all amounts outstanding for any period during calendar year 1982 the rate shall be 15% simple annual interest; and

(3) For all amounts outstanding during any period after calendar year 1982 the rate shall be simple annual interest at the rate established by section 6621 of the Internal Revenue Code of 1954 which is in effect for such period.

(d) The Fund shall not be liable for the payment of interest under any circumstances, other than the payment of interest on advances from the United States Treasury as provided by section 9501(c) of the Internal Revene Code of 1954.

[48 FR 24294, May 31, 1983]

§ 725.620 Failure to secure benefits; other penalties.

(a) If an operator fails to discharge its insurance obligations under the Act, the provisions of § 725.495 shall apply.

(b) Any employer who knowingly transfers, sells, encumbers, assigns, or in any manner disposes of, conceals, secrets, or destroys any property belonging to such employer, after one of its employees has been injured within the purview of the Act, and with intent to avoid the payment of benefits under the Act to such miner or his or her dependents, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both. In any case where such employer is a corporation, the president, secretary, and treasurer thereof shall be also severally liable for such penalty or imprisonment as well as jointly liable with such corporation for such fine.

(c) No agreement by a miner to pay any portion of a premium paid to a carrier by such miner's employer or to contribute to a benefit fund or department maintained by such employer for the purpose of providing benefits or medical services and supplies as required by this part shall be valid; and any employer who makes a deduction for such purpose from the pay of a miner entitled to benefits under the Act shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $1,000.

(d) No agreement by a miner to waive his or her right to benefits under the Act and the provisions of this part shall be valid.

(e) This section shall not affect any other liability of the employer under this part.

§ 725.621 Reports.

(a) Upon making the first payment of benefits and upon suspension, reduction, or increase of payments, the operator or other employer responsible for making payments shall immediately notify the deputy commissioner of the action taken, in accordance with a form prescribed by the Office.

(b) Within 16 days after final payment of benefits has been made by an employer, such employer shall so notify the deputy commissioner, in accordance with a form prescribed by the Office, stating that such final payment, has been made, the total amount of benefits paid, the name of the beneficiary, and such other information as the Office deems pertinent.

(c) The Director may from time to time prescribe such additional reports to be made by operators, other employers, or carriers as the Director may consider necessary for the efficient administration of the Act.

(d) Any employer who fails or refuses to file any report required of such employer under this section shall be subject to a civil penalty not to exceed $500 for each failure or refusal, which penalty shall be determined in accordance with the procedures set forth in § 725.495, as appropriate.

(e) No request for information or response to such request shall be considered a report for purposes of this section or the Act, unless it is so designated by the Director or by this section.

(Approved by the Office of Management and Budget under control number 1215–0064)

(Pub. L. No. 96–511)

[43 FR 36772, Aug. 18, 1978, as amended at 49 FR 18295, Apr. 30, 1984]

Subpart I—Medical Benefits and Vocational Rehabilitation

§ 725.701 Availability of medical benefits.

(a) A miner who is determined to be eligible for benefits under this part or part 727 of this subchapter is entitled to medical benefits as set forth in this subpart as of the date of his or her claim, but in no event before January 1, 1974. No medical benefits shall be provided to the survivor or dependent of a miner under this part.

(b) A responsible operator, other employer, or where there is neither, the Fund, shall furnish a miner entitled to benefits under this part with such medical, surgical, and other attendance and treatment, nursing and hospital services, medicine and apparatus, and any other medical service or supply, for such periods as the nature of the miner's pneumoconiosis and ancillary pulmonary conditions and disability require.

(c) The medical benefits referred to in paragraphs (a) and (b) of this section shall include palliative measures useful only to prevent pain or discomfort associated with the miner's pneumoconiosis or attendant disability.

(d) The costs recoverable under this subpart shall include the reasonable cost of travel necessary for medical treatment (to be determined in accordance with prevailing United States government mileage rates) and the reasonable documented cost to the miner or medical provider incurred in communicating with the employer, carrier, or district director on matters connected with medical benefits.

§ 725.701A Claims for medical benefits only under section 11 of the Reform Act.

(a) Section 11 of the Reform Act directs the Secretary of Health, Education and Welfare to notify each miner receiving benefits under part B of title IV of the Act that he or she may file a claim for medical treatment benefits described in this subpart. Section 725.308(b) of this subpart provides that a claim for medical treatment benefits shall be filed on or before December 31, 1980, unless the period is enlarged for good cause shown. This section sets forth the rules governing the processing adjudication, and payment of claims filed under section 11.

(b) (1) A claim filed pursuant to the notice described in paragraph (a) of this section shall be considered a claim for medical benefits only, and shall be filed, processed, and adjudicated in accordance with the provisions of this part, except as provided in this section. While a claim for medical benefits must be treated as any other claim filed under part C of title IV of the Act, the Department shall accept the Social Security Administration's finding of entitlement as its initial determination.

(2) In the case of a part B beneficiary whose coal mine employment terminated before January 1, 1970, the Secretary shall make an immediate award of medical benefits. Where the part B beneficiary's coal mine employment terminated on or after January 1, 1970, the Secretary shall immediately authorize the payment of medical benefits and thereafter inform the responsible operator, if any, of the operator's right to contest the claimant's entitlement for medical benefits.

(c) A miner on whose behalf a claim is filed under this section (see § 725.301) must have been alive on March 1, 1978, in order for the claim to be considered.

(d) The criteria contained in subpart C of part 727 of this subchapter are applicable to claims for medical benefits filed under this section.

(e) No determination made with respect to a claim filed under this section shall affect any determination previously made by the Social Security Administration. The Social Security Administration may, however, reopen a previously approved claim if the conditions set forth in § 410.672(c) of this chapter are present. These conditions are generally limited to fraud or concealment.

(f) If medical benefits are awarded under this section, such benefits shall be payable by a responsible coal mine operator (see §§ 725.491–725.493), if the miner's last employment occurred on or after January 1, 1970, and in all other cases by the fund. An operator which may be required to provide medical treatment benefits to a miner under this section shall have the right

to participate in the adjudication of the claim as is otherwise provided in this part.

(g) Any miner whose coal mine employment terminated after January 1, 1970, may be required to submit to a medical examination requested by an identified operator. The unreasonable refusal to submit to such an examination shall have the same consequences as are provided under § 725.408.

(h) If a miner is determined eligible for medical benefits in accordance with this section, such benefits shall be provided from the date of filing, except that such benefits may also include payments for any unreimbursed medical treatment costs incurred personally by such miner during the period from January 1, 1974, to the date of filing which are attributable to medical care required as a result of the miner's total disability due to pneumoconiosis. No reimbursement for health insurance premiums, taxes attributable to any public health insurance coverage, or other deduction or payments made for the purpose of securing third party liability for medical care costs is authorized by this section. If a miner seeks reimbursement for medical care costs personally incurred before the filing of a claim under this section, the deputy commissioner shall require documented proof of the nature of the medical service provided, the identity of the medical provider, the cost of the service, and the fact that the cost was paid by the miner, before reimbursement before such cost may be awarded.

[43 FR 36772, Aug. 18, 1978, as amended at 45 FR 44264, July 1, 1980]

§ 725.702 Physician defined.

The term ''physician'' includes only doctors of medicine (MD) and osteopathic practitioners within the scope of their practices as defined by State law. No treatment or medical services performed by any other practitioner of the healing arts is authorized by this part, unless such treatment or service is authorized and supervised both by a physician as defined in this section and the district director.

§ 725.703 Notification of right to medical benefits; authorization of treatment.

(a) Upon notification to a miner of such miner's entitlement to benefits, the Office shall provide the miner with a list of authorized treating physicians and medical facilities in the area of the miner's residence. The miner may select a physician from this list or may select another physician with approval of the Office. Where emergency services are necessary and appropriate, authorization by the Office shall not be required.

(b) The Office may, on its own initiative, or at the request of a responsible operator, order a change of physicians or facilities, but only where it has been determined that the change is desirable or necessary in the best interest of the miner. The miner may change physicians or facilities subject to the approval of the Office.

(c) If adequate treatment cannot be obtained in the area of the claimant's residence, the Office may authorize the use of physicians or medical facilities outside such area as well as reimbursement for travel expenses and overnight accommodations.

§ 725.704 Arrangements for medical care.

(a) *Operator liability*. If an operator has been determined liable for the payment of benefits to a miner, the Office shall notify such operator or insurer of the names, addresses, and telephone numbers of the authorized providers of medical benefits chosen by an entitled miner, and shall require the operator or insurer to:

(1) Notify the miner and the providers chosen that such operator will be responsible for the cost of medical services provided to the miner on account of the miner's total disability due to pneumoconiosis;

(2) Designate a person or persons with decisionmaking authority with whom the Office, the miner and authorized providers may communicate on matters involving medical benefits provided under this subpart and notify the Office, miner and providers of such designation;

(3) Make arrangements for the direct reimbursement of providers for their services.

(b) *Fund liability.* If there is no operator found liable for the payment of benefits, the Office shall make necessary arrangements to provide medical care to the miner, notify the miner and medical care facility selected of the liability of the fund, designate a person or persons with whom the miner or provider may communicate on matters relating to medical care, and make arrangements for the direct reimbursement of the medical provider.

§ 725.705 Authorization to provide medical services.

(a) Except as provided in paragraph (b) of this section, medical services from an authorized provider which are payable under § 725.701 shall not require prior approval of the Office or the responsible operator.

(b) Except where emergency treatment is required, prior approval of the Office or the responsible operator shall be obtained before any hospitalization or surgery, or before ordering an apparatus for treatment where the purchase price exceeds $100. A request for approval of non-emergency hospitalization or surgery shall be acted upon expeditiously, and approval or disapproval will be given by telephone if a written response cannot be given within 7 days following the request. No employee of the Department of Labor, other than a district director or the Chief, Branch of Medical Analysis and Services, DCMWC, is authorized to approve a request for hospitalization or surgery by telephone.

(c) Payment for medical services, treatment, or an apparatus shall be made at no more than the rate prevailing in the community in which the providing physician, medical facility or supplier is located.

§ 725.706 Reports of physicians and supervison of medical care.

(a) Within 30 days following the first medical or surgical treatment provided under § 725.701, the treating physician or facility shall furnish to the Office and the responsible operator, if any, a report of such treatment.

(b) In order to permit continuing supervision of the medical care provided to the miner with respect to the necessity, character and sufficiency of any medical care furnished or to be furnished, the treating physician, facility, employer or carrier shall provide such reports in addition to those required by paragraph (a) of this section as the Office may from time to time require. Within the discretion of the district director, payment may be refused to any medical provider who fails to submit any report required by this section.

§ 725.707 Disputes concerning medical benefits.

(a) Whenever a dispute develops concerning medical services under this part, the district director shall attempt to informally resolve such dispute. In this regard the district director may, on his or her own initiative or at the request of the responsible operator order the claimant to submit to an examination by a physician selected by the district director.

(b) If no informal resolution is accomplished, the district director shall refer the case to the Office of Administrative Law Judges for hearing in accordance with this part. Any such hearing shall be scheduled at the earliest possible time and shall take precedence over all other requests for hearing except for prior requests for hearing arising under this section and as provided by § 727.405 of this subchapter. During the pendency of such adjudication, the Director may order the payment of medical benefits prior to final adjudication under the same conditions applicable to benefits awarded under § 725.522.

(c) In the development or adjudication of a dispute over medical benefits, the adjudication officer is authorized to take whatever action may be necessary to protect the health of a totally disabled miner.

(d) Any interested medical provider may, if appropriate, be made a party to a dispute over medical benefits.

§ 725.710 Objective of vocational rehabilitation.

The objective of vocational rehabilitation is the return of a miner who is totally disabled for work in or around

a coal mine and who is unable to utilize those skills which were employed in the miner's coal mine employment to gainful employment commensurate with such miner's physical impairment. This objective may be achieved through a program of re-evaluation and redirection of the miner's abilities, or retraining in another occupation, and selective job placement assistance.

§ 725.711 Requests for referral to vocational rehabilitation assistance.

Each miner who has been determined entitled to receive benefits under part C of title IV of the Act shall be informed by the OWCP of the availability and advisability of vocational rehabilitation services. If such miner chooses to avail himself or herself of vocational rehabilitation, his or her request shall be processed and referred by OWCP vocational rehabilitation advisors pursuant to the provisions of §§ 702.501–702.508 of this chapter as is appropriate.

PART 726—BLACK LUNG BENEFITS; REQUIREMENTS FOR COAL MINE OPERATOR'S INSURANCE

Subpart A—General

Sec.

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AUTHORITY: 5 U.S.C. 301, Reorganization Plan No. 6 of 1950, 15 FR 3174, 30 U.S.C. 901 et seq., 902(f), 925, 932, 934, 936, 945; 33 U.S.C. 901 et seq., Secretary's Order 7–87, 52 FR 48466, Employment Standards Order No. 90–02.

SOURCE: 38 FR 12494, May 11, 1973, unless otherwise noted.

Subpart A—General

§ 726.1 Statutory insurance requirements for coal mine operators.

Section 423 of title IV of the Federal Coal Mine Health and Safety Act as amended (hereinafter the Act) requires each coal mine operator who is operating or has operated a coal mine in a State which is not included in the list published by the Secretary (see part 722 of this chapter) to secure the payment of benefits for which he may be found liable under section 422 of the Act and the provisions of this subchapter by either (a) qualifying as a self-insurer, or

(b) by subscribing to and maintaining in force a commercial insurance contract (including a policy or contract procured from a State agency).

§ 726.2 Purpose and scope of this part.

(a) This part provides rules directing and controlling the circumstances under which a coal mine operator shall fulfill his insurance obligations under the Act.

(b) This subpart A sets forth the scope and purpose of this part and generally describes the statutory framework within which this part is operative.

(c) Subpart B of this part sets forth the criteria a coal mine operator must meet in order to qualify as a self-insurer.

(d) Subpart C of this part sets forth the rules and regulations of the Secretary governing contracts of insurance entered into by coal operators and commercial insurance sources for the payment of black lung benefits under part C of the Act.

§ 726.3 Relationship of this part to other parts in this subchapter.

(a) This part 726 implements and effectuates responsibilities for the payment of black lung benefits placed upon coal operators by sections 415 and 422 of the Act and the regulations of the Secretary in this subchapter, particularly those set forth in part 725 of this subchapter. All definitions, usages, procedures, and other rules affecting the responsibilities of coal operators prescribed in parts 715, 720, and 725 of this subchapter are hereby made applicable, as appropriate, to this part 726.

(b) In the event that an apparent conflict arises between the interpretation of any provision in this part 726 and the interpretation of some provision appearing in a different incorporated part of this chapter, the conflicting provisions shall be read harmoniously to the fullest extent possible. In the event that a harmonious interpretation of the provisions is impossible, the provision or provisions of this part shall govern insofar as the question is one which arises out of a dispute over the responsibilities and obligations of coal mine operators to secure the payment of black lung benefits as prescribed by the Act. No provision of this part shall be operative as to matters falling outside the purview of this part.

§ 726.4 Who must obtain insurance coverage.

(a) Section 423 of part C of title IV of the Act requires each operator of a coal mine or former operator in any State which does meet the requirements prescribed by the Secretary pursuant to section 411 of part C of title IV of the Act to self-insure or obtain a policy or contract of insurance to guarantee the payment of benefits for which such operator may be adjudicated liable under section 422 of the Act. In enacting sections 422 and 423 of the Act Congress has unambiguously expressed its intent that coal mine operators bear the cost of providing the benefits established by part C of title IV of the Act. Section 3 of the Act defines an ''operator'' as any owner, lessee, or other person who operates, controls, or supervises a coal mine.

(b) Section 422(i) of the Act clearly recognizes that any individual or business entity who is or was a coal mine operator may be found liable for the payment of pneumoconiosis benefits after December 31, 1973. Within this framework it is clear that the Secretary has wide latitude for determining which operator shall be liable for the payment of part C benefits. Comprehensive standards have been promulgated in subpart D or part 725 of this chapter for the purpose of guiding the Secretary in making such determination. It must be noted that pursuant to these standards any parent or subsidiary corporation, any individual or corporate partner, or partnership, any lessee or lessor of a coal mine, any joint venture or participant in a joint venture, any transferee or transferor of a corporation or other business entity, any former, current, or future operator or any other form of business entity which has had or will have a substantial and reasonably direct interest in the operation of a coal mine may be determined liable for the payment of pneumoconiosis benefits after December 31, 1973. The failure of any such business entity to self-insure or obtain a policy or contract of insurance shall in no way relieve such business entity

of its obligation to pay pneumoconiosis benefits in respect of any case in which such business entity's responsibility for such payments has been properly adjudicated. Any business entity described in this section shall take appropriate steps to insure that any liability imposed by part C of the Act on such business entity shall be dischargeable.

§ 726.5 Effective date of insurance coverage.

Pursuant to section 422(c) of part C of title IV of the Act, no coal mine operator shall be responsible for the payment of any benefits whatsoever for any period prior to January 1, 1974. However, coal mine operators shall be liable as of January 1, 1974, for the payment of benefits in respect of claims which were filed under section 415 of part B of title IV of the Act after July 1, 1973. Section 415(a)(3) requires the Secretary to notify any operator who may be liable for the payment of benefits under part C of title IV beginning on January 1, 1974, of the pendency of a section 415 claim. Section 415(a)(5) declares that any operator who has been notified of the pendency of a section 415 claim shall be bound by the determination of the Secretary as to such operator's liability and as to the claimant's entitlement to benefits as if the claim were filed under part C of title IV of the Act and section 422 thereof had been applicable to such operator. Therefore, even though no benefit payments shall be required of an operator prior to January 1, 1974, the liability for these payments may be finally adjudicated at any time after July 1, 1973. Neither the failure of an operator to exercise his right to participate in the adjudication of such a claim nor the failure of an operator to obtain insurance coverage in respect of claims filed after June 30, 1973, but before January 1, 1974, shall excuse such operator from his liability for the payment of benefits to such claimants under part C of title IV of the Act.

§ 726.6 The Office of Workmen's Compensation Programs.

The Office of Workmen's Compensation Programs (hereinafter the Office or OWCP) is that subdivision of the Employment Standards Administration of the U.S. Department of Labor which has been empowered by the Secretary of Labor to carry out his functions under section 415 and part C of title IV of the Act. As noted throughout this part 726 the Office shall perform a number of functions with respect to the regulation of both the self-insurance and commercial insurance programs. All correspondence with or submissions to the Office should be addressed as follows:

Division of Coal Mine Workers' Compensation, Office of Workmen's Compensation Programs, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210

§ 726.7 Forms, submission of information.

Any information required by this part 726 to be submitted to the Office of Workmen's Compensation Programs or any other office or official of the Department of Labor, shall be submitted on such forms or in such manner as the Secretary deems appropriate and has authorized from time to time for such purposes.

Subpart B—Authorization of Self-Insurers

§ 726.101 Who may be authorized to self-insure.

(a) Pursuant to section 423 of part C of title IV of the Act, authorization to self-insure against liability incurred by coal mine operators on account of the total disability or death of miners due to pneumoconiosis may be granted or denied in the discretion of the Secretary. The provisions of this subpart describe the minimum requirements established by the Secretary for determining whether any particular coal mine operator shall be authorized as a self-insurer. Any operator who meets the standards and qualifications contained in this subpart prescribed for self-insurers shall be required to deposit security in the form of either an indemnity bond or negotiable securities (at the option of the Office) of a kind and in an amount determined by the Office.

(b) The minimum requirements which must be met by any operator

seeking authorization to self-insure are as follows:

(1) Such operator must, at the time of application, have been in the business of mining coal for at least the 3 consecutive years prior to such application; and,

(2) Such operator must demonstrate the administrative capacity to fully service such claims as may be filed against him; and,

(3) Such operator's average current assets over the preceding 3 years (in computing average current assets such operator shall not include the amount of any negotiable securities which he may be required to deposit to secure his obligations under the Act) must exceed current liabilities by the sum of—

(i) The estimated aggregate amount of black lung benefits (including medical benefits) which such operator may expect to be required to pay during the ensuing year; and,

(ii) The annual premium cost for any indemnity bond purchased; and

(4) Such operator must obtain an indemnity bond the face amount of which, or deposit negotiable securities the current value of which, shall be determined as follows:

(i) An operator with between 5 and 19 employee-miners shall be required to post security in an amount equal to $3,000 times the average number of employee-miners plus $75,000.

(ii) An operator with between 20 and 100 employee-miners shall be required to post security in the amount of $135,000;

(iii) Thereafter, there shall be an increase in the amount of security which shall be required to be posted of approximately $75,000 per 100 employee-miners in excess of the first 100 employee-miners;

(iv) The amounts of security required in this paragraph are the minimum security requirements the Office shall prescribe in respect of any application for authorization to self-insure. Any factors bearing on a particular application which the Office deems pertinent shall be considered in fixing the amount of security which shall be required, and may result in higher security requirements than those enumerated in this paragraph.

(v) For purposes of this paragraph the number of employee-miners shall be established by determining the maximum quarterly average number of full-time employee-miners employed by the applicant during the preceding 4 calendar quarters; and

(5) No operator with fewer than 5 full-time employee-miners shall be permitted to self-insure.

(c) No operator who is unable to meet the requirements of this section should apply for authorization to self-insure and no application for self-insurance shall be approved by the Office until such time as the amount prescribed by the Office has been secured either by indemnity bond or the deposit of negotiable securities as prescribed in this subpart.

§ 726.102 Application for authority to become a self-insurer; how filed; information to be submitted.

(a) *How filed.* Application for authority to become a self-insurer shall be addressed to the Office and be made on a form provided by the Office. Such application shall be signed by the applicant over his typewritten name and if the applicant is not an individual, by the principal officer of the applicant duly authorized to make such application over his typewritten name and official designation and shall be sworn to by him. If the applicant is a corporation, the corporate seal shall be affixed. The application shall be filed with the Office in Washington, DC.

(b) *Information to be submitted.* Each application for authority to self-insure shall contain:

(1) A statement of the employer's payroll report for each of the preceding 3 years;

(2) A statement of the average number of employees engaged in employment within the purview of the Act for each of the preceding 3 years;

(3) A list of the mine or mines to be covered by any particular self-insurance agreement. Each such mine or mines listed shall be described by name and reference shall be made to the Federal Identification Number assigned such mine by the Bureau of Mines, U.S. Department of the Interior;

(4) A certified itemized statement of the gross and net assets and liabilities

of the operator for each of the 3 preceding years in such manner as prescribed by the Office;

(5) A statement demonstrating the applicant's administrative capacity to provide or procure adequate servicing for a claim including both medical and dollar claims; and

(6) In addition to the aforementioned, the Office may in its discretion, require the applicant to submit such further information or such evidence as the Office may deem necessary to have in order to enable it to give adequate consideration to such application.

(c) *Who may file.* An application for authorization to self-insure may be filed by any parent or subsidiary corporation, partner or partnership, party to a joint venture or joint venture, individual, or other business entity which may be determined liable for the payment of black lung benefits under part C of title IV of the Act, regardless of whether such applicant is directly engaged in the business of mining coal. However, in each case for which authorization to self-insure is granted, the agreement and undertaking filed pursuant to §726.110 and the security deposit shall be respectively filed by and deposited in the name of the applicant only.

§ 726.103 Application for authority to self-insure; effect of regulations contained in this part.

As appropriate, each of the regulations, interpretations and requirements contained in this part 726 including those described in subpart C of this part shall be binding upon each applicant hereunder and the applicant's consent to be bound by all requirements of the said regulations shall be deemed to be included in and a part of the application, as fully as though written therein.

§ 726.104 Action by the Office upon application of operator.

(a) Upon receipt of a completed application for authorization to self-insure, the Office shall, after examination of the information contained in the application deny the applicant's request for authorization to self-insure or, determine the amount of security which must be given by the applicant to guarantee the payment of benefits and the discharge of all other obligations which may be required of such applicant under the Act.

(b) The applicant shall thereafter be notified that he may give security in the amount fixed by the Office (see §726.105):

(1) In the form of an indemnity bond with sureties satisfactory to the Office; or,

(2) By a deposit of negotiable securities with a Federal Reserve Bank as provided by the regulations in this part.

(c) Any applicant who cannot meet the security deposit requirements imposed by the Office should proceed to obtain a commercial policy or contract of insurance. Any applicant for authorization to self-insure whose application has been rejected or who believes that the security deposit requirements imposed by the Office are excessive may, in writing, request that the Office review its determination. A request for review should contain such information as may be necessary to support the request that the amount of security required be reduced.

(d) Upon receipt of any such request the Office shall review its previous determination in light of any new or additional information submitted and inform the applicant whether or not a reduction in the amount of security initially required is warranted.

§ 726.105 Fixing the amount of security.

The amount of security to be fixed and required by the Office shall be such as the Office shall deem to be necessary and sufficient to secure the performance by the applicant of all obligations imposed upon him as an operator by the Act. The formula described in §726.101 for determining the amount of security which shall be required is prescribed for the initial year of the black lung benefits program only. In addition, the formula is not the exclusive criterion to be used by the Office in determining whether or not to authorize an applicant to self-insure. Other factors such as the Office may deem relevant to any particular case shall be considered. The amount of security which shall be required as computed

pursuant to paragraph (b)(3) of § 726.101 may be increased or decreased in ensuing years when experience or changed conditions so warrant.

§ 726.106 Type of security.

(a) The Office shall determine the type or types of security which an applicant shall or may procure. (See § 726.104(b).)

(b) In the event the indemnity bond option is selected such indemnity bond shall be in such form and contain such provisions as the Office may prescribe: *Provided,* That only corporations may act as sureties on such indemnity bonds. In each case in which the surety on any such bond is a surety company, such company must be one approved by the U.S. Treasury Department under the laws of the United States and the applicable rules and regulations governing bonding companies (see Department of Treasury's Circular–570).

(c) An applicant for authorization to self-insure authorized to deposit negotiable securities to secure his obligations under the Act in the amount fixed by the Office shall deposit any negotiable securities acceptable as security for the deposit of public moneys of the United States under regulations issued by the Secretary of the Treasury. (See 31 CFR 203.7 and 203.8.) The approval, valuation, acceptance, and custody of such securities is hereby committed to the several Federal Reserve Banks and the Treasurer of the United States.

§ 726.107 Deposits of negotiable securities with Federal Reserve banks or the Treasurer of the United States; authority to sell such securities; interest thereon.

Deposits of securities provided for by the regulations in this part shall be made with any Federal Reserve bank or any branch of a Federal Reserve bank designated by the Office, or the Treasurer of the United States, and shall be held subject to the order of the Office with power in the Office, in its discretion in the event of default by the said self-insurer, to collect the interest as it may become due, to sell the securities or any of them as may be required to discharge the obligations of the self-insurer under the Act and to apply the proceeds to the payment of any benefits or medical expenses for which the self-insurer may be liable. The Office may, however, whenever it deems it unnecessary to resort to such securities for the payment of benefits, authorize the self-insurer to collect interest on the securities deposited by him.

§ 726.108 Withdrawal of negotiable securities.

No withdrawal of negotiable securities deposited by a self-insurer, shall be made except upon authorization by the Office. A self-insurer discontinuing business, or discontinuing operations within the purview of the Act, or providing security for the payment of benefits by commercial insurance under the provisions of the Act may apply to the Office for the withdrawal of securities deposited under the regulations in this part. With such application shall be filed a sworn statement setting forth:

(a) A list of all outstanding cases in which benefits are being paid, with the names of the miners and other beneficiaries, giving a statement of the amounts of benefits paid and the periods for which such benefits have been paid; and (b) a similar list of all pending cases in which no benefits have as yet been paid. In such cases withdrawals may be authorized by the Office of such securities as in the opinion of the Office may not be necessary to provide adequate security for the payment of outstanding and potential liabilities of such self-insurer under the Act.

§ 726.109 Increase or reduction in the amount of indemnity bond or negotiable securities.

Whenever in the opinion of the Office the principal sum of the indemnity bond filed or the amount of negotiable securities deposited, by a self-insurer is insufficient to afford adequate security for the payment of benefits and medical expenses under the Act, the self-insurer shall, upon demand by the Office, file such additional indemnity bond or deposit such additional amount of negotiable securities as the Office may require. At any time upon application of a self-insurer, or on the initiative of

the Office, when in its opinion the facts warrant, the principal sum of an indemnity bond required to be given or the amount of negotiable securities required to be deposited may be reduced. A self-insurer seeking such reduction shall furnish such information as the Office may request relative to his current affairs, the nature and hazard of the work of his employees, the amount of the payroll of his employees engaged in coal mine employment within the purview of the Act, his financial condition, and such other evidence as may be deemed material, including a record of payment of benefits made by him.

§ 726.110 Filing of agreement and undertaking.

(a) In addition to the requirement that adequate security be procured as set forth in this subpart, the applicant for the authorization to self-insure shall as a condition precedent to receiving authorization to act as a self-insurer, execute and file with the Office an agreement and undertaking in a form prescribed and provided by the Office in which the applicant shall agree:

(1) To pay when due, as required by the provisions of said Act, all benefits payable on account of total disability or death of any of its employee-miners within the purview of the Act; (2) in such cases to furnish medical, surgical, hospital, and other attendance, treatment, and care as required by the provisions of the Act; (3) to deposit with the Office an indemnity bond in the amount which the Office shall fix, or to deposit negotiable securities as provided for by the regulations in this part in the amount which the Office shall fix, accordingly as elected in the application; (4) to authorize the Office to sell such negotiable securities so deposited or any part thereof and from the proceeds thereof to pay such benefits, medical, and other expenses and any accrued penalties imposed by law as it may find to be due and payable.

(b) At such time when an applicant has deposited the requisite amount of negotiable securities or obtained an indemnity bond pursuant to § 726.106, such applicant shall send a completed agreement and undertaking together with satisfactory proof that his obligations and liabilities under the Act have been secured to the Office in Washington, D.C.

§ 726.111 Notice of authorization to self-insure.

Upon receipt of a completed agreement and undertaking and satisfactory proof that negotiable securities have been deposited or that an adequate indemnity bond has been procured an applicant for authorization to self-insure shall be notified by the Office in writing, that he is authorized to self-insure to meet the obligations imposed upon such applicant by section 415 and part C of title IV of the Act.

§ 726.112 Reports required of self-insurer; examination of accounts of self-insurer.

(a) Each operator who has been authorized to self-insure under this part shall submit to the Office reports containing such information as the Office may from time to time require or prescribe.

(b) Whenever it deems it to be necessary, the Office may inspect or examine the books of account, records, and other papers of a self-insurer for the purpose of verifying any financial statement submitted to the Office by the self-insurer or verifying any information furnished to the Office in any report required by this section, or any other section of the regulations in this part, and such self-insurer shall permit the Office or its duly authorized representative to make such an inspection or examination as the Office shall require. In lieu of this requirement the Office may in its discretion accept an adequate report of a certified public accountant.

(c) Failure to submit or make available any report or information requested by the Office from an authorized self-insurer pursuant to this section may, in appropriate circumstances result in a revocation of the authorization to self-insure.

§ 726.113 Disclosure of confidential information.

Any financial information or records, or other information relating to the business of an authorized self-insurer or applicant for the authorization of self-insurance obtained by the Office

shall be exempt from public disclosure to the extent provided in 5 U.S.C. 552(b) and the applicable regulations of the Department of Labor promulgated thereunder. (See 29 CFR part 70.)

§ 726.114 Period of authorization as self-insurer; reauthorization.

(a) No initial authorization as a self-insurer shall be granted for a period in excess of 18 months. A self-insurer who has made an adequate deposit of negotiable securities as required by the Office under the regulations in this part will be reauthorized for the ensuing fiscal year without additional security if the Office finds that his experience as a self-insurer warrants such action. If it is determined that such self-insurer's experience indicates a need for the deposit of additional security, no reauthorization shall be issued for the ensuing fiscal year until such time as the Office receives satisfactory proof that the requisite amount of additional securities have been deposited. A self-insurer who currently has on file an indemnity bond, will receive from the Office each year a bond form for execution in contemplation of reauthorization, and the submission of such bond duly executed in the amount indicated by the Office will be deemed and treated as such self-insurer's application for reauthorization for the ensuing Federal fiscal year.

(b) In each case for which there is an approved change in the amount of negotiable securities required or the face amount of an indemnity bond obtained, a new agreement and undertaking shall be executed.

§ 726.115 Revocation of authorization to self-insure.

The Office may for good cause shown suspend or revoke the authorization of any self-insurer. Failure by a self-insurer to comply with any provision or requirement of law or of the regulations in this part, or with any lawful order or communication of the Office, or the failure or insolvency of the surety on his indemnity bond, or impairment of financial responsibility of such self-insurer, may be deemed good cause for such suspension or revocation.

Subpart C—Insurance Contracts

§ 726.201 Insurance contracts—generally.

Each operator of a coal mine who has not obtained authorization as a self-insurer shall purchase a policy or enter into a contract with a commercial insurance carrier or State agency. Pursuant to authority contained in sections 422(a) and 423 (b) and (c) of part C of title IV of the Act, this subpart describes a number of provisions which are required to be incorporated in a policy or contract of insurance obtained by a coal mine operator for the purpose of meeting the responsibility imposed upon such operator by the Act in respect of the total disability or death of miners due to pneumoconiosis.

§ 726.202 Who may underwrite an operator's liability.

Each coal mine operator who is not authorized to self-insure shall insure and keep insured the payment of benefits as required by the Act with any stock company or mutual company or association, or with any other person, or fund, including any State fund while such company, association, person, or fund is authorized under the law of any State to insure workmen's compensation.

§ 726.203 Federal Coal Mine Health and Safety Act endorsement.

(a) The following form of endorsement shall be attached and applicable to the standard workmen's compensation and employer's liability policy prepared by the National Council on Compensation Insurance affording coverage under the Federal Coal Mine Health and Safety Act of 1969, as amended:

It is agreed that: (1) With respect to operations in a State designated in item 3 of the declarations, the unqualified term ''workmen's compensation law'' includes part C of title IV of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. section 931–936, and any laws amendatory thereto, or supplementary thereto, which may be or become effective while this policy is in force, and definition (a) of Insuring Agreement III is amended accordingly; (2) with respect to such insurance as is afforded by this endorsement, (a) the States, if any, named below, shall be deemed to be designated in item 3 of

the declaration; (b) Insuring Agreement IV(2) is amended to read ''by disease caused or aggravated by exposure of which the last day of the last exposure, in the employment of the insured, to conditions causing the disease occurs during the policy period, or occurred prior to (effective date) and claim based on such disease is first filed against the insured during the policy period.''

(b) The term ''effective date'' as used in paragraph (a) of this section shall be construed to mean the effective date of the first policy or contract of insurance procured by an operator for purposes of meeting the obligations imposed on such operator by section 423 of part C of title IV of the Act.

(c) The Act contains a number of provisions and imposes a number of requirements on operators which differ in varying degrees from traditional workmen's compensation concepts. To avoid unnecessary administrative delays and expense which might be occasioned by the drafting of an entirely new standard workmen's compensation policy specially tailored to the Act, the Office has determined that the existing standard workmen's compensation policy subject to the endorsement provisions contained in paragraph (a) of this section shall be acceptable for purposes of writing commercial insurance coverage under the Act. However, to avoid undue disputes over the meaning of certain policy provisions and in accordance with the authority contained in section 423(b)(3) of the Act, the Office has determined that the following requirements shall be applicable to all commercial insurance policies obtained by an operator for the purpose of insuring any liability incurred pursuant to the Act:

(1) *Operator liability.* (i) Section 415 and part C of title IV of the Act provide coverage for total disability or death due to pneumoconiosis to all claimants who meet the eligibility requirements imposed by the Act. Section 422 of the Act and the regulations duly promulgated thereunder (part 725 of this chapter) set forth the conditions under which a coal mine operator may be adjudicated liable for the payment of benefits to an eligible claimant for any period subsequent to December 31, 1973.

(ii) Section 422(c) of the Act prescribes that except as provided in 422(i) (see paragraph (c)(2) of this section) an operator may be adjudicated liable for the payment of benefits in any case if the total disability or death due to pneumoconiosis upon which the claim is predicated arose at least in part out of employment in a mine in any period during which it was operated by such operator. The Act does not require that such employment which contributed to or caused the total disability or death due to pneumoconiosis occur subsequent to any particular date in time. The Secretary in establishing a formula for determining the operator liable for the payment of benefits (see subpart D of part 725 of this chapter) in respect of any particular claim, must therefore, within the framework and intent of title IV of the Act find in appropriate cases that an operator is liable for the payment of benefits for some period after December 31, 1973, even though the employment upon which an operator's liability is based occurred prior to July 1, 1973, or prior to the effective date of the Act or the effective date of any amendments thereto, or prior to the effective date of any policy or contract of insurance obtained by such operator. Paragraph (a) of this section shall be construed to incorporate these requirements in any policy or contract of insurance obtained by an operator to meet the obligations imposed on such operator by section 423 of the Act.

(2) *Successor liability.* Section 422(i) of part C of title IV of the Act requires that a coal mine operator who after December 30, 1969, acquired his mine or substantially all of the assets thereof from a person who was an operator of such mine on or after December 30, 1969, shall be liable for and shall secure the payment of benefits which would have been payable by the prior operator with respect to miners previously employed in such mine if the acquisition had not occurred and the prior operator had continued to operate such mine. In the case of an operator who is determined liable for the payment of benefits under section 422(i) of the Act and part 725 of this subchapter, such liability shall accrue to such operator regardless of the fact that the miner on whose total disability or death the claim is predicated was never employed

by such operator in any capacity. Paragraph (a) of this section shall be construed to incorporate this requirement in any policy or contract of insurance obtained by an operator to meet the obligations imposed on such operator by section 423 of the Act.

(3) *Medical eligibility.* Pursuant to section 422(h) of part C of title IV of the Act and the regulations described therein (see subpart D of part 410 of this title) benefits shall be paid to eligible claimants on account of total disability or death due to pneumoconiosis and in cases where the miner on whose death a claim is predicated was totally disabled by pneumoconiosis at the time of his death regardless of the cause of such death. Paragraph (a) of this section shall be construed to incorporate these requirements in any policy or contract of insurance obtained by an operator to meet the obligations imposed on such operator by section 423 of the Act.

(4) *Payment of benefits, rates.* Section 422(c) of the Act by incorporating section 412(a) of the Act requires the payment of benefits at a rate equal to 50 per centum of the minimum monthly payment to which a Federal employee in grade GS–2, who is totally disabled is entitled at the time of payment under chapter 81 of title 5, United States Code. These benefits are augmented on account of eligible dependents as appropriate (see section 412(a) of part B of title IV of the Act). Since the dollar amount of benefits payable to any beneficiary is required to be computed at the time of payment such amounts may be expected to increase from time to time as changes in the GS–2 grade are enacted into law. Paragraph (a) of this section shall be construed to incorporate in any policy or contract of insurance obtained by an operator to meet the obligations imposed on such operator by section 423 of the Act, the requirement that the payment of benefits to eligible beneficiaries shall be made in such dollar amounts as are prescribed by section 412(a) of the Act computed at the time of payment.

(5) *Compromise and waiver of benefits.* Section 422(a) of part C of title IV of the Act by incorporating sections 15(b) and 16 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 915(b) and 916) prohibits the compromise and/or waiver of claims for benefits filed or benefits payable under section 415 and part C of title IV of the Act. Paragraph (a) of this section shall be construed to incorporate these prohibitions in any policy or contract of insurance obtained by an operator to meet the obligations imposed on such operator by section 423 of the Act.

(6) *Additional requirements.* In addition to the highlighted requirements described in paragraph (c)(1) through (5) of this section, paragraph (a) of this section shall, to the fullest extent possible, be construed to bring any policy or contract of insurance entered into by an operator for the purpose of insuring such operator's liability under part C of title IV of the Act into conformity with the legal requirements placed upon such operator by section 415 and part C of title IV of the Act and parts 720 and 725 of this subchapter.

(d) Nothing in this section shall relieve any operator or carrier of the duty to comply with any State workmen's compensation law, except insofar as such State law is in conflict with the provisions of this section.

§ 726.204 Statutory policy provisions.

Pursuant to section 423(b) of part C of title IV of the Act each policy or contract of insurance obtained to comply with the requirements of section 423(a) of the Act must contain or shall be construed to contain—

(a) A provision to pay benefits required under section 422 of the Act, notwithstanding the provisions of the State workmen's compensation law which may provide for lesser payments; and,

(b) A provision that insolvency or bankruptcy of the operator or discharge therein (or both) shall not relieve the carrier from liability for such payments.

§ 726.205 Other forms of endorsement and policies.

Forms of endorsement or policies other than that described in § 726.203

may be entered into by operators to insure their liability under the Act. However, any form of endorsement or policy which materially alters or attempts to materially alter an operator's liability for the payment of any benefits under the Act shall be deemed insufficient to discharge such operator's duties and responsibilities as prescribed in part C of title IV of the Act. In any event, the failure of an operator to obtain an adequate policy or contract of insurance shall not affect such operator's liability for the payment of any benefits for which he is determined liable.

§ 726.206 Terms of policies.

A policy or contract of insurance shall be issued for the term of 1 year from the date that it becomes effective, but if such insurance be not needed except for a particular contract or operation, the term of the policy may be limited to the period of such contract or operation.

§ 726.207 Discharge by the carrier of obligations and duties of operator.

Every obligation and duty in respect of payment of benefits, the providing of medical and other treatment and care, the payment or furnishing of any other benefit required by the Act and in respect of the carrying out of the administrative procedure required or imposed by the Act or the regulations in this part or 20 CFR part 725 upon an operator shall be discharged and carried out by the carrier as appropriate. Notice to or knowledge of an operator of the occurrence of total disability or death due to pneumoconiosis shall be notice to or knowledge of such carrier. Jurisdiction of the operator by a district director, administrative law judge, the Office, or appropriate appellate authority under the Act shall be jurisdiction of such carrier. Any requirement under any benefits order, finding, or decision shall be binding upon such carrier in the same manner and to the same extent as upon the operator.

REPORTS BY CARRIER

§ 726.208 Report by carrier of issuance of policy or endorsement.

Each carrier shall report to the Office each policy and endorsement issued, cancelled, or renewed by it to an operator. The report shall be made in such manner and on such form as the Office may require.

(Approved by the Office of Management and Budget under control number 1215–0059)

(Pub. L. No. 96–511)

[38 FR 12494, May 11, 1973, as amended at 49 FR 18294, Apr. 30, 1984]

§ 726.209 Report; by whom sent.

The report of issuance, cancellation, or renewal of a policy and endorsement provided for in § 726.208 shall be sent by the home office of the carrier, except that any carrier may authorize its agency or agencies to make such reports to the Office.

(Approved by the Office of Management and Budget under control number 1215–0059)

(Pub. L. No. 96–511)

[38 FR 12494, May 11, 1973, as amended at 49 FR 18294, Apr. 30, 1984]

§ 726.210 Agreement to be bound by report.

Every carrier seeking to write insurance under the provisions of this Act shall be deemed to have agreed that the acceptance by the Office of a report of the issuance or renewal of a policy of insurance, as provided for by § 726.208 shall bind the carrier to full liability for the obligations under this Act of the operator named in said report. It shall be no defense to this agreement that the carrier failed or delayed to issue, cancel, or renew the policy to the operator covered by this report.

(Approved by the Office of Management and Budget under control number 1215–0059)

(Pub. L. No. 96–511)

[38 FR 12494, May 11, 1973, as amended at 49 FR 18294, Apr. 30, 1984]

§ 726.211 Name of one employer only shall be given in each report.

A separate report of the issuance or renewal of a policy and endorsement, provided for by § 726.208, shall be made for each operator covered by a policy. If a policy is issued or renewed insuring more than one operator, a separate report for each operator so covered shall be sent to the Office with the name of only one operator on each such report.

(Approved by the Office of Management and Budget under control number 1215–0059)

(Pub. L. No. 96–511)

[38 FR 12494, May 11, 1973, as amended at 49 FR 18294, Apr. 30, 1984]

§ 726.212 Notice of cancellation.

Cancellation of a contract or policy of insurance issued under authority of the Act shall not become effective otherwise than as provided by 33 U.S.C. 936(b); and notice of a proposed cancellation shall be given to the Office and to the operator in accordance with the provisions of 33 U.S.C. 912(c), 30 days before such cancellation is intended to be effective (see sec. 422(a) of part C of title IV of the Act).

(Approved by the Office of Management and Budget under control number 1215–0059)

(Pub. L. No. 96–511)

[38 FR 12494, May 11, 1973, as amended at 49 FR 18294, Apr. 30, 1984]

§ 726.213 Reports by carriers concerning the payment of benefits.

Pursuant to 33 U.S.C. 914(c) as incorporated by section 422(a) of part C of title IV of the Act and § 726.207 each carrier issuing a policy or contract of insurance under the Act shall upon making the first payment of benefits and upon the suspension of any payment in any case, immediately notify the Office in accordance with a form prescribed by the Office that payment of benefit has begun or has been suspended as the case may be. In addition, each such carrier shall at the request of the Office submit to the Office such additional information concerning policies or contracts of insurance issued to guarantee the payment of benefits under the Act and any benefits paid thereunder, as the Office may from time to time require to carry out its responsibilities under the Act.

(Approved by the Office of Management and Budget under control number 1215–0059)

(Pub. L. No. 96–511)

[38 FR 12494, May 11, 1973, as amended at 49 FR 18294, Apr. 30, 1984]

PART 727—REVIEW OF PENDING AND DENIED CLAIMS UNDER THE BLACK LUNG BENEFITS REFORM ACT OF 1977

Subpart A—General

Sec.

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AUTHORITY: 5 U.S.C. 301, Reorganization Plan No. 6 of 1950, 15 FR 3174, 30 U.S.C. 901 et seq., 902(f), 925, 932, 934, 936, 945; 33 U.S.C. 901 et seq., Secretary's Order 7–87, 52 FR 48466, Employment Standards Order No. 90–02.

SOURCE: 43 FR 36819, Aug. 18, 1978, unless otherwise noted.

Subpart A—General

§ 727.1 Statutory provisions, purpose of this part.

(a) Under title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, benefits were provided to coal miners and certain survivors of coal miners on account of the miners' total disability or death due to pneumoconiosis. Part B of title IV of the act as amended provided that all claims for benefits filed between December 30, 1969, and June 30, 1973, would be filed with, processed by, and paid from Federal funds by the Secretary of Health, Education, and Welfare, through the Social Security Administration. The survivor of a miner was permitted to file a claim with the Secretary of Health, Education, and Welfare under part B until January 1, 1974, or within 6 months of the miner's death, if death occurred before January 1, 1974, or in the case of a part B beneficiary, within 6 months of the beneficiary's death. Section 415 of part B of title IV of the act provides that a claim filed by a miner between July 1 and December 31, 1973, would be filed with and processed by the Secretary of Labor and paid, if appropriate, by the Secretary of Labor from Federal funds for all periods of eligibility between July 1 and December 31, 1973. For periods of eligibility after December 31, 1973, an approved section 415 claim was to be paid by a coal mine operator found liable pursuant to the act or the Secretary of Labor as appropriate. A claim filed after December 31, 1973, was to be filed under an approved State workers' compensation law or, if no such law was available in an appropriate State, the claim was to be filed with the Secretary of Labor under part C of title IV of the Act. Claims were to be adjudicated under certain provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 et seq., and paid by a coal mine operator found liable pursuant to the act. If no such operator could be identified benefits were to be paid by the Secretary of Labor from Federal funds.

(b) The Black Lung Benefits Revenue Act of 1977 and the Black Lung Benefits Reform Act of 1977 significantly amend the provisions of title IV of the act to, among other things, establish the black lung disability trust fund (the fund) for the payment of all claims predicated upon coal mine employment which terminate prior to January 1, 1970, and for other claims for which no operator liability can be established. The fund is financed by individual coal mine operators. Other provisions of the act as amended modify the evidentiary requirements necessary to establish entitlement to benefits, eliminate certain restrictions on the filing of claims, establish penalties to be applied if a coal operator fails to meet its obligations under the act, and make technical, correcting, and other administrative or procedural and substantive changes.

(c) Section 435 of the act as amended directs the Secretary of Health, Education, and Welfare and the Secretary of Labor to undertake a review of all previously denied and pending claims in light of the amendments made by such act. The Secretary of Health, Education, and Welfare is directed to perform this review at the request of the claimant on all denied and pending claims filed under part B of title IV of the Act, exclusive of those claims filed under section 415. The Secretary of

Labor is directed to perform this review automatically on all claims filed under section 415 and part C of title IV of the Act, which were denied or pending as of the effective date of the Black Lung Benefits Reform Act of 1977, and in addition is required to review certain claims originally filed with the Secretary of Health, Education, and Welfare.

(d) The new section 435 contains provisions setting forth the scope of the claims review, the procedures to be followed and the consequences which accrue depending upon the results of any particular review. It is the purpose of this part to set forth and implement the provisions of section 435 as those provisions apply to the Secretary of Labor, and inform all interested parties of the manner in which a right to review will be extended with respect to all denied and pending claims for black lung benefits under the act by the Secretary of Labor.

§ 727.2 Applicability and content of this part.

(a) This part is designed to apply to, and set forth the role of, the Secretary of Labor in carrying out the provisions of section 435 of the act. The action to be taken and the procedure to be followed by the Secretary of Health, Education, and Welfare and the Social Security Administration under section 435 is detailed elsewhere. This part will, however, describe what will be done by the Secretary of Health, Education, and Welfare and the Social Security Administration in general terms and will detail the responsibilities assigned to the Secretary of Labor with respect to a claim reviewed by the Secretary of Health, Education, and Welfare.

(b) This subpart A describes generally the statutory framework established to facilitate the review of all pending and denied black lung claims, the applicability and content of this part and other relevant parts contained in this title 20 of the Code of Federal Regulations, and sets forth applicable definitions and usages.

(c) Subpart B of this part sets forth the procedures to be followed in the review of various types of claims subject to review under this part.

(d) Subpart C of this part contains the criteria to be applied in determining a claimant's eligibility for benefits under this part. Such criteria shall also be applicable to all claims for medical services filed under section 11 of the Black Lung Benefits Reform Act of 1977 (see § 725.308(b) of this subchapter), and shall also be applicable to all other claims filed under part 725 of this subpart until such time as the Secretary promulgates new criteria for determining total disability or death due to pneumoconiosis in accordance with section 402(f)(1) of the act.

(e) Subpart D of this part contains provisions relating to the liability for, and conditions governing, the payment of benefits under this part.

(f) Subpart E of this part sets forth special provisions relating to the processing of claims subject to review under this part which are within the jurisdiction of an admininstrative law judge or the Benefits Review Board.

§ 727.3 Definitions, use of terms.

Except as is otherwise provided by this part, the definitions and usages of terms contained in subpart A of part 725 of this title, as amended from time to time, shall be applicable to this part.

§ 727.4 Applicability of other parts in this subchapter.

(a) *Part 725.* Part 725 of this subchapter, which sets forth: (1) The procedure for filing a claim for black lung benefits under part C of title IV of the act, (2) the procedure to be followed in the adjudication of claims so filed, (3) standards for determining whether a particular individual is a miner, or a qualified dependent or survivor of a miner, (4) the criteria to be applied in determining the liability of a coal operator or the fund for the payment of approved claims so filed, and (5) the manner in which the payment of benefits shall be made with respect to part C claims, shall not be applicable to the processing, adjudication, or payment of claims under this part unless applicability is specifically provided by part 725 or this part.

(b) *Part 718.* Part 718 of this subchapter, which contains the criteria

and standards to be applied in determining whether a miner is totally disabled due to pneumoconiosis or whether a miner died due to or while totally or partially disabled by pneumoconiosis, shall not be applicable to the determination of claims under this part unless applicability is provided by part 718 or this part. Until such time as part 718 of this subchapter is revised in accordance with the 1977 amendments to the act, the provisions of subpart D of part 410 of this title which are not inconsistent with the 1977 amendments to the act, shall be applicable to the adjudication of claims under this part, unless otherwise provided by this part (see subpart C of this part).

(c) *Parts 715, 717, and 720.* Parts 715, 717, and 720 of this subchapter, which parts established the procedures for the filing, processing, and payment of claims filed under section 415 of the act, are repealed and pertinent provisions of those parts which retain vitality are incorporated within part 725 of this subchapter as amended.

(d) *Part 726.* Part 726 of this subchapter, which contains provisions setting forth a coal operator's obligations to insure or self-insure its liability for the payment of benefits to certain eligible claimants, is applicable to this part insofar as it bears upon the responsibility of a coal operator to secure the payment of benefits to certain claimants who may be determined eligible for benefits under this part.

Subpart B—Initial Review of Pending and Denied Claims

§ 727.101 Who is entitled to review.

(a) *By the Secretary of HEW.* Any person who filed a claim for benefits under part B of title IV of the Act, excluding miners who filed under section 415 of the act between July 1 and December 31, 1973, and whose claim was either pending or had been denied as of March 1, 1978 (see § 727.102), may upon notification by the Secretary of Health, Education, and Welfare, elect to have the claim reviewed by the Secretary of Health, Education, and Welfare.

(b) *By the Secretary of Labor.* (1) Any person who elects review by the Social Security Administration under paragraph (a) of this section and whose claim cannot be approved after such review shall have the claim reviewed by the Secretary of Labor.

(2) Any person who is eligible to have his or her claim reviewed under paragraph (a) of this section may elect to have the claim referred directly to the Secretary of Labor for review.

(3) Any person who has filed a claim for benefits under section 415 or part C of title IV of the Act and whose claim was pending or had been denied (see § 727.102) on or before March 1, 1978, shall have the claim automatically reviewed by the Secretary of Labor. (But see § 727.103.)

(4) Any claimant whose claim is subject to review by the Secretary of Labor under this paragraph shall have the right to submit additional evidence to the Secretary of Labor in support of such claim.

§ 727.102 "Pending" and "denied" claim defined.

(a) *Applicability.* This section defines the terms ''pending'' and ''denied'' claims for purposes of this part only, and the following definitions shall be applicable only to claims filed with the Secretary of Labor under section 415 and part C of title IV of the Act.

(b) *Denied claim defined.* For the purposes of this part, a claim filed with the Secretary of Labor shall be considered a denied claim if:

(1) The claim was filed before March 1, 1978; and

(2) The claimant's entitlement to benefits has been denied for any reason by a district director in the Office of Workers' Compensation Programs, U.S. Department of Labor, an administrative law judge assigned to determine black lung claims by the Secretary of Labor, the Benefits Review Board in the U.S. Department of Labor, or an appropriate U.S. court of appeals; and

(3) No further proceedings before a district director, administrative law judge, the Benefits Review Board, or a U.S. court of appeals are pending; and

(4) The time has expired to seek further consideration of such denial; or

(5) The claim has been declared abandoned by a district director or administrative law judge (see § 725.409 of this subchapter which replaces 38 FR 26059).

(c) *Pending claim defined.* For the purposes of this part and except as provided in §§ 727.402 and 727.403, a claim filed with the Secretary of Labor shall be considered a pending claim if:

(1) The claim was filed before March 1, 1978; and

(2) The claim is before a district director, administrative law judge, the Board, or a U.S. court of appeals for consideration; or

(3) The time permitted to seek further consideration of the claim has not expired.

(d) *Withdrawn claims.* A claim for benefits which has been previously withdrawn at the request of the claimant (see § 725.306 of this subchapter) shall not be considered a pending or denied claim for purposes of this part. Any person who has voluntarily withdrawn his or her claim from consideration may file a new claim for benefits under part 725 of this subchapter.

§ 727.103 Duplicate claims.

(a) A person who filed a claim for benefits with the Social Security Administration and whose claim has been approved by that agency and who has also filed a claim with the Secretary of Labor which was pending or had been denied as of March 1, 1978, shall be entitled to a review of such claim under this part.

(b) A person who has filed a claim with the Social Security Administration which was pending or had been denied by that agency as of March 1, 1978, and who has also filed a claim with the Secretary of Labor that has been approved, shall be entitled to elect review of the pending or denied claim by the Social Security Administration or by the Department of Labor subject to the limitation contained in paragraph (e) of this section.

(c) A person who has filed a claim both with the Social Security Administration and the Department of Labor and whose claims were either pending with or denied by both agencies as of March 1, 1978, shall have the claim reviewed by the Social Security Administration if such review is requested by the claimant. If the claim is not approved by the Social Security Administration it shall be forwarded to the Secretary of Labor for further review as provided in § 727.106. During the pendency of review proceedings by the Social Security Administration, if any, no action shall be taken by the Secretary of Labor with respect to the claim which is pending or had been denied by the Secretary of Labor. If the claimant does not respond to notification of his or her right to review by the Social Security Administration within 6 months of such notice (see § 727.104), unless the period is enlarged for good cause shown, the Secretary of Labor shall proceed under this part to complete processing of the claim originally filed with the Secretary of Labor. If the claimant, upon notification of his or her right to review by the Social Security Administration (see § 727.104) requests that the claim originally filed with the Administration be forwarded to the Department of Labor for review, or if more than one claim has been filed with the Secretary of Labor by the same claimant, such claims shall be merged and processed with the first claim filed with the Department of Labor.

(d) A person may exercise the right of review provided in paragraph (c) of this section at the same time such person is pursuing an appeal of a previously denied part B claim under the law as it existed prior to March 1, 1978. If the part B claim is ultimately approved as a result of the appeal, the claimant must immediately notify the Secretary of Labor and, where appropriate, the coal mine operator, and all duplicate payments made under part C shall be considered an overpayment and arrangements shall be made to insure the repayment of such overpayments to the fund or an operator as appropriate.

(e) In the case of a claimant who has filed one or more claims with both the Social Security Administration and the Department of Labor, under no circumstances are duplicate benefits payable for concurrent periods of eligibility.

§ 727.104 Review by the Social Security Administration.

(a) *Notification.* The Social Security Administration will notify each claimant who has filed a claim for benefits under part B of title IV of the Act, excluding miners who filed under section

415 of the Act, and whose claim was either pending or had been denied on or before March 1, 1978, that upon the request of the claimant such claim shall be either:

(1) Reviewed by the Social Security Administration on the basis of the evidence contained in the claimant's file, in accordance with the amendments made by the Black Lung Benefits Reform Act of 1977; or,

(2) Referred by the Social Security Administration to the Office of Workers' Compensation Programs in the Department of Labor for review based on the evidence contained in the claimant's file and any additional evidence the claimant seeks to submit, in accordance with the amendments made by the Black Lung Benefits Reform Act of 1977.

(b) *Response to notification.* Upon receipt of a claimant's response or a response on behalf of a claimant to the notice required by paragraph (a) of this section the Social Security Administration will undertake to review the claim or refer the claimant's file to the Office for processing under §727.107. If there is no response to notification sent in accordance with paragraph (a) of this section within 6 months from the date on which notice is sent, unless the period is enlarged for good cause shown, the claimant shall be considered to have waived the right to review by the Social Security Administration. The date on which notice is sent and the date on which a claimant's response is received shall be noted on an appropriate form by the Social Security Administration.

(c) *Change of election.* A Part B claimant who has elected review by the Secretary of Labor may in writing revoke such election and elect review by the Social Security Administration at any time before being notified of the district director's initial findings on the claim (§725.410 of this subchapter). If such a revocation is made, the district director shall return the claimant's file to the Social Security Administration for appropriate processing. All documents received by the district director, except the documents changing the claimant's election, shall be deleted from the claimant's file before it is returned to the Social Security Administration.

(d) *Social Security Administration review procedures.* Where the Social Security Administration determines that the claimant is eligible, the Administration will forward the claim file together with a copy of such determination to the Office for processing and payment in accordance with §727.105 and shall so notify the claimant. Where it is determined that the claim cannot be approved, the Social Security Administration will transfer the claimant's file to the Office for further review in accordance with §727.106, and shall so notify the claimant.

§ 727.105 Action by the Office, Social Security approval.

(a)(1) Where the Social Security Administration determines that the claimant is eligible for benefits upon review under §727.104(c), the claimant's file and certification of approval for payment of benefits will be forwarded to the Department of Labor. Upon receipt of the file and certification, the Office shall immediately authorize the payment of all benefits due to the claimant from the fund, in accordance with §725.522 of this subchapter. Such payments shall commence within not more than 30 days. Payments shall include all past due benefits, augmentation for dependents and medical expenses to the extent supported by information in the file.

(2) After authorizing payment, the district director shall commence verification of the information in the file on which authorization of benefit payments was based. The district director shall request current information from the claimant pertaining to any matter affecting the amount of benefits payable or any additional information which may be necessary to establish a more detailed and complete history of the miner's employment. After receipt of such information, the district director shall determine the amount of benefits actually payable to the claimant and shall, if necessary, increase, decrease or terminate benefit payments as appropriate in accordance with subpart G of part 725 of this subchapter. The district director shall then issue a proposed decision and

order in accordance with the procedure set forth in §§ 725.418 and 725.419 of this subchapter, except as provided in paragraph (b)(1) of this section. If the information received establishes that there has been an underpayment or overpayment, benefit payments shall be corrected retroactive to January 1, 1974.

(3) If the information requested is not supplied to the district director within 60 days following such request, unless the period is enlarged for good cause shown, the district director shall issue an order to show cause why benefit payments should not be suspended and all benefits previously paid should not be declared an overpayment (see § 725.540 of this subchapter). If the claimant submits a satisfactory response to such order, and within a reasonable time submits sufficient evidence to allow the district director to determine the actual amount of benefits payable, the district director shall issue a proposed decision and order awarding benefits in accordance with §§ 725.418 and 725.419 of this subchapter except as provided in paragraph (b)(1) of this section. If there is no satisfactory response to the district director's order to show cause in the time allotted, the district director may issue a proposed decision and order in accordance with §§ 725.418 and 725.419 of this subchapter or proceed in accordance with § 725.409 of this subchapter. Benefit payments shall not be terminated and no overpayment shall be declared on account of an unrepresented claimant's failure to respond to a show cause order until the district director has attempted to contact the claimant personally or by telephone. In the case of an unrepresented claimant, a response to a show cause order may be given orally, in person or by telephone, except that such a response shall not excuse the claimant from submitting necessary information in writing.

(b) (1) If the district director determines that there is a coal mine employer which may be liable for the payment of benefits to the claimant, the district director shall identify and notify such operator of its possible liability as provided in § 725.412 of this subchapter, and shall proceed to adjudicate the claim in accordance with the appropriate provisions of subparts D and E of part 725 of this subchapter. The identification and notification of an operator shall be made as soon as possible after receipt of the claimant's file

(2) An employer notified under this section shall have the right to have the claimant examined by a physician selected by such operator (see § 725.414 of this subchapter). If an employer contests the claim, the claimant may obtain and submit additional medical evidence to the district director within the time permitted by § 725.414 of this subchapter for the submission of the employer's evidence. Evidence submitted by a claimant under this paragraph shall be paid for by the fund, if authorized by the district director, and shall be reimbursable to the fund by the employer, if the employer is found liable for the claim (see § 725.407 of this subchapter).

(c) Except as is otherwise provided in this section, a determination of entitlement made by the Social Security Administration under this section is binding on the district director.

(d) If it is determined by an administrative law judge, the Benefits Review Board, or a U.S. court that the determination of entitlement made by the Social Security Administration was incorrect, the payment of benefits shall terminate and any benefits paid shall be considered an overpayment subject to collection in accordance with § 725.540 of this subchapter.

§ 727.106 Action by the Office, insufficient evidence for Social Security approval.

(a) In the case of a claim which has not been approved for benefits by the Social Security Administration under § 727.105, the claim shall be transferred by the Administration to the Office and the Office shall follow the procedures set forth in this section. There shall be no further consideration of a claim described in this paragraph except as provided in this part.

(b) Upon receipt of the claimant's file from the Social Security Administration, the Office shall assign the claim to a district director who may:

(1) Assist the claimant in obtaining additional medical evidence or request

that such evidence be submitted (see §§ 725.405–725.408 of this subchapter); or

(2) Request such additional documents or information as may be necessary to establish the amount of benefits which may be payable, or to establish a more detailed and complete history of the nature and duration of the miner's employment.

(c) Based upon the evidence developed under this section, if any, and the information contained in the claimant's original file, the district director may make an initial finding with respect to the eligibility of the claimant and shall proceed to adjudicate the claim under §§ 725.409–725.421 of this subchapter, which action may include the notification and participation of a coal mine employer and the submission of additional evidence as is appropriate.

§ 727.107 Action by the Office, Social Security referral without prior review.

(a) In the case of a claim which is referred at the claimant's request by the Social Security Administration to the Office under § 727.104(a)(2) without prior review by the Social Security Administration, the Office shall follow the procedures set forth in this section.

(b) Upon receipt of a claimant's file the claim shall be assigned to a district director who shall examine the evidence contained in the file to determine whether the claim may be approved in light of the amendments made by the Black Lung Benefits Reform Act of 1977.

(c) If it is determined by the district director that the evidence in the file supports a finding of entitlement to benefits the district director may:

(1) Request up-to-date information from the claimant pertaining to any matter affecting the amount of benefits payable (see subpart G of part 725 of this subchapter); and (2) request any additional information or verification which may be necessary to establish a more detailed and complete history of the miner's employment, for the purpose of determining the identity of any coal mine employer which may be liable for the payment of the claim, and for such other purposes as may be appropriate. Upon receipt of any additional information requested under this paragraph, or if the claimant fails to supply such information, the district director may make an initial finding with respect to the eligibility of the claimant, notify a coal mine employer, if any, of its possible liability for the claim and proceed to adjudicate the claim under §§ 725.409–725.421 of this subchapter.

(d) If it is determined by the district director that the evidence on file is insufficient to support a finding of entitlement with respect to a claim reviewed under this section, the district director may:

(1) Assist the claimant in obtaining additonal medical evidence or request that such evidence be submitted (see §§ 725.405–725.408 of this subchapter); or (2) request such additional documents or information as may be necessary to establish the amount of benefits which may be payable, or to establish a more detailed and complete history of the nature and duration of the miner's employment. Based upon evidence developed under this paragraph, if any, and the information contained in the claimant's original file, the district director may make an initial finding with respect to the eligibility of the claimant and shall proceed to adjudicate the claim under §§ 725.409–725.421 of this subchapter.

§ 727.108 Action by the Office, Department of Labor pending or denied claim.

(a) In the case of a claim filed with the Office under section 415 or part C of title IV of the act which is pending or has been denied as of March 1, 1978, the Office shall follow the procedures set forth in this section.

(b) The district director shall examine the evidence contained in the file to determine whether the claim may be approved in light of the amendments made by the Black Lung Benefits Reform Act of 1977.

(c) The district director may: (1) Request up-to-date information from the claimant pertaining to any matter affecting the amount of benefits payable (see subpart G of part 725 of this subchapter); and (2) request any additional information or verification which may

be necessary to establish a more detailed and complete history of the miner's employment, for the purpose of determining the identity of any coal mine employer which may be liable for the payment of the claim, and for such other purposes as may be appropriate. Upon receipt of any additional information requested under this paragraph, or if the claimant fails to supply such information, the district director may notify a coal mine employer, if any, of its possible liability for the claim and proceed to adjudicate the claim under §§ 725.409–725.421 of this subchapter.

(d) If it is determined by the district director that the evidence on file is insufficient to support a finding of entitlement with respect to a claim reviewed under this section, the district director may:

(1) Assist the claimant in obtaining additional medical evidence or request that such evidence be submitted (see §§ 725.405–725.408 of this subchapter); or (2) request such additional documents or information as may be necessary to establish the amount of benefits which may be payable, or to establish a more detailed and complete history of the nature and duration of the miner's employment. Based upon the evidence developed under this paragraph, if any, and the information contained in the claimant's original file, the district director may make an initial finding with respect to the eligibility of the claimant and shall proceed to adjudicate the claim under §§ 725.409–725.421 of this subchapter.

(e) Notwithstanding the provisions of paragraphs (a) through (d) of this section, in the case of a claim filed by a part B beneficiary under part C of the act prior to March 1, 1978, for such additional benefits as may be available, the Department shall accept the Social Security Administration's documented finding of entitlement as its initial determination of eligibility.

§ 727.109 Hearings and appeals, parties.

(a) If a hearing before an administrative law judge is necessary in connection with a claim reviewed under this part, the hearing shall be conducted in accordance with the procedures set forth in subpart E of part 725 of this subchapter. An appeal from a decision of an administrative law judge shall be considered by the Benefits Review Board in accordance with the procedures set forth in parts 801 and 802 of this title.

(b) parties to proceedings conducted in connection with a claim reviewed under this section, matters relating to the representation of parties and the right of such representative to obtain a fee for services rendered, the powers of adjudication officers and the service of papers or documents shall be governed by the appropriate provisions contained in subparts C, D, and E of part 725 of this subchapter.

Subpart C—Criteria for Determining Eligibility for Benefits

§ 727.200 Basis for criteria.

In enacting the Black Lung Benefits Reform Act of 1977, Congress provided that the criteria for determining whether a miner is or was totally disabled or died due to pneumoconiosis shall be no more restrictive than the criteria applicable to a claim filed with the Social Security Administration on or before June 30, 1973, under part B of title IV of the Act (the interim adjudicatory rules). These criteria are to be applied to claims reviewed under section 435 of the Act, to all filed reviewed under section 11 of the Black Lung Benefits Reform Act of 1977 and to new claims filed prior to the effective date of regulations to be promulgated in part 718 of this subchapter which will establish permament criteria, regardless of the date on which the claim is finally adjudicated. The rules promulgated in this section take into account the amendments made by the Black Lung Benefits Reform Act of 1977 and the expectations of the Congress. Accordingly, these rules provide additional standards, not available in the interim adjudicatory rules, by which a claimant can take advantage of a presumption of total disability or death due to pneumoconiosis arising out of coal mine employment.

§ 727.201 Persons entitled to benefits, dependents.

Benefits are provided under the Act to a miner who is totally disabled due

to pneumoconiosis and to certain survivors of a miner who died due to or while totally (or in certain cases, partially) disabled by pneumoconiosis. The amount of benefits payable to a miner or survivor may be increased on account of certain dependents. For the purpose of determining whether a claimant is a miner or qualified survivor of a miner or a qualified dependent of a miner or survivor under this part, the provisions of part 725 of this subchapter shall be applicable as appropriate.

§ 727.202 Definition of pneumoconiosis.

For the purposes of the act, *pneumoconiosis* means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosisanthro-silicosis, massive pulmonary fibrosis, progressive massive fibrosis silicosis, or silicotuberculosis arising out of coal mine employment. For purposes of this definition, a disease ''arising out of coal mine employment'' includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or aggravated by, dust exposure in coal mine employment.

§ 727.203 Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO_2	Arterial pCO_2 equal to or less than (mm. Hg.)
30 or below	70.
31	69.
32	68.
33	67.
34	66.
35	65.
36	64.
37	63.
38	62.
39	61.
40–45	60.
Above 45	Any value.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual

coal mine work or comparable and gainful work (see §410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see §410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of part 718.* Except as is otherwise provided in this section, the provisions of part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under part 718 of this subchapter as amended from time to time.

§727.204 Presumption of entitlement applicable to certain death claims.

(a) In the case of a miner who died on or before March 1, 1978, who was employed for 25 or more years in one or more coal mines prior to June 30, 1971, the eligible survivors of such miner shall be entitled to the payment of benefits, unless it is established that at the time of death such miner was not partially or totally disabled due to pneumoconiosis. Eligible survivors shall, upon request by the Office, furnish such evidence as is available with respect to the health of the miner at the time of death, and the length of the miner's coal mine employment.

(b) For the purpose of this section a miner will be considered to have been ''partially disabled'' if he or she had reduced ability to engage in his or her usual coal mine work or ''comparable and gainful work'' (see part 718 of this subchapter as amended from time to time).

(c) In order to rebut this presumption the evidence must demonstrate that the miner's ability to perform his or her usual and customary work or ''comparable and gainful work'' was not reduced at the time of his or her death or that the miner did not have pneumoconiosis.

(d) The following evidence alone shall not be sufficient to rebut the presumption:

(1) Evidence that a deceased miner was employed in a coal mine at the time of death;

(2) Evidence pertaining to a deceased miner's level of earnings prior to death;

(3) A chest X-ray interpreted as negative for the existence of pneumoconiosis;

(4) A death certificate which makes no mention of pneumoconiosis.

§727.205 Effect of current coal mine employment or coal mine employment at the time of death.

In the case of a miner who is working in coal mine employment or was employed in coal mine employment at the time of death, the following shall apply:

(a) A deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled. In the case of a deceased miner who was employed in a coal mine at the time of death, all relevant evidence, including the circumstances of such employment and the statements of the miner's spouse, shall be considered in determining whether the miner was totally disabled due to pneumoconiosis at the time of death. In the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her coal mine work, the miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled.

(b) Notwithstanding any other provision of this section, and except as provided in section 411(c)(3) of the act, no miner shall be found to be totally disabled if the miner is found to be doing his or her customary coal mine work or ''comparable and gainful work'' (see §410.412(a)(1) of this title) and there are no changed circumstances of employment indicative of reduced ability to perform coal mine work.

(c) No miner who is engaged in coal mine employment shall (except as provided in section 411(c)(3) of the act) be entitled to any benefits under this part while so employed. Any miner who has been determined to be eligible for benefits for any period during which such miner is engaged in coal mine employment shall be entitled to benefits if the miner's employment terminates within 1 year after the date such determination becomes final (see § 725.503A of this subchapter).

§ 727.206 Quality standards applicable to evidence.

(a) No chest X-ray or X-ray report, ventilatory study or blood gas study which does not or did not meet the quality standards applicable at the time the evidence was submitted shall be considered sufficient to invoke the interim presumption provided in § 727.203(a) of this part. With respect to evidence submitted prior to the effective date of part 718 of this title, the standards to be applied in the evaluation of evidence are contained in subpart D of part 410 of this title. Evidence submitted after the effective date of the revised part 718 shall be evaluated as provided in that part.

(b)(1) In all claims where there is other evidence of a pulmonary or respiratory impairment, a board-certified or board-eligible radiologist's interpretation of a chest X-ray shall be accepted by the Office if the X-ray is in compliance with the requirements of § 410.428(b) of this title and if such X-ray has been taken by a radiologist or qualified radiologic technologist or technician and there is no evidence that the claim has been fraudulently represented.

(2) The following definitions shall apply when making a finding in accordance with this paragraph:

(i) The term ''other evidence'' means medical tests such as blood-gas studies, pulmonary function studies or physical performance tests, physical examinations or medical histories which establish the presence of a chronic respiratory or cardio-pulmonary condition and the spouse's affidavit except that the spouse's affidavit alone shall not be sufficient in the case of a living miner to establish the existence of a respiratory or pulmonary impairment. In the case of a deceased miner, in the absence of medical evidence to the contrary, affidavits of persons with knowledge of the miner's physical condition may be sufficient to establish the presence of a respiratory or pulmonary impairment.

(ii) ''Pulmonary or respiratory impairment'' means an inability of the human respiratory apparatus to perform satisfactorily one or more of the three components of respiration, viz., ventilation, perfusion, and diffusion.

(iii) ''Board-certified'' means certification in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association.

(iv) ''Board-eligible'' means the successful completion of a formal accredited residency program in radiology or diagnostic roentgenology.

(v) ''Qualified radiologic technologist or technician'' means an individual who is either certified as a registered technologist by the American Registry of Radiologic Technologists or licensed as a radiologic technologist by a State licensing board.

Subpart D—Payment of Benefits/ Liability

§ 727.300 Conditions and duration of eligibility.

The provisions of subpart B of part 725 of this subchapter shall be applicable in determining the conditions and duration of eligibility applicable with respect to a claim approved under this part.

§ 727.301 Amounts payable, other payment provisions.

Except as is otherwise provided in this part (see § 727.302), provisions relating to the amount of benefits payable, the manner of payment and all other provisions contained in subpart G of part 725 and § 725.309 of this subchapter, shall be applicable to a claim approved under this part. A miner whose claim is approved under this part shall be entitled to medical benefits to be determined and administered in accordance with the provisions of subpart I of part 725 of this subchapter.

§ 727.302 Date from which benefits are payable after review and approval.

(a) Section 435(c) of the act provides that any individual whose claim is approved after review shall be awarded benefits on a retroactive basis for a period which begins no earlier than January 1, 1974. This section implements section 435(c) of the act and sets forth provisions governing the date from which benefits shall be payable with respect to a claim reviewed under this part. (See also section 6(a) of the Longshoremen's Act as incorporated by section 422(a) of the act.)

(b) In the case of a claim reviewed and finally approved under § 727.105, benefits shall be payable for all periods of eligibility occurring on or after January 1, 1974.

(c)(1) In the case of a miner whose claim is reviewed and finally approved under § 727.106, benefits shall be payable for all periods of eligibility beginning with the month of onset of total disability due to pneumoconiosis or January 1, 1974, whichever is later. Where the evidence does not establish the month of onset, benefits shall be payable from the month during which the miner elected review under § 727.104.

(2) In the case of a survivor whose claim is reviewed and finally approved under § 727.106, benefits shall be payable for all periods of eligibility occurring on or after the month of the miner's death or January 1, 1974, whichever is later.

(d)(1) In the case of a miner's claim which is reviewed and finally approved under § 727.107, benefits shall be payable for all periods of eligibility beginning with the month of onset of total disability due to pneumoconiosis or January 1, 1974, whichever is later. Where the evidence does not establish the month of onset, benefits shall be payable from the month during which the miner elected review under § 727.104.

(2) In the case of a survivor whose claim is reviewed and finally approved under § 727.107, benefits shall be payable for all periods of eligibility occurring on or after the month of the miner's death or January 1, 1974, whichever is later.

(e) In the case of a claim reviewed and finally approved under § 727.108, benefits shall be payable as provided in § 725.503 of this subchapter.

(f) For the purposes of this section, the term ''finally approved'' means that an award of benefits has been made or affirmed by a district director, administrative law judge, the Benefits Review Board, or a U.S. court of appeals, that no further hearing, appeal, or reconsideration is pending, and the time to request such hearing, appeal, or reconsideration has expired. (See part 725 of this subchapter generally.) Benefit payments shall be initiated prior to final approval in accordance with the provisions of § 725.522 of this subchapter.

§ 727.303 Claims filed under section 415 of the act.

(a) A claim filed by a miner between July 1 and December 31, 1973, with the Secretary of Labor under section 415 of the act is subject to review under this section if it was pending or had been denied on or before March 1, 1978. Prior to the enactment of the Black Lung Benefits Reform Act of 1977, benefits with respect to a section 415 claim may have been payable by the Secretary of Labor from Federal funds for periods of eligibility between July 1 and December 31, 1973. However, under section 435 of the act, no benefits may be paid with respect to a claim reviewed under that section, including a section 415 claim, for any period of eligibility prior to January 1, 1974. Accordingly, in the case of any claim filed under section 415 of the act with respect to which no benefits have been awarded prior to March 1, 1978, for any period of eligibility between July 1 and December 31, 1973, no benefits which might have been awarded for this period shall be awarded in any adjudication of the claim taking place after the effective date of this part.

(b) A claim filed under section 415 of the act which is reviewed under this part shall for all purposes be considered as if it was filed on January 1, 1974, under part C of title IV of the Act.

§ 727.304 Liability for benefit payments.

A claim approved under this part shall be payable either by a coal mine employer (see subpart F of part 725 of

this subchapter) or the black lung disability trust fund. Benefits shall be payable by a responsible coal mine employer if the miner's last date of coal mine employment occurred on or after January 1, 1970, and if the miner's last coal mine employer or a successor to such employer is found liable under the provisions of subpart F of part 725 of this subchapter. Where it is determined that the employer liable for the payment of such benefits has not commenced payment of benefits within 30 days after the date the claimant is initially determined eligible or within 30 days after a payment is due, the fund will make the required payments. The employer is required by section 424 of the act to reimburse the fund where its liability is finally determined. For the purposes of determining the liability of a coal mine employer or the fund for the payment of an approved claim, the provisions of subparts F and H of part 725 of this subchapter shall be applicable to a claim considered under this part, including any claim originally filed under part B of title IV of the Act with the Social Security Administration. In all other cases, benefits shall be payable by the fund. Nothing in this part shall be construed in derogation of the terms of part 725 of this subchapter insofar as part 725 affects the liability of a coal mine employer.

Subpart E—Special Review Provisions Relating to Claims Pending Before an Administrative Law Judge or the Benefits Review Board

§ 727.401 General.

Section 435 of the act requires the Secretary of Labor to establish a consistent and effective procedure for the review of pending and denied claims in light of the amendments made by the Black Lung Benefits Reform Act of 1977. A number of the claims encompassed by section 435 are pending in the Office of Administrative Law Judges or before the Benefits Review Board. In order to insure a fair, orderly, and uniform disposition of claims pending before an administrative law judge or the Board which are subject to review under section 435 of the act, it has been determined that a return of many of these claims to the Office for expedited review is essential. This subpart sets forth the procedures to be followed with respect to claims which are within the jurisdiction of the Office of Administrative Law Judges or the Benefits Review Board for which review under section 435 of the act is required. In order to carry out the purposes of section 435, certain of the procedures ordinarily applicable in the adjudication of a claim are changed in certain specified instances. These changes are intended exclusively to facilitate a uniform administrative review of all pending and denied claims where such review is appropriate. Once the administrative review of these claims has been completed, the hearing and appeal procedures set forth in subpart D of part 725 of this subchapter shall be available to all parties to a claim. Additional evidence may be submitted in connection with a reviewed claim by any party as is considered appropriate by the district director or administrative law judge, and as is permitted by the act and this part.

§ 727.402 Claims pending in the Office of Administrative Law Judges.

(a) A claim which is pending in the Office of Administrative Law Judges may be subject to review by a district director under this part. This section sets forth criteria to be applied by the Chief Administrative Law Judge or an administrative law judge for determining whether a claim should be remanded to the district director for review under § 727.108 or whether jurisdiction over the claim should be retained and sets forth a procedure to be followed if remand is required.

(b) A claim pending in the Office of Administrative Law Judges, which has been administratively denied by the district director and with respect to which no decision has been issued, may be remanded to the district director for consideration under § 727.108, upon the request of the Director or the claimant, or by the administrative law judge on his or her own motion.

(c) A claim pending in the Office of Administrative Law Judges, which has been administratively approved by the district director and was forwarded for

hearing at the request of a coal mine operator, shall be remanded to the district director for payment if the miner on whose total disability or death the claim is predicated was last engaged in coal mine employment before January 1, 1970. If the miner's last coal mine employment occurred on or after January 1, 1970, the Office of Administrative Law Judges shall retain jurisdiction over the claim and proceed to adjudicate the claimant's eligibility and the liability of the named coal mine employer in accordance with the provisions of this part. If jurisdiction over a claim is retained under this paragraph, the administrative law judge may, on his or her own motion or at the request of the claimant, remand the claim to the district director for consideration under §727.108 if further evidentiary development of the claim is necessary. The right to review provided by §727.108 is not available to a coal mine employer.

(d) A claim which has been denied by an administrative law judge and with respect to which no reconsideration or appeal is pending shall be automatically reviewed under §727.108.

(e) In the case of a claim with respect to which a decision has been issued by an administrative law judge but not filed with the district director, or if the decision has been filed and the time for appeal to the Benefits Review Board has not expired, the provisions of this paragraph shall apply. If appropriate, such decision shall be immediately filed with the district director. If the decision denied the claimant's entitlement to benefits, the claim shall be considered a pending claim subject to review by the district director under §727.108, or subject to an appeal to the Benefits Review Board. If the decision awards benefits to the claimant, the claim shall be paid as provided in part 725 of this subchapter and an appeal to the Benefits Review Board may be taken. If such an appeal is taken, the Board shall consider the appeal under the applicable provisions of this part, and may take such other action as is appropriate.

(f) Except as provided in paragraph (b) of this section, the remand of a claim authorized by this section shall be made by order of the Chief Administrative Law Judge or an administrative law judge on his or her own motion, or on the motion of any party to the claim as is appropriate.

§727.403 Claims pending before the Benefits Review Board.

(a) A claim pending before the Benefits Review Board which may be subject to review under this part shall be considered by the Board as the Board deems appropriate, in accordance with the authority given the Board by the act.

(b) If a claim subject to review under this part is pending before the Board, the Board may, on its own motion or at the request of the Director, remand such case to the district director for review under §727.108. The consent of the parties shall not be a prerequisite to a remand by the Board under this paragraph.

(c) A claimant whose claim is pending before the Board may request that his or her claim be remanded to the district director for consideration under §727.108.

§727.404 Claims pending in a U.S. Court of Appeals.

A claim pending in a U.S. court of appeals which may be subject to review under this part shall be considered by the court as the court deems appropriate.

§727.405 Expedited review of claims.

(a) A claim which is remanded to the district director by an administrative law judge, the Benefits Review Board, or a court, under this subpart shall be reviewed under §727.108 and in accordance with the provisions of this part on a priority basis. Such claim shall be reviewed by the district director before any other claim, except for a claim remanded at an earlier date under this subpart. If no additional evidence is submitted or required with respect to a claim remanded under this subpart, the district director shall make initial findings (see §725.410 of this subchapter) on the claim within no more than 60 days from the date on which the claim was remanded.

(b) If, after appropriate notice has been given to the claimant of his opportunity to elect review by the district director in accordance with this subpart, or to proceed through the administrative appeals process, the claimant chooses not to elect review by the district director, the claimant's right to review provided by this part shall be considered fully satisfied, and no further review of the claim beyond that afforded by the appeals process shall be required under section 435 of the act.

CHAPTER VII—BENEFITS REVIEW BOARD, DEPARTMENT OF LABOR

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PART 801—ESTABLISHMENT AND OPERATION OF THE BOARD

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AUTHORITY: 5 U.S.C. 301; 30 U.S.C. 901 *et seq.*; 33 U.S.C. 901 *et seq.*; Reorganization Plan No. 6 of 1950, 15 FR 3174; Secretary of Labor's Order 38–72, 38 FR 90, January 3, 1973.

SOURCE: 52 FR 27290, July 20, 1987, unless otherwise noted.

INTRODUCTORY

§ 801.1 Purpose and scope of this part.

This part 801 describes the establishment and the organizational structure of the Benefits Review Board of the Department of Labor, sets forth the general rules applicable to operation of the Board, and defines terms used in this chapter.

§ 801.2 Definitions and use of terms.

(a) For purposes of this chapter, except where the content clearly indicates otherwise, the following definitions apply:

(1) *Acts* means the several Acts listed in §§ 801.102 and 802.101 of this chapter, as amended and extended, unless otherwise specified.

(2) *Board* means the Benefits Review Board established by section 21 of the LHWCA (33 U.S.C. 921) as described in § 801.101, and as provided in this part and Secretary of Labor's Order No. 38–72 (38 FR 90). Mention in these regulations of the ''permanent Board'' refers to the five permanent Board members only.

(3) *Chairman* or *Chairman of the Board* means Chairman of the Benefits Review Board. The Chairman of the Board is officially entitled Chief Administrative Appeals Judge.

(4) *Secretary* means the Secretary of Labor.

(5) *Department* means the Department of Labor.

(6) *Judge* means an administrative law judge appointed as provided in 5 U.S.C. 3105 and subpart B of 5 CFR part 930, who is qualified to preside at hearings under 5 U.S.C. 557 and is empowered by the Secretary to conduct formal hearings whenever necessary in respect of any claim for benefits or compensation arising under the Acts.

(7) *Chief Administrative Law Judge* means the Chief Administrative Law Judge of the Department of Labor.

(8) *Director* means the Director of the Office of Workers' Compensation Programs of the Department of Labor (hereinafter OWCP).

(9) *Deputy commissioner* means a person appointed as provided in sections 39 and 40 of the LHWCA or his designee, authorized by the Director to make decisions and orders in respect to claims arising under the Acts.

(10) *Party* or *Party in Interest* means the Secretary or his designee and any person or business entity directly affected by the decision or order from which an appeal to the Board is taken.

(11) *Day* means calendar day.

(12) *Member* means a member of the Benefits Review Board. Unless specifically stated otherwise, the word ''member'' shall apply to permanent, temporary and interim members. Permanent Board members are officially entitled Administrative Appeals Judges. Temporary and interim Board members are designated as Acting Administrative Appeals Judges.

(b) The definitions contained in this part shall not be considered to derogate from the definitions of terms in the respective Acts.

(c) The definitions pertaining to the Acts contained in the several parts of chapter VI of this title 20 shall be applicable to this chapter as is appropriate.

[52 FR 27290, July 20, 1987, as amended at 52 FR 28640, July 31, 1987]

§ 801.3 Applicability of this part to 20 CFR part 802.

Part 802 of title 20, Code of Federal Regulations, contains the rules of practice and procedure of the Board. This part 801, including the definitions and usages contained in § 801.2, is applicable to part 802 of this chapter as appropriate.

ESTABLISHMENT AND AUTHORITY OF THE BOARD

§ 801.101 Establishment.

By Pub. L. 92–576, 82 Stat. 1251, in an amendment made to section 21 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 921), there was established effective November 26, 1972, a Benefits Review Board, which is composed of members appointed by the Secretary of Labor.

§ 801.102 Review authority.

(a) The Board is authorized, as provided in 33 U.S.C. 921(b), as amended, to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions or orders with respect to claims for compensation or benefits arising under the following Acts, as amended and extended:

(1) The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 et seq.;

(2) The Defense Base Act (DBA), 42 U.S.C. 1651 et seq.;

(3) The District of Columbia Workmen's Compensation Act (DCWCA), 36 D.C. Code 501 et seq. (1973);

(4) The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 et seq.;

(5) The Nonappropriated Fund Instrumentalities Act (NFIA), 5 U.S.C. 8171 et seq.;

(6) Title IV, section 415 and part C of the Federal Mine Safety and Health Act of 1977, Public Law 95–164, 91 Stat. 1290 (formerly the Federal Coal Mine Health and Safety Act, hereinafter, FCMHSA, of 1969) as amended by the Black Lung Benefits Reform Act of 1977, Public Law 92–239, 92 Stat. 95, the Black Lung Benefits Revenue Act of 1977, Public Law 95–227, 92 Stat. 11, and the Black Lung Benefits Amendments of 1981, Public Law 97–119, 95 Stat. 1643 (30 U.S.C. 901 et seq.).

§ 801.103 Organizational placement.

As prescribed by the statute, the functions of the Benefits Review Board are quasi-judicial in nature and involve review of decisions made in the course of the administration of the above statutes by the Employment Standards Administration in the Department of Labor. It is accordingly found appropriate for organizational purposes to place the Board in the Office of the Deputy Secretary and it is hereby established in that Office, which shall be responsible for providing necessary funds, personnel, supplies, equipment, and records services for the Board.

§ 801.104 Operational rules.

The Deputy Secretary of Labor may promulgate such rules and regulations as may be necessary or appropriate for effective operation of the Benefits Review Board as an independent quasi-judicial body in accordance with the provisions of the statute.

MEMBERS OF THE BOARD

§ 801.201 Composition of the Board.

(a) The Board shall be composed of five permanent members appointed by the Secretary from among individuals who are especially qualified to serve thereon. Each permanent member shall serve an indefinite term subject to the discretion of the Secretary.

(b) The member designated by the Secretary as Chairman of the Board shall serve as chief administrative officer of the Board and shall have the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board.

(c) The four remaining members shall be the associate members of the Board.

(d) Upon application of the Chairman of the Board, the Secretary may designate up to four Department of Labor administrative law judges to serve as temporary Board members in addition to the five permanent Board members. Up to four such temporary members may serve at any one time. The term of any temporary Board member shall not exceed 1 year from date of appointment.

§ 801.202 Interim appointments.

(a) *Acting Chairman.* In the event that the Chairman of the Board is temporarily disabled or unavailable to perform his or her duties as prescribed in this chapter VII, he or she shall designate a permanent member to serve as Acting Chairman until such time as the Secretary designates an Acting Chairman. In the event that the Chairman is physically unable to make such designation, the next senior permanent member shall serve as Acting Chairman until such time as the Secretary of Labor designates an Acting Chairman.

(b) *Interim members.* In the event that a permanent member of the Board is temporarily unable to carry out his or her responsibilities because of disqualification, illness, or for any other reason, the Secretary of Labor may, in his or her discretion, appoint a qualified individual to serve in the place of such permanent member for the duration of that permanent member's inability to serve.

§ 801.203 Disqualification of Board Members.

(a) During the period in which the Chairman or the other members serve on the Board, they shall be subject to the Department's regulations governing ethics and conduct set forth at 20 CFR part 0.

(b) Notice of any objection which a party may have to any Board member who will participate in the proceeding shall be made by such party at the earliest opportunity. The Board member shall consider such objection and shall, in his or her discretion, either proceed with the case or withdraw.

ACTION BY THE BOARD

§ 801.301 Quorum and votes of the permanent Board; panels within the Board.

(a) For the purpose of carrying out its functions under the Acts, whenever action is taken by the entire permanent Board sitting en banc, three permanent members of the Board shall constitute a quorum, and official action of the permanent Board can be taken only on the concurring vote of at least three permanent members.

(b) The Board may delegate any or all of its powers except en banc review to panels of three members. Each panel shall consist of at least two permanent members. Two members of the panel shall constitute a quorum and official panel action can be taken only on the concurring vote of two members of the panel.

(c) A panel decision shall stand unless vacated or modified by the concurring vote of at least three permanent members sitting en banc.

(d) En banc action is not available in cases arising under the District of Columbia Workmen's Compensation Act.

§ 801.302 Procedural rules.

Procedural rules for performance by the Board of its review functions and for insuring an adequate record for any judicial review of its orders, and such amendments to the rules as may be necessary from time to time, shall be promulgated by the Deputy Secretary. Such rules shall incorporate and implement the procedural requirements of section 21(b) of the Longshore and Harbor Workers' Compensation Act.

§ 801.303 Location of Board's proceedings.

The Board shall hold its proceedings at 200 Constitution Avenue, NW., Room N–5101, Washington, DC 20210, unless for good cause the Board orders that proceedings in a particular matter be held in another location.

[62 FR 10666, Mar. 7, 1997]

§ 801.304 Business hours.

The office of the Clerk of the Board at Washington, DC shall be open from 8:30 a.m.—5:00 p.m. on all days, except

Saturdays, Sundays, and legal holidays, for the purpose of receiving notices of appeal, petitions for review, other pleadings, motions, and other papers.

REPRESENTATION

§ 801.401 Representation before the Board.

On any issues requiring representation of the Secretary, the Director, Office of Workers' Compensation Programs, a deputy commissioner, or an administrative law judge before the Board, such representation shall be provided by attorneys designated by the Solicitor of Labor. Representation of all other persons before the Board shall be as provided by the rules of practice and procedure promulgated under § 801.302 (see part 802 of this chapter).

§ 801.402 Representation of Board in court proceedings.

Except in proceedings in the Supreme Court of the United States, any representation of the Benefits Review Board in court proceedings shall be by attorneys designated by the Solicitor of Labor.

PART 802—RULES OF PRACTICE AND PROCEDURE

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AUTHORITY: 5 U.S.C. 301; 30 U.S.C. 901 *et seq.*; 33 U.S.C. 901 *et seq.*; Reorganization Plan No. 6 of 1950, 15 FR 3174; Secretary of Labor's Order 38–72, 38 FR 90, January 3, 1973.

SOURCE: 52 FR 27292, July 20, 1987, unless otherwise noted.

Subpart A—General Provisions

INTRODUCTORY

§ 802.101 Purpose and scope of this part.

(a) The purpose of part 802 is to establish the rules of practice and procedure governing the operation of the Benefits Review Board.

(b) Except as otherwise provided, the rules promulgated in this part apply to all appeals taken by any party from decisions or orders with respect to claims for compensation or benefits under the following Acts:

(1) The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 et seq.;

(2) The Defense Base Act (DBA), 42 U.S.C. 1651 et seq.;

(3) The District of Columbia Workmen's Compensation Act (DCWCA), 36 D.C. Code 501 et seq. (1973);

(4) The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 et seq.;

(5) The Nonappropriated Fund Instrumentalities Act (NFIA), 5 U.S.C. 8171 et seq.;

(6) Title IV, section 415 and part C of the Federal Mine Safety and Health Act of 1977, Public Law 95–164, 91 Stat. 1290 (formerly the FCMHSA of 1969), as amended by the Black Lung Benefits Reform Act of 1977, Public Law 95–239, 92 Stat. 95, the Black Lung Benefits Revenue Act of 1977, Public Law 95–229, 92 Stat. 11, and the Black Lung Benefits Amendments of 1981, Public Law 97–119, 95 Stat. 1643 (30 U.S.C. 901 et seq.).

§ 802.102 Applicability of part 801 of this chapter.

Part 801 of this chapter VII sets forth rules of general applicability covering the composition, authority, and operation of the Benefits Review Board and definitions applicable to this chapter. The provisions of part 801 of this chapter are fully applicable to this part 802.

§ 802.103 Powers of the Board.

(a) *Conduct of proceedings.* Pursuant to section 27(a) of the LHWCA, the Board shall have power to preserve and enforce order during any proceedings for determination or adjudication of entitlement to compensation or benefits or for liability for payment thereof, and to do all things in accordance with law which may be necessary to enable the Board to effectively discharge its duties.

(b) *Contumacy.* Pursuant to section 27(b) of the LHWCA, if any person in proceedings before the Board disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, the Board shall certify the facts to the Federal district court having jurisdiction in the place in which it is sitting (or to the U.S. District Court for the District of Columbia if it is sitting in the District) which shall thereupon in a summary manner hear the evidence as to the acts complained of, and if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process or in the presence of the court.

§ 802.104 Consolidation; severance.

(a) Cases may, in the sole discretion of the Board, be consolidated for purposes of an appeal upon the motion of any party or upon the Board's own motion where there exist common parties, common questions of law or fact or both, or in such other circumstances as justice and the administration of the Acts require.

(b) Upon its own motion, or upon motion of any party, the Board may, for good cause, order any proceeding severed with respect to some or all issues or parties.

§ 802.105 Stay of payment pending appeal.

(a) As provided in section 14(f) of the LHWCA and sections 415 and 422 of the Black Lung Benefits Act, the payment of the amounts required by an award of compensation or benefits shall not be stayed or in any way delayed beyond ten days after it becomes due pending final decision in any proceeding before the Board unless so ordered by the

Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer, coal mine operator or insurance carrier. Any order of the Board permitting any stay shall contain a specific finding, based upon evidence submitted to the Board and identified by reference thereto, that irreparable injury would result to such employer, operator or insurance carrier, and specify the nature and extent of the injury.

(b) When circumstances require, the Board, in its discretion, may issue a temporary order not to exceed 30 days granting a motion for stay of payment prior to the expiration of the ten-day period allowed for filing responses to motions pursuant to §802.219(e). Following receipt of a response to the motion or expiration of the response time provided in §802.219(e), the Board will issue a subsequent order ruling on the motion for stay of payment.

[52 FR 27292, July 20, 1987, as amended at 53 FR 16519, May 9, 1988]

Subpart B—Prereview Procedures

COMMENCING APPEAL: PARTIES

§802.201 Who may file an appeal.

(a) *A party.* (1) Any party or party-in-interest adversely affected or aggrieved by a decision or order issued pursuant to one of the Acts over which the Board has appellate jurisdiction may appeal a decision or order of an administrative law judge or deputy commissioner to the Board by filing a notice of appeal pursuant to this subpart. (See §802.205(b) and (c) for exceptions to this general rule.) A party who files a notice of appeal shall be deemed the petitioner. The Director, OWCP, when acting as a representative of the Special Fund established under the Longshore and Harbor Workers' Compensation Act or the Black Lung Disability Trust Fund established by the Black Lung Benefits Act, or, when appealing a decision or order which affects the administration of one of the Acts, shall be considered a party adversely affected.

(2) When a decision or order is favorable to a party (i.e., the prevailing party), the prevailing party may file a cross-appeal pursuant to §802.205(b) to challenge any adverse findings of fact or conclusions of law in the same proceeding.

(b) *Representative parties.* In the event that a party has not attained the age of 18, is not mentally competent, or is physically unable to file and pursue or defend an appeal, the Board may permit any legally appointed guardian, committee, or other appropriate representative to file and pursue or defend the appeal, or it may in its discretion appoint such representative for purposes of the appeal. The Board may require any legally appointed representative to submit evidence of that person's authority.

§802.202 Appearances by attorneys and other authorized persons; denial or authority to appear.

(a) *Appearances.* Any party or intervenor or any representative duly authorized pursuant to §802.201(b) may appear before and/or submit written argument to the Board by attorney or any other person, including any representative of an employee organization, duly authorized pursuant to paragraph (d)(2) of this section.

(b) Any individual petitioner or respondent or his duly authorized representative pursuant to §802.201(b) or an officer of any corporate party or a member of any partnership or joint venture which is a party may participate in the appeal on his or her own behalf, or on behalf of such business entity.

(c) For each instance in which appearance before the Board is made by an attorney or duly authorized person other than the party or his legal guardian, committee, or representative, there shall be filed with the Board a notice of appearance. Any attorney or other duly authorized person of record who intends to withdraw from representation shall file prior written notice of intent to withdraw from representation of a party or of substitution of counsel or other representative.

(d) *Qualifications*—(1) *Attorneys.* An attorney at law who is admitted to practice before the Federal courts or before the highest court of any State, the District of Columbia, or any territory or commonwealth of the United States, may practice before the Board

unless he or she has been disqualified from representing claimants under the Act pursuant to 33 U.S.C. 931(b)(2)(C), or unless authority to appear has been denied pursuant to §802.202(e)(1) and (3). An attorney's own representation that he or she is in good standing before any of such courts shall be sufficient proof thereof, unless otherwise ordered by the Board.

(2) *Persons not attorneys.* Any person who is not an attorney at law may be admitted to appear in a representative capacity unless he or she has been disqualified from representing claimants under the Act pursuant to 33 U.S.C. 931(b)(2)(C). An application by a person not an attorney at law for admission to appear in a proceeding shall be submitted in writing to the Board at the time such person's appearance is entered. The application shall state such person's name, address, telephone number, general education, any special training or experience in claims representation, and such person's relationship, if any, to the party being represented. The Board may, at any time, make further inquiry as to the qualification or ability of such person to render assistance. In the event of a failure to make application for admission to appear, the Board shall issue an order to show cause why admission to appear should not be denied. Admission to appear in a particular case shall not be deemed a blanket authorization to appear in other cases.

(e) *Denial of authority to appear*—(1) *Attorneys.* The Board may deny the privilege of appearing to any attorney, within applicable statutory constraints, e.g., 5 U.S.C. 555, who has been disbarred or suspended from the practice of law; who has surrendered his or her license while under investigation or under threat of disciplinary action; or who, after notice of an opportunity for hearing in the matter is found by the Board to have engaged in any conduct which would result in the loss of his or her license. No provision hereof shall apply to any attorney who appears on his or her own behalf.

(2) *Persons not attorneys.* The Board may deny the privilege of appearing to any person who, in the Board's judgment, lacks sufficient qualification or ability to render assistance. No provision hereof shall apply to any person who appears on his or her own behalf.

(3) Denial of authority to appear may be considered, after notice of and opportunity for a hearing, by the panel (constituted pursuant to §801.301) which is assigned to decide the appeal in which the attorney or other person has entered an appearance. If such proceeding reveals facts suggesting that one of the circumstances described in 33 U.S.C. 931(b)(2)(C) exists, the Board shall refer that information to the Director, OWCP, for further proceedings pursuant to 33 U.S.C. 931(b)(2)(C) and 907(j). An attorney or other person may appeal a panel's decision to deny authority to appear to the entire permanent Board sitting en banc.

[52 FR 27292, July 20, 1987, as amended at 53 FR 16519, May 9, 1988]

§ 802.203 Fees for services.

(a) No fee for services rendered on behalf of a claimant in the successful pursuit or successful defense of an appeal shall be valid unless approved pursuant to 33 U.S.C. 928, as amended.

(b) All fees for services rendered in the successful pursuit or successful defense of an appeal on behalf of a claimant shall be subject to the provisions and prohibitions contained in 33 U.S.C. 928, as amended.

(c) Within 60 days of the issuance of a decision or non-interlocutory order by the Board, counsel or, where appropriate, representative for any claimant who has prevailed on appeal before the Board may file an application with the Board for a fee. Where the Board remands the case and the administrative law judge on remand issues an award, a fee petition may be filed within 60 days of the decision on remand. In the event that a claimant who was unsuccessful before the Board prevails on appeal to the court of appeals, his or her representative may within 60 days of issuance of the court's judgment file a fee application with the Board for services performed before the Board.

(d) A fee application shall include only time spent on services performed while the appeal was pending before the Board and shall be complete in all respects, containing all of the following specific information:

(1) A complete statement of the extent and character of the necessary work done;

(2) The professional status of each person for whom a fee is claimed who performed services on behalf of the claimant (if such professional status is other than attorney, a definition of the professional status of such individual must be included in the fee petition, including a statment of that individual's professional training, education and experience) and a statement that the attorney was a member in good standing of a state bar at the time the services were performed;

(3) The number of hours, in ¼ hour increments, devoted by each person who performed services on behalf of the claimant and the dates on which such services were performed in each category of work;

(4) The normal billing rate for each person who performed services on behalf of the claimant. The rate awarded by the Board shall be based on what is reasonable and customary in the area where the services were rendered for a person of that particular professional status.

(e) Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, the amount of benefits awarded, and, when the fee is to be assessed against the claimant, shall also take into account the financial circumstances of the claimant. A fee shall not necessarily be computed by multiplying time devoted to work by an hourly rate.

(f) No contract pertaining to the amount of a fee shall be recognized.

(g) A fee application shall be served on all other parties and accompanied by a certificate of service. The Board will not take action on the fee application until such service is effected. Any party may respond to the application within 10 days of receipt of the application. The response shall be filed with the Board and served on all other parties.

NOTICE OF APPEAL

§ 802.204 Place for filing notice of appeal.

Any notice of appeal shall be sent by mail to the U.S. Department of Labor, Benefits Review Board, P.O. Box 37601, Washington, DC 20013–7601, or otherwise presented to the Clerk of the Board at 200 Constitution Avenue, NW., Room S–5220, Washington, DC 20210. A copy shall be served on the deputy commissioner who filed the decision or order being appealed and on all other parties by the party who files a notice of appeal. Proof of service of the notice of appeal on the deputy commissioner and other parties shall be included with the notice of appeal.

[52 FR 27292, July 20, 1987, as amended at 56 FR 54538, Oct. 22, 1991; 62 FR 10666, Mar. 7, 1997]

§ 802.205 Time for filing.

(a) A notice of appeal, other than a cross-appeal, must be filed within 30 days from the date upon which a decision or order has been filed in the Office of the Deputy Commissioner pursuant to section 19(e) of the LHWCA or in such other office as may be established in the future (see §§ 702.349 and 725.478 of this title).

(b) If a timely notice of appeal is filed by a party, any other party may initiate a cross-appeal by filing a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time prescribed by paragraph (a) of this section, whichever period last expires. In the event that such other party was not properly served with the first notice of appeal, such party may initiate a cross-appeal by filing a notice of appeal within 14 days of the date that service is effected.

(c) Failure to file within the period specified in paragraph (a) or (b) of this section (whichever is applicable) shall foreclose all rights to review by the Board with respect to the case or matter in question. Any untimely appeal will be summarily dismissed by the Board for lack of jurisdiction.

§ 802.206 Effect of motion for reconsideration on time for appeal.

(a) A timely motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner shall suspend the running of the time for filing a notice of appeal.

(b)(1) In a case involving a claim filed under the Longshore and Harbor Workers' Compensation Act or its extensions (see §802.101(b)(1)–(5)), a timely motion for reconsideration for purposes of paragraph (a) of this section is one which is filed not later than 10 days from the date the decision or order was filed in the Office of the Deputy Commissioner.

(2) In a case involving a claim filed under title IV of the Federal Mine Safety and Health Act, as amended (see §802.101(b)(6)), a timely motion for reconsideration for purposes of paragraph (a) of this section is one which is filed not later than 30 days from the date the decision or order was served on all parties by the administrative law judge and considered filed in the Office of the Deputy Commissioner (see §§725.478 and 725.479(b), (c) of this title).

(c) If the motion for reconsideration is sent by mail and the fixing of the date of delivery as the date of filing would result in a loss or impairment of reconsideration rights, it will be considered to have been filed as of the date of mailing. The date appearing on the U.S. Postal Service postmark (when available and legible) shall be prima facie evidence of the date of mailing. If there is no such postmark or it is not legible, other evidence such as, but not limited to, certified mail receipts, certificates of service and affidavits may also be used to establish the mailing date.

(d) If a motion for reconsideration is granted, the full time for filing an appeal commences on the date the subsequent decision or order on reconsideration is filed as provided in §802.205.

(e) If a motion for reconsideration is denied, the full time for filing an appeal commences on the date the order denying reconsideration is filed as provided in §802.205.

(f) If a timely motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner is filed, any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed without prejudice as premature. Following decision by the administrative law judge or deputy commissioner pursuant to either paragraph (d) or (e) of this section, a new notice of appeal shall be filed with the Clerk of the Board by any party who wishes to appeal. During the pendency of an appeal to the Board, any party having knowledge that a motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner has been filed shall notify the Board of such filing.

§ 802.207 When a notice of appeal is considered to have been filed in the office of the Clerk of the Board.

(a) *Date of receipt.* (1) Except as otherwise provided in this section, a notice of appeal is considered to have been filed only as of the date it is received in the office of the Clerk of the Board.

(2) Notices of appeal submitted to any other agency or subdivision of the Department of Labor or of the U.S. Government or any State government shall be promptly forwarded to the office of the Clerk of the Board. The notice shall be considered filed with the Clerk of the Board as of the date it was received by the other governmental unit if the Board finds that it is in the interest of justice to do so.

(b) *Date of mailing.* If the notice of appeal is sent by mail and the fixing of the date of delivery as the date of filing would result in a loss or impairment of appeal rights, it will be considered to have been filed as of the date of mailing. The date appearing on the U.S. Postal Service postmark (when available and legible) shall be prima facie evidence of the date of mailing. If there is no such postmark or it is not legible, other evidence, such as, but not limited to, certified mail receipts, certificate of service and affidavits, may be used to establish the mailing date.

§ 802.208 Contents of notice of appeal.

(a) A notice of appeal shall contain the following information:

(1) The full name and address of the pettioner;

(2) The full name of the injured, disabled, or deceased employee;

(3) The full names and addresses of all other parties, including, among others, beneficiaries, employers, coal mine operators, and insurance carriers where appropriate;

(4) The case file number which appears on the decision or order of the administrative law judge;

(5) The claimant's OWCP file number;

(6) The date of filing of the decision or order being appealed;

(7) Whether a motion for reconsideration of the decision or order of the administrative law judge has been filed by any party, the date such motion was filed, and whether the administrative law judge has acted on such motion for reconsideration (see § 802.206);

(8) The name and address of the attorney or other person, if any, who is representing the petitioner.

(b) Paragraph (a) of this section notwithstanding, any written communication which reasonably permits identification of the decision from which an appeal is sought and the parties affected or aggrieved thereby, shall be sufficient notice for purposes of § 802.205.

(c) In the event that identification of the case is not possible from the information submitted, the Clerk of the Board shall so notify the petitioner and shall give the petitioner a reasonable time to produce sufficient information to permit identification of the case. For purposes of § 802.205, the notice shall be deemed to have been filed as of the date the insufficient information was received.

§ 802.209 Transmittal of record to the Board.

Upon receipt of a copy of the notice of appeal or upon request of the Board, the deputy commissioner or other office having custody of such record shall immediately forward to the Clerk of the Board the official record of the case, which record includes the transcript or transcripts of all formal proceedings with exhibits, all decisions and orders rendered in the case.

INITIAL PROCESSING

§ 802.210 Acknowledgment of notice of appeal.

Upon receipt by the Board of a notice of appeal, the Clerk of the Board shall as expeditiously as possible notify the petitioner and all other parties and the Solicitor of Labor, in writing, that a notice of appeal has been filed.

§ 802.211 Petition for review.

(a) Within 30 days after the receipt of an acknowledgment of a notice of appeal issued pursuant to § 802.210, the petitioner shall submit a petition for review to the Board which petition lists the specific issues to be considered on appeal.

(b) Each petition for review shall be accompanied by a supporting brief, memorandum of law or other statement which: Specifically states the issues to be considered by the Board; presents, with appropriate headings, an argument with respect to each issue presented with references to transcripts, pieces of evidence and other parts of the record to which the petitioner wishes the Board to refer; a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result. The Longshore Desk Book and Black Lung Desk Book are not intended as final legal authorities and should not be cited or relied upon as such.

(c) Copies of the petition for review and accompanying documents must be served upon all parties and the Solicitor of Labor.

(d) Failure to submit a petition for review and brief within the 30-day period or to comply with any part of this section may, in the discretion of the Board, cause the appeal to be deemed abandoned (see § 802.402).

(e) When a party appears pro se the Board may, in its discretion, waive formal compliance with the requirements of this section and may, depending upon the particular circumstances, prescribe an alternate method of furnishing such information as may be necessary for the Board to decide the merits of any such appeal.

§ 802.212 Response to petition for review.

(a) Within 30 days after the receipt of a petition for review, each party upon whom it was served may submit to the Board a brief, memorandum, or other statement in response to it.

(b) Arguments in response briefs shall be limited to those which respond to arguments raised in petitioner's brief and to those in support of the decision below. Other arguments will not be considered by the Board (see § 802.205(b)).

§ 802.213 Reply briefs.

(a) Within 20 days after the receipt of a brief, memorandum, or statement submitted in response to the petition for review pursuant to § 802.212, any party upon whom it was served may file a brief, memorandum, or other statement in reply to it.

(b) Arguments in reply briefs shall be limited to those which reply to arguments made in the response brief. Any other arguments in a reply brief will not be considered by the Board.

§ 802.214 Intervention.

(a) If a person or legal entity shows in a written petition to intervene that his, her, or its rights are affected by any proceeding before the Board, the Board may permit that person or legal entity to intervene in the proceeding and to participate within limits prescribed by the Board.

(b) The petition to intervene shall state precisely:

(1) The rights affected, and

(2) The nature of any argument the person or legal entity intends to make.

§ 802.215 Additional briefs.

Additional briefs may be filed or ordered in the discretion of the Board and shall be submitted within time limits specified by the Board.

§ 802.216 Service and form of papers.

(a) All papers filed with the Board, including notices of appeal, petitions for review, briefs and motions, shall be secured at the top and shall have a caption, title, signature of the party (or his attorney or other representative), date of signature, and certificate of service.

(b) For each paper filed with the Board, the original and two legible copies shall be submitted.

(c) A copy of any paper filed with the Board shall be served on each party and the Solicitor of Labor, by the party submitting the paper.

(d) Any paper required to be given or served to or by the Board or any party shall be served by mail or otherwise presented. All such papers served shall be accompanied by a certificate of service.

(e) All papers (exclusive of documentary evidence) submitted to the Benefits Review Board shall conform to standard letter dimensions (8.5x11 inches).

§ 802.217 Waiver of time limitations for filing.

(a) The time periods specified for submitting papers described in this part, except that for submitting a notice of appeal, may be enlarged for a reasonable period when in the judgment of the Board an enlargement is warranted.

(b) Any request for an enlargement of time pursuant to this section shall be directed to the Clerk of the Board and must be received by the Clerk on or prior to the date on which the paper is due.

(c) Any request for an enlargement of time pursuant to this section shall be submitted in writing in the form of a motion, shall specify the reasons for the request, and shall specify the date to which an enlargement of time is requested.

(d) Absent exceptional circumstances, no more than one enlargement of time shall be granted to each party.

(e) Absent a timely request for an enlargement of time pursuant to this section and the Board's granting that request, any paper submitted to the Board outside the applicable time period specified in this part shall be accompanied by a separate motion stating the reasons therefor and requesting that the Board accept the paper although filed out of time.

(f) When a paper filed out of time is accepted by the Board, the time for filing a response shall begin to run from the date of a party's receipt of the Board's order disposing of the motion referred to in paragraph (e) of this section.

§ 802.218 Failure to file papers; order to show cause.

(a) Failure to file any paper when due pursuant to this part, may, in the discretion of the Board, constitute a waiver of the right to further participation in the proceedings.

(b) When a petition for review and brief has not been submitted to the Board within the time limitation prescribed by § 802.211, or within an enlarged time limitation granted pursuant to § 802.217, the petitioner shall be ordered to show cause to the Board why his or her appeal should not be dismissed pursuant to § 802.402.

§ 802.219 Motions to the Board; orders.

(a) An application to the Board for an order shall be by motion in writing. A motion shall state with particularity the grounds therefor and shall set forth the relief or order sought.

(b) A motion shall be a separate document and shall not be incorporated in the text of any other paper filed with the Board, except for a statement in support of the motion. If this paragraph is not complied with, the Board will not consider and dispose of the motion.

(c) If there is no objection to a motion in whole or in part by another party to the case, the absence of an objection shall be stated on the motion.

(d) The rules applicable to service and form of papers, § 802.216, shall apply to all motions.

(e) Within 10 days of the receipt of a copy of a motion, a party may file a written response with the Board.

(f) As expeditiously as possible following receipt of a response to a motion or expiration of the response time provided in paragraph (e) of this section, the Board shall issue a dispositive order.

(g) *Orders granted by Clerk.* The Clerk of the Board may enter orders on behalf of the Board in procedural matters, including but not limited to:

(1) First motions for extensions of time for filing briefs and any papers other than notices of appeal or cross-appeal;

(2) Motions for voluntary dismissals of appeals;

(3) Orders to show cause why appeals should not be dismissed for failure to timely file a petition for review and brief (see § 802.218(b)); and

(4) Unopposed motions which are ordinarily granted as of course, except that the Clerk may, in his or her discretion, refer such motions for disposition to a motions panel as provided by paragraph (h) of this section.

(h) *All other motions.* All other motions will be referred for disposition to a panel of three members constituted pursuant to § 801.301. Any member may request that any motion be considered by the entire permanent Board en banc except as provided in § 801.301(d).

(i) *Reconsideration of orders.* Any party adversely effected by any interlocutory order issued under paragraph (g) or (h) may file a motion to reconsider, vacate or modify the order within 10 days from its filing, stating the grounds for such request. Any motion for reconsideration, vacation or modification of an interlocutory order shall be referred to a three-member panel that may include any member who previously acted on the matter. Suggestions for en banc reconsideration of interlocutory orders shall not be accepted. Reconsideration of all other orders will be treated under § 802.407 of this part.

§ 802.220 Party not represented by an attorney; informal procedure.

A party to an appeal who is not represented by an attorney shall comply with the procedural requirements contained in this part, except as otherwise specifically provided in § 802.211(e). In its discretion, the Board may prescribe additional informal procedures to be followed by such party.

§ 802.221 Computation of time.

(a) In computing any period of time prescribed or allowed by these rules, by direction of the Board, or by any applicable statute which does not provide otherwise, the day from which the designated period of time begins to run

shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.

(b) Whenever a paper is served on the Board or on any party by mail, paragraph (a) of this section will be deemed complied with if the envelope containing the paper is postmarked by the U.S. Postal Service within the time period allowed, computed as in paragraph (a) of this section. If there is no such postmark, or it is not legible, other evidence, such as, but not limited to, certified mail receipts, certificate of service and affidavits, may be used to establish the mailing date.

(c) A waiver of the time limitations for filing a paper, other than a notice of appeal, may be requested by proper motion filed in accordance with §§ 802.217 and 802.219.

Subpart C—Procedure for Review

ACTION BY THE BOARD

§ 802.301 Scope of review.

(a) The Benefits Review Board is not empowered to engage in a de novo proceeding or unrestricted review of a case brought before it. The Board is authorized to review the findings of fact and conclusions of law on which the decision or order appealed from was based. Such findings of fact and conclusions of law may be set aside only if they are not, in the judgment of the Board, supported by substantial evidence in the record considered as a whole or in accordance with law.

(b) Parties shall not submit new evidence to the Board. Any evidence submitted by a party which is not part of the record developed at the hearing before the administrative law judge will be returned without being considered by the Board.

(c) Any party who considers new evidence necessary to the adjudication of the claim may apply for modification pursuant to section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 922. A party who files a petition for modification shall promptly notify the Board of such filing. Upon receipt of such notification, the Board shall dismiss the case without prejudice. Should the petition for modification be declined, the petitioner may file a request for reinstatement of his or her appeal with the Board within 30 days of the date the petition is declined. Should the petition for modification be accepted, any party adversely affected by the decision or order granting or denying modification may file a new appeal with the Board within 30 days of the date the decision or order on modification is filed.

[52 FR 27292, July 20, 1987, as amended at 53 FR 16519, May 9, 1988]

§ 802.302 Docketing of appeals.

(a) *Maintenance of dockets.* A docket of all proceedings shall be maintained by the Board. Each proceeding shall be assigned a number in chronological order upon the date on which a notice of appeal is received. Correspondence or further applications in connection with any pending case shall refer to the docket number of that case.

(b) *Inspection of docket; publication of decision.* The docket of the Board shall be open to public inspection. The Board shall publish its decisions in a form which is readily available for inspection, and shall allow the public to inspect its decisions at the permanent location of the Board.

ORAL ARGUMENT BEFORE THE BOARD

§ 802.303 Decision; no oral argument.

(a) In the event that no oral argument is ordered pursuant to § 802.306, the Board shall proceed to review the record of the case as expeditiously as possible after all briefs, supporting statements, and other pertinent documents have been received.

(b) Each case shall be considered in the order in which it becomes ready for decision, regardless of docket number, although for good cause shown, upon the filing of a motion to expedite by a party, the Board may advance the order in which a particular case is to be considered.

(c) The Board may advance an appeal on the docket on its own motion if the interests of justice would be served by so doing.

§ 802.304 Purpose of oral argument.

Oral argument may be held by the Board in any case:

(a) When there is a novel issue not previously considered by the Board; or

(b) When in the interests of justice oral argument will serve to assist the Board in carrying out the intent of any of the Acts; or

(c) To resolve conflicting decisions by administrative law judges on a substantial question of law.

§ 802.305 Request for oral argument.

(a) During the pendency of an appeal, but not later than the expiration of 20 days from the date of receipt of the response brief provided by §802.212, any party may request oral argument. The Board on its own motion may order oral argument at any time.

(b) A request for oral argument shall be submitted in the form of a motion, specifying the issues to be argued and justifying the need for oral argument (see §802.219).

(c) The party requesting oral argument shall set forth in the motion suggested dates and alternate cities convenient to the parties when and where they would be available for oral argument.

§ 802.306 Action on request for oral argument.

As expeditiously as possible after the date upon which a request for oral argument is received, the Board shall determine whether the request shall be granted or denied.

§ 802.307 Notice of oral argument.

(a) In cases where a request for oral argument has been approved or where oral argument has been ordered, the Board shall give all parties a minimum of 30 days' notice, in writing, by mail, of the scope of argument and of the time when, and place where, oral argument will be held.

(b) Once oral argument has been scheduled by the Board, continuances shall not be granted except for good cause shown by a party, such as in cases of extreme hardship or where attendance of a party or his or her representative is mandated at a previously scheduled judicial proceeding. Unless the ground for the request arises thereafter, requests for continuances must be received by the Board at least 15 days before the scheduled date of oral argument, must be served upon the other parties and must specify good cause why the requesting party cannot be available for oral argument.

(c) The Board may cancel or reschedule oral argument on its own motion at any time.

§ 802.308 Conduct of oral argument.

(a) Oral argument shall be held in Washington, DC, unless the Board orders otherwise, and shall be conducted at a time reasonably convenient to the parties. For good cause shown, the presiding judge of the panel may, in his or her discretion, postpone an oral argument to a more convenient time.

(b) The proceedings shall be conducted under the supervision of the Chairman or, if the Chairman is not on the panel, the senior judge, who shall regulate all procedural matters arising during the course of the argument.

(c) Within the discretion of the Board, oral argument shall be open to the public and may be presented by any party, representative, or duly authorized attorney. Presentation of oral argument may be denied by the Board to a party who has not significantly participated in the appeal prior to oral argument.

(d) The Board shall determine the scope of any oral argument presented and shall so inform the parties in its notice scheduling oral argument pursuant to §802.307.

(e) The Board in its discretion shall determine the amount of time allotted to each party for argument and rebuttal.

§ 802.309 Absence of parties.

The unexcused absence of a party or his or her authorized representative at the time and place set for argument shall not be the occasion for delay of the proceeding. In such event, argument on behalf of other parties may be heard and the case shall be regarded as submitted on the record by the absent party. The presiding judge may, with the consent of the parties present, cancel the oral argument and treat the appeal as submitted on the written record.

Subpart D—Completion of Board Review

DISMISSALS

§ 802.401 Dismissal by application of party.

(a) At any time prior to the issuance of a decision by the Board, the petitioner may move that the appeal be dismissed. If granted, such motion for dismissal shall be granted with prejudice to the petitioner.

(b) At any time prior to the issuance of a decision by the Board, any party or representative may move that the appeal be dismissed.

§ 802.402 Dismissal by abandonment.

(a) Upon motion by any party or representative or upon the Board's own motion, an appeal may be dismissed upon its abandonment by the party or parties who filed the appeal. Within the discretion of the Board, a party may be deemed to have abandoned an appeal if neither the party nor his representative participates significantly in the review proceedings.

(b) An appeal may be dismissed on the death of a party only if the record affirmatively shows that there is no person who wishes to continue the action and whose rights may be prejudiced by dismissal.

DECISION OF THE BOARD

§ 802.403 Issuance of decisions; service.

(a) The Board shall issue written decisions as expeditiously as possible after the completion of review proceedings before the Board. The transmittal of the decision of the Board shall indicate the availability of judicial review of the decision under section 21(c) of the LHWCA when appropriate.

(b) The original of the decision shall be filed with the Clerk of the Board. A copy of the Board's decision shall be sent by certified mail or otherwise presented to all parties to the appeal and the Director. The record on appeal, together with a transcript of any oral proceedings, any briefs or other papers filed with the Board, and a copy of the decision shall be returned to the appropriate deputy commissioner for filing.

(c) Proof of service of Board decisions shall be certified by the Clerk of the Board or by another employee in the office of the Clerk of the Board who is authorized to certify proof of service.

§ 802.404 Scope and content of Board decisions.

(a) In its decision the Board shall affirm, modify, vacate or reverse the decision or order appealed from, and may remand the case for action or proceedings consistent with the decision of the Board. The consent of the parties shall not be a prerequisite to a remand ordered by the Board.

(b) In appropriate cases, such as where the issues raised on appeal have been thoroughly discussed and disposed of in prior cases by the Board or the courts, or where the findings of fact and conclusions of law are both correct and adequately discussed, the Board in its discretion may issue a brief, summary decision in writing, disposing of the appeal.

(c) In cases which cannot be disposed of as in paragraph (b) of this section, a full, written decision discussing the issues and applicable law shall be issued.

§ 802.405 Remand.

(a) *By the Board.* Where a case is remanded, such additional proceedings shall be initiated and such other action shall be taken as is directed by the Board.

(b) *By a court.* Where a case has been remanded by a court, the Board may proceed in accordance with the court's mandate to issue a decision or it may in turn remand the case to an administrative law judge or deputy commissioner with instructions to take such action as is ordered by the court and any additional necessary action.

§ 802.406 Finality of Board decisions.

A decision rendered by the Board pursuant to this subpart shall become final 60 days after the issuance of such decision unless a written petition for review praying that the order be modified or set aside, pursuant to section 21(c) of the LHWCA, is filed in the appropriate U.S. court of appeals prior to

the expiration of the 60-day period herein described, or unless a timely request for reconsideration by the Board has been filed as provided in §802.407. If a timely request for reconsideration has been filed, the 60-day period for filing such petition for review will run from the issuance of the Board's decision on reconsideration.

RECONSIDERATION

§802.407 Reconsideration of Board decisions.

(a) Any party-in-interest may, within 30 days from the filing of a decision or non-interlocutory order by a panel or the Board pursuant to §802.403(b), request reconsideration of such decision by those members who rendered the decision. The panel of members who heard and decided the appeal will rule on the motion for reconsideration. If any member of the original panel is unavailable, the Chariman shall designate a new panel member.

(b) Except as provided in §801.301(d), a party may, within 30 days from the filing of a decision or non-interlocutory order by a panel of the Board pursuant to §802.403(b), suggest the appropriateness of reconsideration by the permanent members sitting en banc. Such suggestion, however, must accompany a motion for reconsideration directed to the panel which rendered the decision. The suggestion for reconsideration en banc must be clearly marked as such.

(c) Except as provided in §801.301(d), even where no party has suggested reconsideration en banc, any permanent member may petition the permanent Board for reconsideration en banc of a panel decision.

(d) Reconsideration en banc shall be granted upon the affirmative vote of the majority of permanent members of the Board. A panel decision shall stand unless vacated or modified by the concurring vote of at least three permanent members.

§802.408 Notice of request for reconsideration.

(a) In the event that a party requests reconsideration of a decision or order, he or she shall do so in writing, in the form of a motion, stating the supporting rationale for the request, and include any material pertinent to the request.

(b) The request shall be sent by mail, or otherwise presented, to the Clerk of the Board. Copies shall be served on all other parties.

§802.409 Grant or denial of request.

All requests for reconsideration shall be reviewed by the Board and shall be granted or denied in the discretion of the Board.

JUDICIAL REVIEW

§802.410 Judicial review of Board decisions.

(a) Within 60 days after a decision by the Board has been filed pursuant to §802.403(b), any party adversely affected or aggrieved by such decision may file a petition for review with the appropriate U.S. Court of Appeals pursuant to section 21(c) of the LHWCA.

(b) The Director, OWCP, as designee of the Secretary of Labor responsible for the administration and enforcement of the statutes listed in §802.101, shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to section 21(c) of the LHWCA.

§802.411 Certification of record for judicial review.

The record of a case including the record of proceedings before the Board shall be transmitted to the appropriate court pursuant to the rules of such court.

CHAPTER VIII—JOINT BOARD FOR THE ENROLLMENT OF ACTUARIES

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PART 900—STATEMENT OF ORGANIZATION

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AUTHORITY: Sec. 3041–2, Pub. L. 93–406, 88 Stat. 829, 1002 (29 U.S.C. 1241–2).

SOURCE: 40 FR 18776, Apr. 30, 1975, unless otherwise noted.

§ 900.1 Basis.

This statement is issued by the Joint Board for the Enrollment of Actuaries (the Joint Board) pursuant to the requirement of section 552 of title 5 of the United States Code that every agency shall publish in the FEDERAL REGISTER a description of its central and field organization.

§ 900.2 Establishment.

The Joint Board has been established by the Secretary of Labor and the Secretary of the Treasury pursuant to section 3041 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1241). Bylaws of the Board have been issued by the two Secretaries.[1]

§ 900.3 Composition.

Pursuant to the Bylaws, the Joint Board consists of three members appointed by the Secretary of the Treasury and two appointed by the Secretary of Labor. The Board elects a Chairman from among the Treasury Representatives and a Secretary from among the Department of Labor Representatives. The Pension Benefit Guaranty Corporation may designate a non-voting representative to sit with, and participate in, the discussions of the Board. All decisions of the Board are made by simple majority vote.

§ 900.4 Meetings.

The Joint Board meets on the call of the Chairman at such times as are necessary in order to consider matters requiring action. Minutes are kept of each meeting by the Secretary.

§ 900.5 Staff.

(a) The Executive Director advises and assists the Joint Board directly in carrying out its responsibilities under the Act and performs such other functions as the Board may delegate to him.

(b) Members of the staffs of the Departments of the Treasury and of Labor, by arrangement with the Joint Board, perform such services as may be appropriate in assisting the Board in the discharge of its responsibilities.

§ 900.6 Offices.

The Joint Board does not maintain offices separate from those of the Departments of the Treasury and Labor. Its post office address is Joint Board for the Enrollment of Actuaries, c/o Department of the Treasury, Washington, D.C. 20220.

§ 900.7 Delegations of authority.

As occasion warrants, the Joint Board may delegate functions to the Chairman or the Executive Director, including the authority to receive applications and to give notice of actions. Any such delegation of authority is conferred by resolution of the Board.

[1] Copy filed with the Office of the Federal Register. Copies may also be obtained from the Executive Director of the Board.

PART 901—REGULATIONS GOVERNING THE PERFORMANCE OF ACTUARIAL SERVICES UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

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AUTHORITY: Sec. 3042, subtitle C, title 3, Employee Retirement Income Security Act of 1974. (88 Stat. 1002, 29 U.S.C. 1241, 1242), unless otherwise noted.

SOURCE: 42 FR 39200, Aug. 3, 1977, unless otherwise noted.

§ 901.0 Scope.

This part contains rules governing the performance of actuarial services under the Employee Retirement Income Security Act of 1974, hereinafter also referred to as ERISA. Subpart A of this part sets forth definitions and eligibility to perform actuarial services; subpart B of this part sets forth rules governing the enrollment of actuaries; subpart C of this part sets forth standards of performance to which enrolled actuaries must adhere; subpart D of this part is reserved and will set forth rules applicable to suspension and termination of enrollment; and subpart E of this part sets forth general provisions.

Subpart A—Definitions and Eligibility To Perform Actuarial Services

§ 901.1 Definitions.

As used in this part, the term:

(a) *Actuarial experience* means the performance of, or the direct supervision of, services involving the application of principles of probability and compound interest to determine the present value of payments to be made upon the fulfillment of certain specified conditions or the occurrence of certain specified events.

(b) *Responsible actuarial experience* means actuarial experience:

(1) Involving participation in making determinations that the methods and assumptions adopted in the procedures followed in actuarial services are appropriate in the light of all pertinent circumstances, and

(2) Demonstrating a thorough understanding of the principles and alternatives involved in such actuarial services.

(c) *Month of responsible actuarial experience* means a month during which the actuary spent a substantial amount of time in responsible actuarial experience.

(d) *Responsible pension actuarial experience* means responsible actuarial experience involving valuations of the liabilities of pension plans, wherein the performance of such valuations requires the application of principles of life contingencies and compound interest in the determination, under one or more standard actuarial cost methods, of such of the following as may be appropriate in the particular case:

(1) Normal cost.

(2) Accrued liability.

(3) Payment required to amortize a liability or other amount over a period of time.

(4) Actuarial gain or loss.

(e) *Month of responsible pension actuarial experience* means a month during which the actuary spent a substantial amount of time in responsible pension actuarial experience.

(f) *Applicant* means an individual who has filed an application to become an enrolled actuary.

(g) *Enrolled actuary* means an individual who has satisfied the standards and qualifications as set forth in this part and who has been approved by the Joint Board (or its designee) to perform actuarial services required under ERISA or regulations thereunder.

(h) *Actuarial services* means performance of actuarial valuations and preparation of any actuarial reports.

§ 901.2 Eligibility to perform actuarial services.

(a) *Enrolled actuary.* Subject to the standards of performance set forth in subpart C of this part, any individual who is an enrolled actuary as defined in § 901.1(g) may perform actuarial services required under ERISA or regulations thereunder. Where a corporation, partnership, or other entity is engaged to provide actuarial services, such services may be provided on its behalf only by an enrolled actuary who is an employee, partner or consultant.

(b) *Government officers and employees.* No officer or employee of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States, including the District of Columbia, may perform actuarial services required under ERISA or regulations thereunder if such services would be in violation of 18 U.S.C. 205. No Member of Congress or Resident Commissioner (elect or serving) may perform such actuarial services if such services would be in violation of 18 U.S.C. 203 or 205.

(c) *Former government officers and employees*—(1) *Personal and substantial participation in the performance of actuarial services.* No former officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, shall perform actuarial services required under ERISA or regulations thereunder or aid or assist in the performance of such actuarial services, in regard to particular matters, involving a specific party or parties, in which the individual participated personally and substantially as such officer or employee.

(2) *Official responsibility.* No former officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, shall, within 1 year after his employment has ceased, perform actuarial services required under ERISA or regulations thereunder in regard to any particular matter involving a specific party or parties which was under the individual's official responsibility as an officer or employee of the Government at any time within a period of 1 year prior to the termination of such responsibility.

Subpart B—Enrollment of Actuaries

§ 901.10 Application for enrollment.

(a) *Form.* As a requirement for enrollment, an applicant shall file with the Executive Director of the Joint Board a properly executed application on a form or forms specified by the Joint Board, and shall agree to comply with the regulations of the Joint Board.

(b) *Additional information.* The Joint Board or Executive Director, as a condition to consideration of an application for enrollment, may require the applicant to file additional information and to submit to written or oral examination under oath or otherwise.

(c) *Denial of application.* If the Joint Board proposes to deny an application for enrollment, the Executive Director shall notify the applicant in writing of the proposed denial and the reasons therefor, of his rights to request reconsideration, of the address to which such request should be made and the date by which such request must be made. The applicant may, within 30 days from the date of the written proposed denial, file a written request for reconsideration therefrom, together with his reasons in support thereof, to the Joint Board. The Joint Board may afford an applicant the opportunity to make a personal appearance before the Joint Board. A decision on the request for reconsideration shall be rendered by the Joint Board as soon as practicable. In

the absence of a request for reconsideration within the aforesaid 30 days, the proposed denial shall, without further proceeding, constitute a final decision of denial by the Joint Board.

§ 901.11 Enrollment procedures.

(a) *Enrollment.* The Joint Board shall enroll each applicant it determines has met the requirements of these regulations and shall so notify the applicant. Subject to the provisions of subpart D of this part, an individual must renew his or her enrollment in the manner described in paragraph (d) of this section.

(b) *Enrollment certificate.* The Joint Board (or its designee) shall issue a certificate of enrollment to each actuary who is duly enrolled under this part.

(c) *Rosters.* The Executive Director shall maintain rosters of all actuaries who are duly enrolled under this part and of all individuals whose enrollment has been suspended or terminated.

(d) *Renewal of enrollment.* To maintain active enrollment to perform actuarial services under the Employee Retirement Income Security Act of 1974, each enrolled actuary is required to have his/her enrollment renewed as set forth herein. Failure by an individual to receive notification of the renewal requirement from the Joint Board will not be justification for circumvention of such requirement.

(1) All individuals enrolled before January 1, 1990, shall apply for renewal of enrollment on the prescribed form before March 1, 1990. The effective date of renewal for such individuals is April 1, 1990.

(2) Thereafter, applications for renewal will be required of all enrolled actuaries between October 1, 1992, and March 1, 1993, and between October 1 and March 1 of every third year period subsequent thereto.

(3) The Executive Director of the Joint Board will notify each enrolled actuary of the renewal of enrollment requirement at his/her address of record with the Joint Board.

(4) A reasonable non-refundable fee may be charged for each application for renewal of enrollment filed.

(5) Forms required for renewal may be obtained from the Executive Director, Joint Board for the Enrollment of Actuaries, c/o Department of the Treasury, Washington, DC 20220.

(e) *Condition for renewal: Continuing professional education.* To qualify for renewal of enrollment, an enrolled actuary must certify, on the form prescribed by the Executive Director, that he/she has satisfied the following continuing professional education requirements.

(1) *For renewed enrollment effective April 1, 1990.* (i) A minimum of 10 hours of continuing education credit must be completed between (the effective date of these regulations) and December 31, 1989. Of the 10 hours, at least 6 hours must be comprised of core subject matter; the remainder may be comprised of non-core subject matter.

(ii) An individual who receives initial enrollment between October 1, 1988 and December 31, 1989 is exempt from the continuing education requirement for the enrollment cycle ending December 31, 1989, but is required to file a timely application for renewal of enrollment effective April 1, 1990.

(2) *For renewed enrollment effective April 1, 1993 and every third year thereafter.* (i) A minimum of 36 hours of continuing education credit must be completed between January 1, 1990, and December 31, 1992, and between January 1 and December 31 for each three year period subsequent thereto. Each such three year period is known as an enrollment cycle. Of the 36 hours, at least 18 must be comprised of core subject matter; the remainder may be of a non-core nature.

(ii) An individual who receives initial enrollment during the first or second year of an enrollment cycle must satisfy the following requirements by the end of the enrollment cycle: Those enrolled during the first year of an enrollment cycle must complete 24 hours of continuing education; those enrolled during the second year of an enrollment cycle must complete 12 hours of continuing education. At least one-half of the applicable hours must be comprised of core subject matter; the remainder may be comprised of non-core subject matter. For purposes of this paragraph, credit will be awarded for continuing education completed after January 1 of the year in which initial enrollment was received.

(iii) An individual who receives initial enrollment during the third year of an enrollment cycle is exempt from the continuing education requirements until the next enrollment cycle, but must file a timely application for renewal.

(3) Enrolled actuaries whose enrollment status would have expired under previous regulations during the five year period from October 1, 1988, are not subject to compliance with such previous regulations addressing renewal of enrollment. Their enrollment status will not be adversely affected provided they comply with requirements on this part.

(f) *Qualifying continuing education*—(1) *In general.* To qualify for continuing education credit consistent with the requirements of the above subsections, a course of learning must be a qualifying program comprised of core and/or non-core subject matter conducted by a qualifying sponsor.

(i) Core subject matter is program content designed to enhance the knowledge of an enrolled actuary with respect to matters directly related to the performance of pension actuarial services under ERISA or the Internal Revenue Code. Such core subject matter includes the characteristics of actuarial cost methods under ERISA, actuarial assumptions, minimum funding standards, title IV of ERISA, requirements with respect to the valuation of plan assets, requirements for qualification of pension plans, maximum deductible contributions, tax treatments of distributions from qualified pension plans, excise taxes related to the funding of qualified pension plans and standards of performance for actuarial services.

(ii) Non-core subject matter is program content designed to enhance the knowledge of an enrolled actuary in matters related to the performance of pension actuarial services. Examples include economics, computer programs, pension accounting, investment and finance, risk theory, communication skills and business and general tax law.

(iii) The Joint Board may publish other topics or approve other topics which may be included in a qualifying program as core or non-core subject matter.

(iv) Repeated taking of the same course of study cannot be used to satisfy the continuing education requirements of the regulations. If the major content of a program or session differs substantively from a previous one bearing the same or similar title, it may be used to satisfy such requirements.

(2) *Qualifying Programs*—(i) *Formal programs.* Formal programs qualify as continuing education programs if they:

(A) Require attendance by at least three individuals engaged in substantive pension service in addition to the instructor, discussion leader or speaker;

(B) Require that the program be conducted by a qualified instructor, discussion leader or speaker, i.e. a person whose background, training, education and/or experience is appropriate for instructing or leading a discussion on the subject matter of the particular program; and

(C) Require a written outline and/or textbook and certificate of attendance provided by the sponsor, all of which must be retained by the enrolled actuary for a three year period following the end of the enrollment cycle.

(ii) *Correspondence or individual study programs (including audio and/or video taped programs).* Qualifying continuing education programs include correspondence or individual study programs completed on an individual basis by the enrolled actuary and conducted by qualifying sponsors. The allowable credit hours for such programs will be measured on a basis comparable to the measurement of a seminar or course for credit in an accredited educational institution. Such programs qualify as continuing education programs if they:

(A) Require registration of the participants by the sponsor;

(B) Provide a means for measuring completion by the participants (e.g., written examination); and

(C) Require a written outline and/or textbook and certificate of completion provided by the sponsor. Such certificate must be retained by the participant for a three year period following the end of an enrollment cycle.

(iii) *Teleconferencing.* Programs utilizing teleconferencing or other communications technologies qualify for continuing education purposes if they either:

(A) Meet all the requirements of formal programs, except that they may include a sign-on/sign-off capacity or similar technique in lieu of the physical attendance of participants; or

(B) Meet all the requirements of correspondence or individual study programs.

(iv) *Serving as an instructor, discussion leader or speaker.* (A) Four hours of continuing education credit will be awarded for each contact hour completed as an instructor, discussion leader or speaker at an educational program which meets the continuing education requirements of this section, in recognition of both presentation and preparation time.

(B) The credit for instruction and preparation may not exceed 50% of the continuing education requirement for an enrollment cycle.

(C) Presentation of the same material as an instructor, discussion leader or speaker more than one time in any 36 month period will not qualify for continuing education credit. A program will not be considered to consist of the same material if a substantial portion of the content has been revised to reflect changes in the law or in the state of the art relative to the performance of pension actuarial service.

(D) Credit as an instructor, discussion leader or speaker will not be awarded to panelists, moderators or others whose contribution does not constitute a substantial portion of the program. However, such individuals may be awarded credit for attendance, provided the other provisions of this section are met.

(E) The nature of the subject matter will determine if credit will be of a core or non-core nature.

(v) *Credit for published articles, books, films, audio and video tapes, etc.* (A) Continuing education credit will be awarded for the creation of materials for publication or distribution with respect to matters directly related to the continuing professional education requirements of this section.

(B) The credit allowed will be on the basis of one hour credit for each hour of preparation time of the material. It will be the responsibility of the person claiming the credit to maintain records to verify preparation time.

(C) Publication or distribution may utilize any available technology for the dissemination of written, visual or auditory materials.

(D) The materials must be available on reasonable terms for acquisition and use by all enrolled actuaries.

(E) The credit for the creation of materials may not exceed 25% of the continuing education requirement of any enrollment cycle.

(F) The nature of the subject matter will determine if credit will be of a core or non-core nature.

(G) Publication of the same material more than one time will not qualify for continuing education credit. A publication will not be considered to consist of the same material if a substantial portion has been revised to reflect changes in the law or in the state of the art relating to the performance of pension actuarial service.

(vi) *Service on Joint Board advisory committee(s).* Continuing education credit may be awarded by the Joint Board for service on (any of) its advisory committee(s), to the extent that the Board considers warranted by the service rendered.

(vii) *Preparation of Joint Board examinations.* Continuing educational credit may be awarded by the Joint Board for participation in drafting questions for use on Joint Board examinations or in pretesting its examinations, to the extent the Board determines suitable. Such credit may not exceed 50% of the continuing professional education requirement for the applicable enrollment cycle.

(viii) *Society examinations.* Individuals may earn continuing professional education credit for achieving a passing grade on proctored examinations sponsored by a professional organization or society recognized by the Joint Board. Such credit is limited to the number of hours scheduled for each examination and may be applied only as non-core credit provided the content of the examination is non-core.

(ix) *Pension law examination.* Individuals may establish eligibility for renewal of enrollment for any enrollment cycle by:

(A) Achieving a passing score on the pension law actuarial examination offered by the Joint Board and administered under this part during the applicable enrollment cycle; and

(B) Completing a minimum of 12 hours of qualifying continuing education in core subject matter during the same applicable enrollment cycle.

(C) This option of satisfying the continuing professional education requirements is not available to those who receive initial enrollment during the enrollment cycle.

(g) *Sponsors.* (1) Sponsors are those responsible for presenting programs.

(2) To qualify as a sponsor, a program presenter must:

(i) Be an accredited educational institution;

(ii) Be recognized for continuing education purposes by the licensing body of any State, possession, territory, Commonwealth, or the District of Columbia responsible for the issuance of a license in the field of actuarial science, insurance, accounting or law;

(iii) Be recognized by the Executive Director of the Joint Board as a professional organization or society whose programs include offering continuing professional education opportunities in subject matter within the scope of this section; or

(iv) File a sponsor agreement with the Executive Director of the Joint Board to obtain approval of the program as a qualifying continuing education program.

(3) Professional organizations or societies and others wishing to be considered as qualifying sponsors shall request such status of the Executive Director of the Joint Board and furnish information in support of the request together with any further information deemed necessary by the Executive Director.

(4) A qualifying sponsor must ensure the program complies with the following requirements:

(i) Programs must be developed by individual(s) qualified in the subject matter.

(ii) Program subject matter must be current.

(iii) Instructors, discussion leaders, and speakers must be qualified with respect to program content.

(iv) Programs must include some means for evaluation of technical content and presentation.

(v) Certificates of completion must be provided those who have successfully completed the program.

(vi) Records must be maintained by the sponsor to verify satisfaction of the requirements of this section. Such records must be retained for a period of three years following the end of the enrollment cycle in which the program is held. In the case of programs of more than one session, records must be maintained to verify completion of the program and attendance by each participant at each session of the program.

(5) Sponsor agreements and qualified professional organization or society sponsors approved by the Executive Director will remain in effect for one enrollment cycle. The names of such sponsors will be published on a periodic basis.

(h) *Measurement of continuing education course work.* (1) All continuing education programs will be measured in terms of credit hours. The shortest recognized program will be one credit hour.

(2) A credit hour is 50 minutes of continuous participation in a program. Each session in a program must be at least one full credit hour, i.e. 50 minutes. For example, a single-session program lasting 100 minutes will count as two credit hours, and a program comprised of three 75 minute sessions (225 minutes) constitutes four credit hours. However, at the end of an enrollment cycle, an individual may total the number of minutes of sessions of at least one credit hour in duration attended during the cycle and divide by fifty. For example, attending three 75 minute segments at two separate programs will accord an individual nine credit hours (450 minutes divided by 50) toward fulfilling the minimum number of continuing professional education hours. It will not be permissible to merge non-core hours with core hours. For university or college courses, each

''semester'' hour credit will equal 15 credit hours and each ''quarter'' hour credit will equal 10 credit hours. Measurements of other formats of university or college courses will be handled on a comparable basis.

(i) *Record keeping requirements.* (1) Each individual applying for renewal shall retain for a period of three years following the end of an enrollment cycle the information required with regard to qualifying continuing professional education credit hours. Such information shall include:

(i) The name of the sponsoring organization;

(ii) The location of the program;

(iii) The title of the program and description of its content, e.g., course syllabus and/or textbook;

(iv) The dates attended;

(v) The credit hours claimed and whether core or non-core subject matter;

(vi) The name(s) of the instructor(s), discussion leader(s), or speaker(s), if appropriate;

(vii) The certificate of completion and/or signed statement of the hours of attendance obtained from the sponsor; and

(viii) The total core and non-core credit.

(2) To receive continuing education credit for service completed as an instructor, discussion leader, or speaker, the following information must be maintained for a period of three years following the end of the applicable enrollment cycle.

(i) The name of the sponsoring organization;

(ii) The location of the program;

(iii) The title of the program and description of its content;

(iv) The dates of the program; and

(v) The credit hours claimed and whether core or non-core subject matter.

(3) To receive continuing education credit for a publication, the following information must be maintained for a period of three years following the end of the applicable enrollment cycle.

(i) The publisher;

(ii) The title of the publication;

(iii) A copy of the publication;

(iv) The date of publication;

(v) The credit hours claimed;

(vi) Whether core or non-core subject matter; and

(vii) The availability and distribution of the publications to enrolled actuaries.

(j) *Waivers.* (1) Waiver from the continuing education requirements for a given period may be granted by the Executive Director of the Joint Board for the following reasons:

(i) Physical incapacity, which prevented compliance with the continuing education requirements;

(ii) Extended active military duty;

(iii) Absence from the individual's country of residence for an extended period of time due to employment or other reasons, provided the individual does not perform services as an enrolled actuary during such absence; and

(iv) Other compelling reasons, which will be considered on a case-by-case basis.

(2) A request for waiver must be accompanied by appropriate documentation. The individual will be required to furnish any additional documentation or explanation deemed necessary by the Executive Director of the Joint Board. Examples of appropriate documentation could be a medical certificate, military orders, etc.

(3) A request for waiver must be filed no later than the last day of the renewal application period.

(4) If a request for waiver is not approved, the individual will be so notified by the Executive Director of the Joint Board and placed on a roster of inactive enrolled individuals.

(5) If a request for waiver is approved, the individual will be so notified.

(6) Those who are granted waivers are required to file timely applications for renewal of enrollment.

(k) *Failure to comply.* (1) Compliance by an individual with the requirements of this part shall be determined by the Executive Director of the Joint Board. An individual who applies for renewal of enrollment but who fails to meet the requirements of eligibility for renewal will be notified by the Executive Director at his/her last known address by first class mail. The notice will state the basis for the non-compliance and will provide the individual an opportunity to furnish in writing, within 60

days of the date of the notice, information relating to the matter. Such information will be considered by the Executive Director in making a final determination as to eligibility for renewal of enrollment.

(2) The Executive Director of the Joint Board may require any individual, by first class mail sent to his/her mailing address of record with the Joint Board, to provide copies of any records required to be maintained under this section. The Executive Director may disallow any continuing professional education hours claimed if the individual concerned fails to comply with such requirements.

(3) An individual whose application for renewal is not approved may seek review of the matter by the Joint Board. A request for review and the reasons in support of the request must be filed with the Joint board within 30 days of the date of the non-approved notice.

(4) An individual who has not filed a timely application for renewal of enrollment, who has not made a timely response to the notice of non-compliance with the renewal requirements, or who has not satisfied the requirements of eligibility for renewal will be placed on a roster of inactive enrolled actuaries for a period of three years from the date renewal would have been effective. During this time, the individual will be ineligible to perform services as an enrolled actuary and to practice before the Internal Revenue Service.

(5) During inactive enrollment status or at any other time an individual is ineligible to perform services as an enrolled actuary and to practice before the Internal Revenue Service, the individual shall not in any manner, directly or indirectly, indicate he or she is so enrolled, or use the term ''enrolled actuary,'' the designation ''E.A.,'' or other form of reference to eligibility to perform services as an enrolled actuary.

(6) An individual placed in an inactive status must file an application for renewal of enrollment and satisfy the requirements for renewal as set forth in this section within three years from the date renewal would have been effective. The name of such individual otherwise will be removed from the inactive enrollment roster and his/her enrollment will terminate. Eligibility for enrollment must then be reestablished by the individual as provided in this part.

(7) An individual placed in an inactive status may satisfy the requirements for renewal of enrollment at any time during his/her period of inactive enrollment. If such satisfaction includes completing the continuing education requirement, the application for renewal may be filed immediately upon such completion. Continuing education credit under this subsection may not be used to satisfy the requirements of the enrollment cycle in which the individual has been placed back on the active roster.

(8) An individual in inactive status remains subject to the jurisdiction of the Joint Board and/or the Department of the Treasury with respect to disciplinary matters.

(9) An individual who is in good faith has certified that he/she has satisfied the continuing professional education requirements of this section will not be considered to be in non-compliance with such requirements on the basis of a program he/she has attended being found inadequate or not in compliance with the requirements for renewal. Such individual will be granted renewal, but the Executive Director may require such individual to remedy the resulting shortfall by earning replacement credit during the cycle in which renewal was granted or within a reasonable time period as determined by the Executive Director. For example, if six of the credit hours claimed were disallowed, the individual may be required to present 42 credit hours instead of the minimum 36 credit hours to qualify for renewal related to the next cycle.

(l) *Inactive retirement status.* An individual who no longer performs services as an enrolled actuary may request placement in an inactive retirement status at any time and such individual will be placed in such status. The individual will be ineligible to perform services as an enrolled actuary. Such individual must file a timely application for renewal of enrollment at each applicable renewal cycle as provided in

this part. An individual who is placed in an inactive retirement status may be reinstated to active enrollment status upon filing an application for renewal of enrollment and providing evidence of the completion of the required continuing professional education hours for the applicable enrollment cycle. An individual in inactive retirement status remains subject to the jurisdiction of the Joint Board and/or the Department of the Treasury with respect to disciplinary matters.

(m) *Renewal while under suspension or disbarment.* An individual who is ineligible to perform actuarial services and/or to practice before the Internal Revenue Service by virtue of disciplinary action is required to meet the requirements for renewal of enrollment during the period of such ineligibility.

(n) *Verification.* The Executive Director of the Joint Board or his/her designee may review the continuing education records of an enrolled actuary and/or qualified sponsor, including attending programs, in a manner deemed appropriate to determine compliance with the requirements and standards for the renewal of enrollment as provided in this section.

[42 FR 39200, Aug. 3, 1977, as amended at 53 FR 34484, Sept. 7, 1988]

§ 901.12 Eligibility for enrollment of individuals applying for enrollment before January 1, 1976.

(a) *In general.* An individual applying before January 1, 1976, to be an enrolled actuary must fulfill the experience requirements of paragraph (b) of this section and either the examination requirements of paragraph (c) of this section or the educational requirements of paragraph (d) of this section.

(b) *Qualifying experience.* Within a 15 year period immediately preceding the date of application, the applicant shall have completed either:

(1) A minimum of 36 months of responsible pension actuarial experience, or

(2) A minimum of 60 months of responsible actuarial experience, including at least 18 months of responsible pension actuarial experience.

(c) *Examination requirement.* The applicant shall satisfactorily complete the Joint Board examination requirement of paragraph (c)(1) of this section or the organization examination requirement of paragraph (c)(2) of this section.

(1) *Joint Board examination.* To satisfy the Joint Board examination requirement, the applicant shall have completed, to the satisfaction of the Joint Board, an examination prescribed by the Joint Board in actuarial mathematics and methodology related to pension plans, including the funding requirements of ERISA.

(2) *Organization examination.* (i) To satisfy the organization examination requirement, the applicant shall, before March 1, 1975, have attained by proctored examination one of the following classes of qualification in one of the following organizations:

(A) Member of the American Academy of Actuaries,

(B) Fellow or Member of the American Society of Pension Actuaries,

(C) Fellow or Associate of the Casualty Actuarial Society,

(D) Fellow or Member of the Conference of Actuaries in Public Practice,

(E) Fellow or Associate of the Society of Actuaries, or

(F) A class attained by proctored examination in any other actuarial organization in the United States or elsewhere if the Joint Board determines that the subject matter included in such examination, complexity of questions, and the minimum acceptable qualifying score are at least comparable to proctored examinations administered by any of the above organizations before March 1, 1975; or

(ii) On or after March 1, 1975, the applicant shall have attained one of the classes of qualification specified in paragraph (c)(2)(i) of this section, the attainment of such qualification having been by proctored examination under requirements determined by the Joint Board to be of not lower standards than the requirements for qualification during the 12 months immediately preceding March 1, 1975.

(d) *Qualifying formal education.* Prior to filing an application, the applicant shall have satisfied one of the following educational requirements:

(1) Received a bachelor's or higher degree from an accredited college or university, such degree having been

granted after the satisfactory completion of a course of study in which the major area of concentration was actuarial science, or

(2) Received a bachelor's or higher degree from an accredited college or university, such degree having been granted after the satisfactory completion of a course of study in which the major area of concentration was mathematics, statistics, or computer science, and shall have successfully completed at least 6 semester hours or 9 quarter hours of courses in life contingencies at an accredited college or university.

(e) *Disreputable conduct.* The applicant may be denied enrollment if it is found that he/she, after his/her eighteenth birthday, has:

(1) Engaged in any conduct evidencing fraud, dishonesty or breach of trust; or

(2) Been convicted of any of the offenses referred to in section 411 of ERISA; or

(3) Submitted false or misleading information on an application for enrollment to perform actuarial services or in any oral or written information submitted in connection therewith or in any report presenting actuarial information to any person, knowing the same to be false or misleading.

§ 901.13 Eligibility for enrollment of individuals applying for enrollment on or after January 1, 1976.

(a) *In general.* An individual applying on or after January 1, 1976, to be an enrolled actuary, must fulfill the experience requirement of paragraph (b) of this section, the basic actuarial knowledge requirement of paragraph (c) of this section, and the pension actuarial knowledge requirement of paragraph (d) of this section.

(b) *Qualifying experience.* Within a 10 year period immediately preceding the date of application, the applicant shall have completed either:

(1) A minimum of 36 months of responsible pension actuarial experience, or

(2) A minimum of 60 months of responsible actuarial experience, including at least 18 months of responsible pension actuarial experience.

(c) *Basic actuarial knowledge.* The applicant shall demonstrate knowledge of basic actuarial mathematics and methodology by one of the following:

(1) *Joint Board basic examination.* Successful completion, to a score satisfactory to the Joint Board, of an examination, prescribed by the Joint Board, in basic actuarial mathematics and methodology including compound interest, principles of life contingencies, commutation functions, multiple-decrement functions, and joint life annuities.

(2) *Organization basic examinations.* Successful completion, to a score satisfactory to the Joint Board, of one or more proctored examinations which are given by an actuarial organization and which the Joint Board has determined cover substantially the same subject areas, have at least a comparable level of difficulty, and require at least the same competence as the Joint Board basic examination referred to in paragraph (c)(1) of this section.

(3) *Qualifying formal education.* Receipt of a bachelor's or higher degree from an accredited college or university after the satisfactory completion of a course of study:

(i) In which the major area of concentration was actuarial mathematics, or

(ii) Which included at least as many semester hours or quarter hours each in mathematics, statistics, actuarial mathematics and other subjects as the Board determines represent equivalence to paragraph (c)(3)(i) of this section.

(d) *Pension actuarial knowledge.* The applicant shall demonstrate pension actuarial knowledge by one of the following:

(1) *Joint Board pension examination.* Successful completion, to a score satisfactory to the Joint Board, of an examination, prescribed by the Joint Board, in actuarial mathematics and methodology relating to pension plans, including the provisions of ERISA relating to the minimium funding requirements and allocation of assets on plan termination.

(2) *Organization pension examinations.* Successful completion, to a score satisfactory to the Joint Board, of one or more proctored examinations which

are given by an actuarial organization and which the Joint Board has determined cover substantially the same subject areas, have at least a comparable level of difficulty, and require at least the same competence as the Joint Board pension examination referred to in paragraph (d)(1) of this section.

(e) *Form; fee.* An applicant who wishes to take an examination administered by the Joint Board under paragraph (c)(1) or (d)(1) of this section shall file an application on a form prescribed by the Joint Board. Such application shall be accompanied by a check or money order in the amount set forth on the application form, payable to the Treasury of the United States. The amount represents a fee charged to each applicant for examination and is designed to cover the costs assessed the Joint Board for the administration of the examination. The fee shall be retained by the United States whether or not the applicant successfully completes the examination or is enrolled.

(f) *Denial of enrollment.* An applicant may be denied enrollment if:

(1) The Joint Board finds that the applicant, during the 15-year period immediately preceding the date of application and on or after the applicant's eighteenth birthday has engaged in disreputable conduct. The term disreputable conduct includes, but is not limited to:

(i) An adjudication, decision, or determination by a court of law, a duly constituted licensing or accreditation authority (other than the Joint Board), or by any federal or state agency, board, commission, hearing examiner, administrative law judge, or other official administrative authority, that the applicant has engaged in conduct evidencing fraud, dishonesty or breach of trust.

(ii) Giving false or misleading information, or participating in any way in the giving of false or misleading information, to the Department of the Treasury or the Department of Labor or the Pension Benefit Guaranty Corporation or any officer or employee thereof in connection with any matter pending or likely to be pending before them, knowing such information to be false or misleading.

(iii) Willfully failing to make a Federal tax return in violation of the revenue laws of the United States, or evading, attempting to evade, or participating in any way in evading or attempting to evade any federal tax or payment thereof, knowingly counseling or suggesting to a client or prospective client an illegal plan to evade federal taxes or payment thereof, or concealing assets of himself or another to evade federal taxes or payment thereof.

(iv) Directly or indirectly attempting to influence, or offering or agreeing to attempt to influence, the official action of any officer or employee of the Department of the Treasury or the Department of Labor or the Pension Benefit Guaranty Corporation by the use of threats, false accusations, duress or coercion, by the offer of any special inducement or promise of advantage or by the bestowing of any gift, favor, or thing of value.

(v) Disbarment or suspension from practice as an actuary, attorney, certified public accountant, public accountant, or an enrolled agent by any duly constituted authority of any state, possession, territory, Commonwealth, the District of Columbia, by any Federal Court of record, or by the Department of the Treasury.

(vi) Contemptuous conduct in connection with matters before the Department of the Treasury, or the Department of Labor, or the Pension Benefit Guaranty Corporation including the use of abusive language, making false accusations and statements knowing them to be false, or circulating or publishing malicious or libelous matter.

(2) The applicant has been convicted of any of the offenses referred to in section 411 of ERISA.

(3) The applicant has submitted false or misleading information on an application for enrollment to perform actuarial services or in any oral or written information submitted in connection therewith or in any report presenting actuarial information to any person, knowing the same to be false or misleading.

(Sec. 3042, subtitle C, title 3, Employee Retirement Income Security Act of 1974 (88 Stat. 1002, 29 U.S.C. 1241, 1242), and the Act of

August 31, 1951, ch. 376, title V, section 501, 65 Stat. 290, 31 U.S.C. 483a)

[44 FR 11751, Mar. 2, 1979, as amended at 44 FR 68458, Nov. 29, 1979]

Subpart C—Standards of Performance for Enrolled Actuaries

§ 901.20 Standards of performance of actuarial services.

In the discharge of duties required by ERISA of enrolled actuaries with respect to any plan to which the Act applies:

(a) *In general.* An enrolled actuary shall undertake an actuarial assignment only when qualified to do so.

(b) *Professional duty.* An enrolled actuary shall not perform actuarial services for any person or organization which he/she believes or has reasonable grounds for believing may utilize his/her services in a fraudulent manner or in a manner inconsistent with law.

(c) *Advice or explanations.* An enrolled actuary shall provide to the plan administrator upon appropriate request, supplemental advice or explanation relative to any report signed or certified by such enrolled actuary.

(d) *Conflicts of interest.* In any situation in which the enrolled actuary has a conflict of interest with respect to the performance of actuarial services, of which the enrolled actuary has knowledge, he/she shall not perform such actuarial services except after full disclosure has been made to the plan trustees, any named fiduciary of the plan, the plan administrator, and, if the plan is subject to a collective bargaining agreement, the collective bargaining representative.

(e) *Assumptions, calculations and recommendations.* The enrolled actuary shall exercise due care, skill, prudence and diligence to ensure that:

(1) The actuarial assumptions are reasonable in the aggregate, and the actuarial cost method and the actuarial method of valuation of assets are appropriate,

(2) The calculations are accurately carried out, and

(3) The report, any recommendations to the plan administrator and any supplemental advice or explanation relative to the report reflect the results of the calculations.

(f) *Report or certificate.* An enrolled actuary shall include in any report or certificate stating actuarial costs or liabilities, a statement or reference describing or clearly identifying the data, any material inadequacies therein and the implications thereof, and the actuarial methods and assumptions employed.

(g) *Utilization of enrolled actuary designation.* An enrolled actuary shall not advertise his/her status as an enrolled actuary in any solicitation related to the performance of actuarial services, and shall not employ, accept employment in partnership, corporate, or any other form, or share fees with, any individual or entity who so solicits. However, the use of the term ''enrolled actuary'' to identify an individual who is named on the stationery, letterhead or business card of an enrolled actuary, or of a partnership, association, or corporation shall not be considered in violation of this section. In addition, the term ''enrolled actuary'' may appear after the general listing of an enrolled actuary's name in a telephone directory provided such listing is not of a distinctive nature.

(h) *Notification.* An enrolled actuary shall provide written notification of the non-filing of any actuarial document he/she has signed upon discovery of the non-filing. Such notification shall be made to the office of the Internal Revenue Service, the Department of Labor, or the Pension Benefit Guaranty Corporation where such document should have been filed.

[40 FR 18776, Apr. 30, 1975, as amended at 43 FR 39757, Sept. 7, 1978]

Subpart D—Suspension or Termination of Enrollment

AUTHORITY: Sec. 3042(b), ERISA, 29 U.S.C. 1242(b).

SOURCE: 43 FR 39757, Sept. 7, 1978, unless otherwise noted.

§ 901.30 Authority to suspend or terminate enrollment.

Under section 3042(b) of ERISA the Joint Board may, after notice and opportunity for a hearing, suspend or terminate the enrollment of an enrolled

actuary if the Joint Board finds that such enrolled actuary

(a) Has failed to discharge his/her duties under ERISA, or

(b) Does not satisfy the requirements for enrollment in effect at the time of his/her enrollment.

§ 901.31 Grounds for suspension or termination of enrollment.

(a) *Failure to satisfy requirements for enrollment.* The enrollment of an actuary may be terminated if it is found that the actuary did not satisfy the eligibility requirements set forth in §§ 901.12 or 901.13, whichever is applicable.

(b) *Failure to discharge duties.* The enrollment of an actuary may be suspended or terminated if it is found that the actuary, following enrollment, failed to discharge his/her duties under ERISA. Such duties include those set forth in § 901.20.

(c) *Disreputable conduct.* The enrollment of an actuary may be suspended or terminated if it is found that the actuary has, at any time after he/she applied for enrollment, engaged in any conduct set forth in § 901.13(e)(1)(i)–(vi) or other conduct evidencing fraud, dishonesty, or breach of trust. Such other conduct includes, but is not limited to, the following:

(1) Conviction of any criminal offense under the laws of the United States (including section 411 of ERISA, 29 U.S.C. 1111), any State thereof, the District of Columbia, or any territory or possession of the United States, which evidences fraud, dishonesty, or breach of trust.

(2) Knowingly filing false or altered documents, affidavits, financial statements or other papers on matters relating to employee benefit plans or actuarial services.

(3) Knowingly making false or misleading representations, either orally or in writing, on matters relating to employee benefit plans or actuarial services, or knowingly failing to disclose information relative to such matters.

(4) The use of false or misleading representations with intent to deceive a client or prospective client, or of intimations that the actuary is able to obtain special consideration or action from an officer or employee of any agency or court authorized to determine the validity of pension plans under ERISA.

(5) Willful violation of any of the regulations contained in this part.

§ 901.32 Receipt of information concerning enrolled actuaries.

If an officer or employee of the Department of the Treasury, the Department of Labor, the Pension Benefit Guaranty Corporation, or a member of the Joint Board has reason to believe that an enrolled actuary has violated any provision of this part, or if any such officer, employee or member receives information to that effect, he/she may make a written report thereof, which report or a copy thereof shall be forwarded to the Executive Director. If any other person has information of any such violation, he/she may make a report thereof to the Executive Director or to any officer or employee of the Department of the Treasury, the Department of Labor, or to the Pension Benefit Guaranty Corporation.

§ 901.33 Initiation of proceeding.

Whenever the Executive Director has reason to believe that an enrolled actuary has violated any provision of the laws or regulations governing enrollment, such individual may be reprimanded or a proceeding may be initiated for the suspension or termination of such individual's enrollment. A reprimand as used in this paragraph is a statement informing the enrolled actuary that, in the opinion of the Executive Director, his/her conduct is in violation of the regulations and admonishing the enrolled actuary that repetition of the conduct occasioning the reprimand may result in the institution of a proceeding for the suspension or termination of the actuary's enrollment. A proceeding for suspension or termination of enrollment shall be initiated by a complaint naming the respondent actuary, signed by the Executive Director and filed in the Executive Director's office. Except in cases where the nature of the proceeding or the public interest does not permit, a proceeding will not be initiated under this section until the facts which may warrant such a proceeding have been called

to the attention of the actuary in writing and he/she has been given an opportunity to respond to the allegations of misconduct.

§ 901.34 Conferences.

(a) *In general.* The Executive Director may confer with an enrolled actuary concerning allegations of his/her misconduct whether or not a proceeding for suspension or termination has been initiated against him/her. If the conference results in agreement as to certain facts or other matters in connection with such a proceeding, such agreement may be entered in the record at the request of the actuary or the Executive Director.

(b) *Voluntary suspension or termination of enrollment.* An enrolled actuary, in order to avoid the initiation or conclusion of a suspension or termination proceeding, may offer his/her consent to suspension or termination of enrollment or may offer his/her resignation. The Executive Director may accept the offered resignation or may suspend or terminate enrollment in accordance with the consent offered.

§ 901.35 Contents of complaint.

(a) *Charges.* A complaint initiating a suspension or termination proceeding shall describe the allegations which are the basis for the proceeding, and fairly inform the respondent of the charges against him/her.

(b) *Answer.* In the complaint, or in a separate paper attached to the complaint, notice shall be given of the place at, and time within which the respondent shall file an answer, which time shall not be less than 15 days from the date of service of the complaint. Notice shall be given that a decision by default may be rendered against the respondent if an answer is not filed as required.

§ 901.36 Service of complaint and other papers.

(a) *Complaint.* The complaint or a copy thereof may be served upon the respondent by certified mail, or first-class mail as hereinafter provided, by delivering it to the respondent, or the respondent's attorney or agent of record either in person or by leaving it at the office or place of business of the respondent, the attorney or agent, or in any other manner which may have been agreed to in writing by the respondent. Where the service is by certified mail, the return post office receipt signed by or on behalf of the respondent shall be proof of service. If the certified matter is not claimed or accepted by the respondent and is returned undelivered, complete service may be made upon the respondent by mailing the complaint to him/her by first-class mail, addressed to the respondent at the last address known to the Executive Director. If service is made upon the respondent or his/her attorney or agent in person or by leaving the complaint at the office or place of business of the respondent, attorney, or agent, the verified return by the person making service, setting forth the manner of service, shall be proof of such service.

(b) *Service of papers other than complaint.* Any paper other than the complaint may be served upon the respondent as provided in paragraph (a) of this section or by mailing the paper by first-class mail to the respondent at the last address known to the Executive Director or by mailing the paper by first-class mail to the respondent's attorney or agent. Such mailing shall constitute complete service. Notices may also be served upon the respondent or his/her attorney or agent by telegraph.

(c) *Filing of papers.* Whenever the filing of a paper is required or permitted in connection with a suspension or termination proceeding, and the place of filing is not specified by this subpart or by rule or order of the Administrative Law Judge, the paper shall be filed with the Executive Director of the Joint Board for the Enrollment of Actuaries, Treasury Department, Washington, D.C. 20220. All papers shall be filed in duplicate.

§ 901.37 Answer.

(a) *Filing.* The respondent's answer shall be filed in writing within the time specified in the complaint or notice of initiation of the proceeding, unless, on application, the time is extended by the Executive Director or

the Administrative Law Judge. The answer shall be filed in duplicate with the Executive Director.

(b) *Contents.* The answer shall contain a statement of facts which constitute the grounds of defense and it shall specifically admit or deny each allegation set forth in the complaint, except that the respondent shall not deny a material allegation in the complaint which he/she knows to be true, or state that he/she is without sufficient information to form a belief when in fact the respondent possesses such information. The respondent may also state affirmatively special matters of defense.

(c) *Failure to deny or answer allegations in the complaint.* Every allegation in the complaint which is not denied in the answer shall be deemed to be admitted and may be considered as proven, and no further evidence in respect of such allegation need be adduced at a hearing. Failure to file an answer within the time prescribed in the notice to the respondent, except as the time for answer is extended by the Executive Director or the Administrative Law Judge, shall constitute an admission of the allegations of the complaint and a waiver of hearing, and the Administrative Law Judge may make a decision by default, without a hearing or further procedure.

§ 901.38 Supplemental charges.

If it appears to the Executive Director that the respondent in his/her answer falsely and in bad faith denies a material allegation of fact in the complaint or states that the respondent has no knowledge sufficient to form a belief when he/she in fact possesses such knowledge, or if it appears that the respondent has knowingly introduced false testimony during proceedings for suspension or termination of his/her enrollment, the Executive Director may file supplemental charges against the respondent. Such supplemental charges may be tried with other charges in the case, provided the respondent is given due notice thereof and is afforded an opportunity to prepare a defense thereto.

§ 901.39 Reply to answer.

No reply to the respondent's answer shall be required, but the Executive Director may file a reply at his/her discretion or at the request of the Administrative Law Judge.

§ 901.40 Proof; variance; amendment of pleadings.

In the case of a variance between the allegations in a pleading and the evidence adduced in support of the pleading, the Administrative Law Judge may order or authorize amendment of the pleading to conform to the evidence, provided that the party who would otherwise be prejudiced by the amendment is given reasonable opportunity to meet the allegations of the pleading as amended. The Administrative Law Judge shall make findings on any issue presented by the pleadings as so amended.

§ 901.41 Motions and requests.

Motions and requests may be filed with the Executive Director or with the Administrative Law Judge.

§ 901.42 Representation.

A respondent or proposed respondent may appear at conference or hearing in person or may be represented by counsel or other representative. The Executive Director may be represented by an attorney or other employee of the Treasury Department.

§ 901.43 Administrative Law Judge.

(a) *Appointment.* An administrative law judge, appointed as provided by section 11 of the Administrative Procedure Act, 60 Stat. 244 (5 U.S.C. 3105), shall conduct proceedings upon complaints for the suspension or termination of enrolled actuaries.

(b) *Powers of Administrative Law Judge.* Among other powers, the Administrative Law Judge shall have authority, in connection with any suspension or termination proceeding of an enrolled actuary, to do the following:

(1) Administer oaths and affirmations;

(2) Make rulings upon motions and requests, which may not be appealed before the close of a hearing except at

the discretion of the Administrative Law Judge;

(3) Determine the time and place of hearing and regulate its course of conduct;

(4) Adopt rules of procedure and modify the same as required for the orderly disposition of proceedings;

(5) Rule upon offers of proof, receive relevant evidence, and examine witnesses;

(6) Take or authorize the taking of depositions;

(7) Receive and consider oral or written argument on facts or law;

(8) Hold or provide for the holding of conferences for the settlement or simplification of the issues by consent of the parties;

(9) Perform such acts and take such measures as are necessary or appropriate to the efficient conduct of any proceeding; and

(10) Make initial decisions.

§ 901.44 Hearings.

(a) *In general.* The Administrative Law Judge shall preside at the hearing on a complaint for the suspension or termination of an enrolled actuary. Hearings shall be stenographically recorded and transcribed and the testimony of witnesses shall be taken under oath or affirmation. Hearings will be conducted pursuant to section 7 of the Administrative Procedure Act, 60 Stat. 241 (5 U.S.C. 556).

(b) *Failure to appear.* If either party to the proceeding fails to appear at the hearing, after due notice thereof has been sent to the parties, the Administrative Law Judge may make a decision against the absent party by default.

§ 901.45 Evidence.

(a) *In general.* The rules of evidence prevailing in courts of law and equity are not controlling in hearings on complaints for the suspension or the termination of the enrollment of enrolled actuaries. However, the Administrative Law Judge shall exclude evidence which is irrelevant, immaterial, or unduly repetitious.

(b) *Depositions.* The deposition of any witness taken pursuant to § 901.46 may be admitted.

(c) *Proof of documents.* Official documents, records, and papers of the Department of the Treasury, the Department of Labor, the Pension Benefit Guaranty Corporation, the Joint Board for the Enrollment of Actuaries or the Office of the Executive Director of the Joint Board for the Enrollment of Actuaries shall be admissible into evidence without the production of an officer or employee to authenticate them. Any such documents, records, and papers may be evidenced by a copy attested to or identified by an officer or employee of the Department of the Treasury, the Department of Labor, the Pension Benefit Guaranty Corporation, the Joint Board for the Enrollment of Actuaries, or the Office of the Executive Director of the Joint Board for the Enrollment of Actuaries, as the case may be.

(d) *Exhibits.* If any document, record, or other paper is introduced into evidence as an exhibit, the Administrative Law Judge may authorize the withdrawal of the exhibit subject to any conditions which he/she deems proper.

(e) *Objections.* Objections to evidence shall state the grounds relied upon, and the record shall not include argument thereon, except as ordered by the Administrative Law Judge. Rulings on such objections shall be part of the record. No exception to the ruling is necessary to preserve the rights of the parties.

§ 901.46 Depositions.

Depositions for use at a hearing may, with the written approval of the Administrative Law Judge, be taken by either the Executive Director or the respondent or their duly authorized representatives. Depositions may be taken upon oral or written interrogatories, upon not less than 10 days written notice to the other party, before any officer duly authorized to administer an oath for general purposes or before an officer or employee of the Department of the Treasury, the Department of Labor, the Pension Benefit Guaranty Corporation, or the Joint Board who is authorized to administer an oath. Such notice shall state the names of the witnesses and the time and place where the depositions are to be taken. The requirement of 10 days notice may be

waived by the parties in writing, and depositions may then be taken from the persons and at the times and places mutually agreed upon by the parties. When a deposition is taken upon written interrogatories, any cross-examination shall be upon written interrogatories. Copies of such written interrogatories shall be served upon the other party with the notice, and the copies of any written cross-interrogatories shall be mailed or delivered to the opposing party at least five days before the date of taking the depositions, unless the parties mutually agree otherwise. A party upon whose behalf a deposition is taken must file it with the Administrative Law Judge and serve one copy upon the opposing party. Expenses in the reporting of depositions shall be borne by the party at whose instance the deposition is taken.

§ 901.47 Transcript.

In cases where the hearing is stenographically reported by a Government contract reporter, copies of the transcript may be obtained from the reporter at rates not to exceed the maximum rates fixed by contract between the Government and the reporter. Where the hearing is stenographically reported by a regular employee of the Department of the Treasury, the Department of Labor, the Pension Benefit Guaranty Corporation, or the Joint Board, a copy thereof will be supplied to the respondent either without charge or upon the payment of a reasonable fee. Copies of exhibits introduced at the hearing or at the taking of depositions will be supplied to parties upon the payment of a reasonable fee (31 U.S.C. 483a).

§ 901.48 Proposed findings and conclusions.

Except in cases where the respondent has failed to answer the complaint or where a party has failed to appear at the hearing, the Administrative Law Judge, before making his/her decision, shall give the parties a reasonable opportunity to submit proposed findings and conclusions and supporting reasons therefor.

§ 901.49 Decision of the Administrative Law Judge.

As soon as practicable after the conclusion of a hearing and the receipt of any proposed findings and conclusions timely submitted by the parties, the Administrative Law Judge shall make the initial decision in the case. The decision should be based solely upon the pleading, the testimony and exhibits received in evidence at the hearing or specifically authorized to be subsequently submitted under the applicable laws and regulations. The decision shall include (a) a statement of findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact or law presented on the record, and (b) an order of suspension, termination or reprimand or an order of dismissal of the complaint. The Administrative Law Judge shall file the decision with the Executive Director and shall transmit a copy thereof to the respondent or his/her attorney or agent of record. In the absence of an appeal to the Joint Board or review of the decision upon motion of the Joint Board, the decision of the Administrative Law Judge shall without further proceedings become the decision of the Joint Board 30 days from the date of the Administrative Law Judge's decision.

§ 901.50 Appeal to the Joint Board.

Within 30 days from the date of the Administrative Law Judge's decision, either party may appeal to the Joint Board for the Enrollment of Actuaries. The appeal shall be filed with the Executive Director in duplicate and shall include exceptions to the decision of the Administrative Law Judge and supporting reasons for such exceptions. If an appeal is filed by the Executive Director, a copy thereof shall be transmitted to the respondent. Within 30 days after receipt of an appeal or copy thereof, the other party may file a reply brief in duplicate with the Executive Director. If the reply brief is filed by the Executive Director, a copy of it shall be transmitted to the respondent. Upon the filing of an appeal and a reply brief, if any, the Executive Director shall transmit the entire record to the joint board.

§ 901.51 Decision of the Joint Board.

On appeal from or review of the initial decision of the Administrative Law Judge, the Joint Board for the Enrollment of Actuaries will make the final decision. In making its decision the Joint Board will review the record of such portions thereof as may be cited by the parties to permit limiting of the issues. A copy of the Joint Board's decision shall be transmitted to the respondent by the Executive Director.

§ 901.52 Effect of suspension, termination or resignation of enrollment; surrender of enrollment certificate.

If the respondent's enrollment is suspended, the respondent shall not thereafter be permitted to perform actuarial services under ERISA during the period of suspension. If the respondent's enrollment is terminated, the respondent shall not thereafter be permitted to perform actuarial serv- ices under ERISA unless and until authorized to do so by the Executive Director pursuant to §901.54. The respondent shall surrender his/her enrollment certificate to the Executive Director for cancellation in the case of a termination or resignation of enrollment or for retention during a period of suspension.

§ 901.53 Notice of suspension, termination or resignation of enrollment.

Upon the resignation or the issuance of a final order suspending or terminating the enrollment of an actuary, the Executive Director shall give notice thereof to appropriate officers and employees of the Department of the Treasury, the Department of Labor, the Pension Benefit Guaranty Corporation, and to other interested departments and agencies of the Federal Government.

§ 901.54 Petition for reinstatement.

Any individual whose enrollment has been terminated may petition the Executive Director for reinstatement after the expiration of five years following such termination. Reinstatement may not be granted unless the Executive Director, with the approval of the Joint Board, is satisfied that the petitioner is not likely to conduct himself/herself thereafter contrary to the regulations in this part, and that granting such reinstatement would not be contrary to the public interest.

Subpart E—General Provisions

AUTHORITY: Sec. 3042(b), ERISA, 29 U.S.C. 1242(b).

SOURCE: 43 FR 39761, Sept. 7, 1978, unless otherwise noted.

§ 901.70 Records.

(a) *Availability.* There are made available for public inspection at the Office of the Executive Director of the Joint Board for the Enrollment of Actuaries a roster of all persons enrolled to perform actuarial services under ERISA and a roster of all persons whose enrollments to perform such services have been suspended or terminated. Other records may be disclosed upon specific request, in accordance with the applicable disclosure and privacy statutes.

(b) *Disciplinary procedures.* A request by an enrolled actuary that a hearing in a disciplinary proceeding concerning him/her be public, and that the record thereof be made available for inspection by interested persons may be granted if written agreement is reached in advance to protect from disclosure tax information which is confidential, in accordance with applicable statutes and regulations.

§ 901.71 Special orders.

The Joint Board reserves the power to issue such special orders as it may deem proper in any case within the purview of this part.

PART 902—RULES REGARDING AVAILABILITY OF INFORMATION

Sec.

902.1 Scope.
902.2 Definitions.
902.3 Published information.
902.4 Access to records.
902.5 Appeal.

AUTHORITY: Sec. 3042, subtitle C, title 3, Employee Retirement Income Security Act of 1974 (88 Stat. 1002, 29 U.S.C. 1241, 1242).

SOURCE: 42 FR 39204, Aug. 3, 1977, unless otherwise noted.

§ 902.1 Scope.

This part is issued by the Joint Board for the Enrollment of Actuaries (the ''Joint Board'') pursuant to the requirements of section 552 of title 5 of the United States Code, including the requirements that every Federal agency shall publish in the FEDERAL REGISTER, for the guidance of the public, descriptions of the established places at which, the officers from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions.

§ 902.2 Definitions.

(a) *Records of the Joint Board.* For purposes of this part, the term ''records of the Joint Board'' means rules, statements, opinions, orders, memoranda, letters, reports, accounts, and other papers containing information in the possession of the Joint Board that constitute part of the Joint Board's official files.

(b) *Unusual Circumstances.* For purposes of this part, ''unusual circumstances'' means, but only to the extent reasonably necessary for the proper processing of the particular request:

(1) The need to search for and collect the requested records from other establishments that are separate from the Joint Board's office processing the request;

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request.

§ 902.3 Published information.

(a) *Federal Register.* Pursuant to sections 552 and 553 of title 5 of the United States Code, and subject to the provisions of §902.5, the Joint Board publishes in the FEDERAL REGISTER for the guidance of the public, in addition to this part, descriptions of its organization and procedures, substantive rules of general applicability, and, as may from time to time be appropriate, statements of general policy, and interpretations of general applicability.

(b) *Other published information.* From time to time, the Joint Board issues statements to the press relating to its operations.

(c) *Obtaining printed information.* If not available through the Government Printing Office, printed information released by the Joint Board may be obtained without cost from the Executive Director of the Joint Board (''Executive Director'').

§ 902.4 Access to records.

(a) *General rule.* All records of the Joint Board, including information set forth in section 552(a)(2) of title 5 of the United States Code, are made available to any person, upon request, for inspection and copying in accordance with the provisions of this section and subject to the limitations stated in section 552(b) of title 5 of the United States Code. Records falling within such limitations may nevertheless be made available in accordance with this section to the extent consistent, in the judgment of the Chairman of the Joint Board (''Chairman''), with the effective performance of the Joint Board's statutory responsibilities and with the avoidance of injury to a public or private interest intended to be protected by such limitations.

(b) *Obtaining access to records.* Records of the Joint Board subject to this section are available by appointment for public inspection or copying during regular business hours on regular business days at the office of the Executive Director. Every request for access to such records, other than published records described in §902.3, shall be signed and submitted in writing to the Executive Director, Joint Board for the Enrollment of Actuaries, c/o Department of the Treasury, Washington, DC 20220, shall state the name and address of the person requesting such access, and shall describe such records in a manner reasonably sufficient to permit their identification without undue difficulty.

(c) *Fees.* A fee at the rate of $5.00 per hour or fraction thereof or the time required to locate such records, plus ten cents per standard page for any copying thereof, shall be paid by any person

requesting records other than published records described in § 902.3. In addition, the cost of postage and any packaging and special handling shall be paid by the requester. Documents shall be provided without charge or at a reduced charge where the Chairman determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(d) *Actions on requests.* The Executive Director shall, within ten days (excepting Saturdays, Sundays and legal public holidays) from receipt of request, determine whether to comply with such request for records and shall immediately notify in writing the person making such request of such determination and the reason therefor, and of the right of such person to appeal any adverse determination, as provided in § 902.5. In unusual circumstances, the time limit for the determination may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which the determination is expected to be dispatched. No such notice shall specify a date that will result in an extension of more than ten working days.

§ 902.5 Appeal.

(a) Any person denied access to records requested under § 902.4, may within thirty days after notification of such denial, file a signed written appeal to the Joint Board. The appeal shall provide the name and address of the appellant, the identification of the records denied, and the dates of the original request and its denial.

(b) The Joint Board shall act upon any such appeal within twenty days (excepting Saturdays, Sundays and legal public holidays) of its receipt, unless for unusual circumstances the time for such action is deferred, subject to § 902.4(b), for not more than ten days. If action upon any such appeal is so deferred, the Joint Board shall notify the requester of the reasons for such deferral and the date on which the final reply is expected to be dispatched. If it is determined that the appeal from the initial denial shall be denied (in whole or in part), the requester shall be notified in writing of the denial, of the reasons therefor, of the fact the Joint Board is responsible for the denial, and of the provisions of section 552(a)(4) of title 5 of the United States Code for judicial review of the determination.

(c) Any extension or extensions of time under §§ 902.4(d) and 902.5(b) shall not cumulatively total more than ten days (excepting Saturdays, Sundays and legal public holidays). If an extension is invoked in connection with an initial determination under § 902.4(d), any unused days of such extension may be invoked in connection with the determination on appeal under § 902.5(a), by written notice from the Joint Board.

PART 903—ACCESS TO RECORDS

Subpart A—Records Pertaining to Individuals

Sec.
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AUTHORITY: 5 U.S.C. 552a.

SOURCE: 41 FR 1493, Jan. 8, 1976, unless otherwise noted.

Subpart A—Records Pertaining to Individuals

§ 903.1 Purpose and scope of regulations.

The regulations in this subpart are issued to implement the provisions of the Privacy Act of 1974 (5 U.S.C. 552a). The regulations relate to all records maintained by the Joint Board for the Enrollment of Actuaries (Joint Board) which are identifiable by individual name or identifier and all systems of such records which are retrievable by name or other identifier. They do not relate to personnel records of Government employees, which are under the

jurisdiction of the Civil Service Commission, and, thus, subject to regulations issued by such Commission. The regulations set forth the procedures by which individuals may request notification of whether the Joint Board maintains or has disclosed a record pertaining to them or may seek access to such records maintained in any nonexempt system of records, request amendment of such records, and appeal any initial adverse determination with respect to any such request.

§ 903.2 Definitions.

(a) The term *agency* includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency (see 5 U.S.C. 552(e));

(b) The term *individual* means a citizen of the United States or an alien lawfully admitted for permanent residence;

(c) The term *maintain* includes maintain, use, collect or disseminate;

(d) The term *record* means any item, collection, or grouping of information about an individual that is maintained by the Joint Board, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual such as a finger or voice print or a photograph;

(e) The term *system of records* means a group of any records under the control of the Joint Board from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(f) The term *routine use* means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

§ 903.3 Procedures for notification with respect to records regarding individuals.

(a) *Procedures for notification.* The systems of records maintained by the Joint Board are listed annually as required by the Privacy Act of 1974. Any individual, who wishes to know whether a system of records contains a record regarding him, may write to the Executive Director, Joint Board for the Enrollment of Actuaries, c/o U.S. Department of the Treasury, Washington, DC 20220. Requests may also be delivered personally to the Executive Director, Joint Board for the Enrollment of Actuaries, 2401 E Street, NW., suite 1537, Washington, D.C. between the hours of 9 a.m. and 5 p.m. on workdays. Any such inquiry will be acknowledged in writing within 10 days (excluding Saturdays, Sundays and legal public holidays) of receipt of the request.

(b) *Requests.* A request for notification of whether a record exists shall:

(1) Be made in writing and signed by the person making the request, who must be the individual about whom the record is maintained, or his duly authorized representative (see § 903.7);

(2) State that it is made pursuant to the Privacy Act, 5 U.S.C. 552a, or the regulations contained in this part;

(3) Furnish the name of the system of records with respect to which notification is sought, as specified in the systems notices published in the FEDERAL REGISTER, Volume 40, No. 167;

(4) Mark ''Privacy Act Request'' on the request and on the envelope in which the request is contained;

(5) Be addressed as specified in paragraph (a) of this section, unless personally delivered; and

(6) Meet the requirements set forth in paragraph (c) of this section.

(c) *Verification of identity.* Notification of the existence of records in certain systems maintained by the Joint Board will not be made unless the individual requester's identity is verified. Where applicable, requirements for verification of identity are specified in the notices of systems published in the FEDERAL REGISTER, Volume 40, No. 167.

(d) *Date of receipt of request.* A request for notification with respect to records

shall be considered to have been received on the date on which the requirements of paragraphs (a), (b) and (c) of this section have been satisfied. Requests for notification shall be stamped with the date of receipt by the Office of the Executive Director.

(e) *Exemptions.* The procedures prescribed under paragraphs (a), (b) and (c) of this section shall not apply to: (1) Systems of records exempted pursuant to 5 U.S.C. 552a(k); (2) information compiled in reasonable anticipation of a civil action or proceeding (see 5 U.S.C. 552a(d) (5); or (3) information regarding an individual which is contained in, and inseparable from, another individual's record.

(f) *Notification of determination*—(1) *In general.* The Executive Director shall, except as otherwise provided in this paragraph, notify an individual requester as to whether or not a system of records contains a record regarding such individual. Such notification shall be made within 30 days (excluding Saturdays, Sundays and legal public holidays) after the date of receipt of the request, as determined in accordance with paragraph (d) of this section. If it is not possible to respond within 30 days, the Executive Director will inform the requester, stating the reasons for the delay (e.g., volume of records involved, need to consult other agencies, or the difficulty of the legal issues involved) and when a response will be dispatched.

(2) *Denial of request.* When it is determined that a request for notification with respect to records will be denied (whether in whole or in part or subject to conditions or exceptions), the person making the request shall be so notified by mail in accordance with paragraph (f)(1) of this section. The letter of notification shall set forth the name and title or position of the responsible official.

(3) *Records exempt in whole or in part.* (i) When an individual requests notification with respect to records concerning himself which have been compiled in reasonable anticipation of a civil action or proceeding either in a court or before an administrative tribunal, the Executive Director will neither confirm nor deny the existence of the record but shall advise the individual only that no record with respect to the existence of which he is entitled to be notified pursuant to the Privacy Act of 1974 has been identified.

(ii) Requests for records which have been exempted from the requirement of notification pursuant to 5 U.S.C. 552a(k)(2) shall be responded to in the manner provided in paragraph (f)(3)(i) of this section.

§ 903.4 Procedures for access to records and accountings of disclosures from records, regarding individuals.

(a) *Access.* The Executive Director of the Joint Board shall, upon request by any individual to gain access to a record regarding him which is contained in a system of records maintained by the Joint Board, or to an accounting of a disclosure from such record made pursuant to 5 U.S.C. 552a(c)(1), permit that individual, and, upon his/her request, a person he/she chooses to accompany him/her, to review the record or any such accounting and have a copy made of all or any portion thereof in a form comprehensible to the individual, except that the Executive Director may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence. Such request may be addressed to the Executive Director, Joint Board for the Enrollment of Actuaries, c/o U.S. Department of the Treasury, Washington, DC 20220. Requests may also be delivered personally to the Executive Director, Joint Board for the Enrollment of Actuaries, 2401 E Street, NW., suite 1537, Washington, DC, between the hours of 9 a.m. and 5 p.m. on workdays. Any such inquiry will be acknowledged in writing within 10 days (excluding Saturdays, Sundays and legal public holidays) of receipt of the request (see paragraph (e) of this section).

(b) *Requests.* A request for access to records or accountings of disclosure from records, shall:

(1) Be signed in writing by the person making the request, who must be the individual about whom the record is maintained, or his duly authorized representative (see § 903.7);

(2) State that it is made pursuant to the Privacy Act, 5 U.S.C. 552a, or the regulations contained in this part;

(3) Furnish the name of the system of records to which access is sought, or the name of the system for a disclosure from which an accounting is sought, as specified in the systems notices published in the FEDERAL REGISTER, Volume 40, No. 167;

(4) Mark ''Privacy Act Request'' on the request and on the envelope in which the request is contained;

(5) Be addressed as specified in paragraph (a) of this section, unless personally delivered;

(6) State whether the requester wishes to inspect the records and/or accountings of disclosures therefrom, or desires to have a copy made and furnished without inspecting them;

(7) State, if the requester desires to have a copy made, the requester's agreement to pay the fees for duplication as ultimately determined in accordance with §903.6; and

(8) Meet the requirements set forth in paragraph (c) of this section.

(c) *Verification of identity.* Access to records contained in certain systems maintained by the Joint Board and/or accountings of disclosures from such records, will not be granted unless the individual requester's identity is verified. Where applicable, requirements for verification of identity are specified in the notices of systems published in the FEDERAL REGISTER, Volume 40, No. 167.

(d) *Exemptions.* The procedures specified in paragraphs (a), (b) and (c) of this section shall not apply to: (1) Systems of records exempted pursuant to 5 U.S.C. 552a(k); (2) information compiled in reasonable anticipation of a civil action or proceeding (see 5 U.S.C. 552a(d)(5)); or (3) information regarding an individual which is contained in, and inseparable from, another individual's record.

(e) *Date of receipt of request.* A request for access to records and/or accountings shall be considered to have been received on the date on which the requirements of paragraphs (a), (b) and (c) of this section have been satisfied. Requests for access, and any separate agreement to pay, shall be stamped with the date of receipt by the Office of the Executive Director. The latest of such stamped dates will be deemed to be the date of receipt of the request.

(f) *Notification of determination*—(1) *In general.* Notification of determinations as to whether to grant access to records and/or accountings requested will be made by the Executive Director of the Joint Board. The notification of the determination shall be made within 30 days (excluding Saturdays, Sundays and legal public holidays) after the date of receipt of the request, as determined in accordance with paragraph (g) of this section. If it is not possible to respond within 30 days, the Executive Director will inform the requester, stating the reason(s) for the delay (e.g., volume of records requested, need to consult other agencies, or the difficulty of the legal issues involved) and when a response will be dispatched (See 5 U.S.C. 552a (d) and (f)).

(2) *Granting of access.* (i) When it has been determined that the request for access will be granted—(A) and a copy requested; such copy in a form comprehensible to him shall be furnished promptly, together with a statement of the applicable fees for duplication as set forth elsewhere in these regulations (See §903.6); and (B) and the right to inspect has been requested, the requester shall be promptly notified in writing of the determination, and when and where the requested records and/or accountings may be inspected.

(ii) An individual seeking to inspect records concerning himself and/or accountings of disclosure from such records may be accompanied by another individual of his own choosing. The individual seeking access shall be required to sign the required form indicating that the Joint Board is authorized to discuss the contents of the subject record in the accompanying person's presence. If, after making the inspection, the individual making the request desires a copy of all or portion of the requested records, such copy in a form comprehensible to him shall be furnished upon payment of the applicable fees for duplication as prescribed by §903.6. Fees shall not be charged where they would amount, in the aggregate, to less than $53.00. (See 5 U.S.C. 552a (d) and (f):

(3) *Denial of request.* (i) When it is determined that the request for access to records will be denied (whether in whole or in part or subject to conditions or exceptions), the person making the request shall be so notified by mail in accordance with paragraph (f)(1) of this section. The letter of notification shall contain a statement of the reasons for not granting the request as made, set forth the name and title or position of the responsible official and advise the individual making the request of the right to file suit in accordance with 5 U.S.C. 552a(g)(1)(B).

(ii) When it is determined that a request for access to accountings will be denied, the person making the request shall be so notified by mail in accordance with paragraph (f)(1)(4)(iii) of this section.

(4) *Records exempt in whole or in part.* (i) When an individual requests records concerning himself which have been compiled in reasonable anticipation of a civil action or proceeding either in a court or before an administrative tribunal, the Executive Director will neither confirm nor deny the existence of the record but shall advise the individual only that no record available to him pursuant to the Privacy Act of 1974 has been identified.

(ii) Requests for records which have been exempted from disclosure pursuant to 5 U.S.C. 552a(k)(2) shall be responded to in the manner provided in paragraph (f)(4)(i) of this section unless a review of the information indicates that the information has been used or is being used to deny the individual any right, privilege or benefit for which he is eligible or to which he would otherwise be entitled under Federal law. In that event, the individual shall be advised of the existence of the information but such information as would identify a confidential source shall be extracted or summarized in a manner which protects the source to the maximum degree possible and the summary extract shall be provided to the requesting individual.

(iii) When an individual requests access to accountings of disclosure from records concerning himself which have been compiled in reasonable anticipation of a civil action or proceeding, either in a court or before an administrative tribunal, or which have been exempted from disclosure pursuant to 5 U.S.C. 552a(k)(2), the Executive Director will neither confirm nor deny the existence of the record or accountings of disclosure therefrom, but shall advise the individual that no accounting available to him pursuant to the Privacy Act of 1974 has been identified.

§ 903.5 Procedures for amendment of records regarding individual—format, agency review and appeal from initial adverse agency determination.

(a) *In general.* Subject to the application of exemptions promulgated by the Joint Board, in accordance with 5 U.S.C. 552a(k), the Executive Director shall, in conformance with 5 U.S.C. 552a(d)(2), permit an individual to request amendment of a record pertaining to him. Any such request shall be addressed to the Executive Director, Joint Board for the Enrollment of Actuaries, U.S. Department of the Treasury, Washington, DC 20220 or delivered personally to the Executive Director, Joint Board for the Enrollment of Actuaries, 2401 E Street, NW., suite 1537, Washington, DC. Any request for amendment of records or any appeal from the initial denial of a request which does not fully comply with the requirements of this section will not be deemed subject to the time constraints of paragraph (e) of this section, unless and until amended so as to comply. However, the Executive Director shall forthwith advise the requester in what respect the request or appeal is deficient so that it may be resubmitted or amended. (See 5 U.S.C. 552a (d) and (f)).

(b) *Form of request to amend records.* In order to be subject to the provisions of this section, a request to amend records shall:

(1) Be made in writing and signed by the person making the request, who must be the individual about whom the record is maintained, or his duly authorized representative. (See § 903.7);

(2) State that it is made pursuant to the Privacy Act, 5 U.S.C. 552a or these regulations;

(3) Mark ''Privacy Act Amendment Request'' on the request and on the envelope; and

(4) Reasonably describe the records which the individual desires to have

amended, including, to the best of the requester's knowledge, dates of letters requesting access to such records previously and dates of letters in which notification concerning access was made, if any, and the individual's documentation justifying the correction. (See 5 U.S.C. 552a (d) and (f)).

(c) *Date of receipt of request.* A request for amendment of records pertaining to an individual shall be deemed to have been received for purposes of this subpart when the requirements of paragraphs (a) and (b) of this section have been satisfied. The Office of the Executive Director shall stamp the date of receipt of the request thereon. (See 5 U.S.C. 552a (d) and (f)).

(d) *Review of requests to amend records.* The Executive Director shall:

(1) Not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(2) Promptly, either—(i) make any correction of any portion of a record which the individual believes and the Executive Director agrees is not accurate, relevant, timely, or complete; or (ii) inform the individual of the refusal to amend the record in accordance with his request, the reason for the refusal, and that he may request that the Joint Board review such refusal. (See 5 U.S.C. 552a (d) and (f)).

(e) *Administrative appeal*—(1) *Ingeneral.* The Joint Board shall permit individuals to request a review of initial decisions made under paragraph (d) of this section when an individual disagrees with a refusal to amend his record. (See 5 U.S.C. 552a(d), and (g)(1)).

(2) *Form of request for administrative review of refusal to amend record.* At any time within 35 days after the date of the notification of the initial decision described in paragraph (d)(2)(ii) of this section, the requester may submit a request for review of such refusal to the official specified in the notification of the initial decision. The appeal shall:

(i) Be made in writing stating any arguments in support thereof and be signed by the person to whom the record pertains, or his duly authorized representative (See § 903.7);

(ii) Within 35 days of the date of the initial decision: (A) Be addressed and mailed to the Joint Board for the Enrollment of Actuaries, c/o U.S. Department of the Treasury, Washington, DC 20220; or (B) be personally delivered to the Executive Director, Joint Board for the Enrollment of Actuaries, 2401 E Street NW., suite 1537, Washington, DC on workdays between the hours of 9 a.m. and 5 p.m.;

(iii) Have clearly marked on the appeal and on the envelope, ''Privacy Act Amendment Appeal'';

(iv) Reasonably describe the records requested to be amended; and

(v) Specify the date of the initial request to amend records, and the date of the letter giving notification that the request was denied. (See 5 U.S.C. 552a (d) and (f)).

(3) *Date of Receipt.* Appeals shall be promptly stamped with the date of their receipt by the Office of the Executive Director and such stamped date will be deemed to be the date of receipt for all purposes of this section. The receipt of the appeal shall be acknowledged within 10 days from the date of receipt (unless the determination on appeal is dispatched in 10 days, in which case, no acknowledgment is required) by the Joint Board and the requester is advised of the date of receipt established by the foregoing and when a response is due in accordance with this paragraph. (See 5 U.S.C. 552a (d) and (f)).

(4) *Review of administrative appeals from denial of requests to amend records.* The Joint Board shall complete the review and notify the requester of the final agency decision within 30 days (exclusive of Saturdays, Sundays and legal public holidays) after the date of receipt of such appeal, unless it extends the time for good cause shown. If such final agency decision is to refuse to amend the record, in whole or in part, the requester shall also be advised of his right; (i) to file a concise ''Statement of Disagreement'' setting forth the reasons for his disagreement with the decision which shall be filed within 35 days of the date of the notification of the final agency decision and (ii) to seek judicial review of the final agency decision under 5 U.S.C. 552a(g)(1)(A). (See 5 U.S.C. 552a (d), (f) and (g)(1)).

(5) *Notation on record and distribution of statements of disagreement.* (i) The Executive Director is responsible, in any disclosure containing information about which an individual has filed a ''Statement of Disagreement,'' occurring after the filing of the statement under paragraph (e)(4) of this section, for clearly noting any portion of the record which is disputed and providing copies of the statement and, if deemed appropriate, a concise statement of the Joint Board's reasons for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed. (See 5 U.S.C. 552a(d)(4)).

(ii) In addition, when a ''Statement of Disagreement'' is filed regarding information previously disclosed to a person or other agency and when, for such disclosure, an accounting was made pursuant to 5 U.S.C. 552(c)(1). then the Executive Director shall provide such person or other agency with the following:

(A) Copy of the ''Statement of Disagreement'';

(B) Copy of the portion of the previously disclosed in dispute clearly noted as disputed and;

(C) If deemed approprirate, a concise statement of the Joint Board's reasons for not making requested amendments.

(f) *Records not subject to correction.* The following records are not subject to correction or amendment by individuals:

(1) Transcripts or written statements made under oath;

(2) Transcripts of Grand Jury proceedings, judicial or quasi-judicial proceedings which form the official record of those proceedings;

(3) Pre-sentence reports comprising the property of the courts but maintained in agency files;

(4) Records pertaining to the determination, the collection and the payment of federal taxes; and

(5) Records duly exempted from correction by notice published in the FEDERAL REGISTER.

[41 FR 1493, Jan. 8, 1976, as amended at 45 FR 84994, Dec. 24, 1980]

§ 903.6 Fees.

Charges for copies of records made pursuant to part 903 of this chapter will be at the rate of $0.10 per copy. For records not susceptible to photocopying, e.g., over-size materials, photographs, etc., the amount charged will be the actual cost of copying. Only one copy of each record requested will be provided. No charge will be made unless the charge as computed above would exceed $3 for each request or related series of requests. If a fee in excess of $25 is required, the requester will be notified that the fee must be tendered before the records will be copied.

§ 903.7 Guardianship.

The guardian of a person judicially determined to be incompetent shall, in additon to establishing the identity of the person he represents, establish his own guardianship by furnishing a copy of a court order establishing the guardianship and may thereafter act on behalf of such individual. (See 5 U.S.C. 552a(h)).

§ 903.8 Exemptions.

(a) *Names of systems:* (1) JBEA—Enrollment Files.

(2) JBEA—Application Files.

(3) JBEA—General Information.

(4) JBEA—Charge Case Inventory Files.

(5) JBEA—Suspension and Termination Files.

(b) *Provisions from which exempted:* These systems contain records described in 5 U.S.C. 552a(k), the Privacy Act of 1974. Exemption will be claimed for such records only where appropriate from the following provisions: subsections (c)(3), (d)(1), (2), (3) and (4), (e)(1), (c)(4)(G), (H) and (I), and (f)(1), (2), (3), (4) and (5) of 5 U.S.C. 552a.

(c) *Reasons for claimed exemptions:* (1) The Privacy Act of 1974 creates several methods by which individuals may learn of and obtain records containing information on such individuals and consisting of investigatory material compiled for law enforcement purposes. These methods are as follows: Subsection (c)(3) allows individuals to discover if other agencies are investigating such individuals; subsections (d)(1), (e)(4)(H) and (f)(2), (3) and (5) establish the ability of individuals to gain access to investigatory material

compiled on such individuals; subsections (d)(2), (3) and (4), (e)(4)(H) and (f)(4) presuppose access and enable individuals to contest the contents of investigatory material compiled on these individuals; and subsections (e)(4)(G) and (f)(1) allow individuals to determine whether or not they are under investigation. Because these subsections are variations upon the individual's ability to ascertain whether his civil or criminal misconduct has been discovered, these subsections have been grouped together for purposes of this notice.

(2)(i) The Joint Board believes that imposition of the requirements of subsection (c)(3), which requires that accountings of disclosures be made available to individuals, would impair the ability of the Joint Board and other investigative entities to conduct investigations of alleged or suspected violations of the regulations governing the performance of actuarial services with respect to plans to which the Employee Retirement Income Security Act (ERISA) applies, and of civil or criminal laws. Making the accountings of disclosures available to individuals enables such individuals to identify entities investigating them and thereby to determine the nature of the violations of which they are suspected. With such knowledge, individuals would be able to alter their illegal activities, destroy or alter evidence of such activities and seriously impair the successful completion of investigations. For these reasons, the Joint Board seeks exemption from the requirements of subsection (c)(3).

(ii) With respect to subsections (d)(1), (e)(4)(H), and (f)(2), (3) and (5), the Joint Board believes that access to investigatory material would prevent the successful completion of investigations. Individuals who gain access to investigatory material involving them discover the nature and extent of the violations of regulations, and of civil and criminal laws, of which they are suspected. By gaining access, such individuals also learn the facts developed during investigations. Knowledge of these matters enables these individuals to destroy or alter evidence which would otherwise have been used against them. In addition, knowledge of the facts and suspected violations gives individuals, who are committing ongoing violations, or who are about to commit violations of regulations, or of civil or criminal laws, the opportunity to temporarily postpone the commission of the violations or to effectively disguise the commission of these violations. Material compiled on investigated individuals reveals investigative techniques and procedures, disclosure of which enables such individuals to structure their illegal activities so as to escape detection. Further, such material may contain, or by its very nature reveal, the identity of confidential sources. When the identities of confidential sources are revealed, they may be subjected to various forms of reprisal. If confidential sources of information are subjected to actual reprisals or fear thereof, they may become reluctant to provide information necessary to identify or prove the guilt of persons who violate regulations, or civil or criminal laws. Further, the protections afforded by the above-referenced subsections are unnecessary because the Joint Board may not deny enrollment or suspend or terminate the enrollment of an individual to perform actuarial services until it has provided such individual with due process safeguards. For the reasons stated in this subparagraph, the Joint Board seeks exemptions from the requirements of subsections (d)(1), (e)(4)(H), and (f)(2), (3) and (5).

(iii) With respect to subsections (d)(2), (3) and (4), (e)(4)(H), and (f)(4), the Joint Board believes that the imposition of these requirements, which presuppose access and provide for amending records, would impair the ability to conduct investigations and would be unnecessary for the same reasons stated in the preceding subparagraph (2)(B). These reasons herein are incorporated by reference. Therefore, the Joint Board seeks exemption from the requirements of subsections (d)(2), (3) and (4), (e)(4)(H), and (f)(4).

(iv) With respect to subsections (e)(4)(G) and (f)(1), the Joint Board believes that informing individuals that they are the subjects of a particular system or systems of records would impair the ability of the Joint Board and

its agents to successfully complete investigations of suspected or alleged violators of the regulations governing the performance of actuarial services with respect to plans to which ERISA applies. Individuals who learn that they are suspected of violating said regulations are given the opportunity to destroy or alter evidence needed to prove the alleged violations. Such individuals may also be able to impair investigations by temporarily suspending or restructuring the activities which place them in violation of said regulations. Further, as noted in preceding subparagraph (2)(B) and incorporated by reference herein, the procedural requirements imposed on the Joint Board by ERISA make the protections afforded by subsections (c)(4)(G) and (f)(1) unnecessary. For these reasons, the Joint Board seeks exemptions from the requirements of subsections (c)(4)(G) and (f)(1).

(v) Subsection (e)(1) of the Privacy Act of 1974 requires that the Joint Board maintain in its records only information that is relevant and necessary to accomplish a purpose of the Office required to be accomplished by statute or by executive order of the President. The Joint Board believes that imposition of said requirement would seriously impair its ability, and the abilities of its agents and other investigative entities to effectively investigate suspected or alleged violations of regulations and of civil or criminal laws. The Joint Board does not initiate inquires into individuals' conduct unless it receives information evidencing violation by such individuals of the regulations governing performance of actuarial services with respect to plans to which ERISA applies. Sources of such information may be unfamiliar with the Joint Board's interpretations of said regulations and, therefore, may not always provide only relevant and necessary information. Therefore, it may often be impossible to determine whether or not information is relevant and necessary. For these reasons, the Joint Board seeks exemptions from the requirement of subsection (e)(1).

(vi) Subsection (e)(4)(I) of the Privacy Act of 1974 requires the publication of the categories of sources of records in each system of records. The Joint Board believes that imposition of said requirement would seriously impair its ability to obtain information from such sources for the following reasons. Revealing such categories of sources could disclose investigative techniques and procedures and could cause sources to decline to provide information because of fear of reprisal, or fear of breaches of promises of confidentiality. For these reasons, the Joint Board seeks exemptions from the requirement of subsection (e)(4)(I).

CHAPTER IX—OFFICE OF THE ASSISTANT SECRETARY FOR VETERANS' EMPLOYMENT AND TRAINING, DEPARTMENT OF LABOR

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PART 1001—SERVICES FOR VETERANS

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AUTHORITY: 29 U.S.C. 49k; 38 U.S.C. chapters 41 and 42.

Subpart A—Purpose and Definitions

§ 1001.100 Purpose and scope of subpart.

(a) This subpart contains the Department of Labor's regulations for implementing 38 U.S.C. 2001–2012, chapters 41 and 42, which require the Secretary of Labor to provide eligible veterans and eligible persons the maximum of employment and training opportunities, with priority given to the needs of disabled veterans and veterans of the Vietnam era, through the public employment service system established pursuant to the Wagner-Peyser Act, as amended.

(b) This subpart describes the roles and responsibilities of the Assistant Secretary for Veterans' Employment and Training (ASVET) and the staff of the Veterans' Employment and Training Service (VETS).

(c) This subpart describes the performance standards for determining compliance of State agencies in carrying out the provisions of 38 U.S.C., chapters 41 and 42 with respect to:

(1) Providing services to eligible veterans and eligible persons to enhance their employment prospects,

(2) Priority referral of special disabled veterans and veterans of the Vietnam era to job openings listed by Federal contractors pursuant to 38 U.S.C. 2012(a), and

(3) Reporting of services provided to eligible veterans and eligible persons pursuant to 38 U.S.C. 2007(c) and 2012(c).

(d) Performance standards are contained in this part at §§ 1001.140–1001.142 on the conduct of the Disabled Veterans Outreach Program (DVOP) in accordance with 38 U.S.C. 2003A.

[49 FR 12919, Mar. 30, 1984. Redesignated and amended at 54 FR 39353, Sept. 26, 1989]

§ 1001.101 Definitions of terms used in subpart.

Assistant Secretary for Veterans' Employment and Training (ASVET) shall mean the official of the Department of Labor as described in § 1001.110 of this part.

Assistant State Director for Veterans' Employment and Training Service (ASDVETS) shall mean a Federal employee who is designated as an assistant to a State Director for Veterans' Employment and Training Service (SDVETS).

Disabled Veteran shall mean a veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Veterans Administration and whos

not classified as a Special Disabled Veteran.

Eligible person shall mean:

(1) The spouse of any person who died of a service-connected disability; or

(2) The spouse of any member of the armed forces serving on active duty who at the time of application for assistance under this subpart, is listed, pursuant to 37 U.S.C. 556 and the regulations issued thereunder, by the Secretary concerned, in one or more of the following categories and has been so listed for a total of more than 90 days: (i) Missing in action, (ii) captured in line of duty by a hostile force, or (iii) forcibly detained or interned in line of duty by a foreign government or power; or

(3) The spouse of any person who has a total disability permanent in nature resulting from a service-connected disability or the spouse of a veteran who died while a disability so evaluated was in existence.

Eligible veteran shall mean a person who (1) served on active duty for a period of more than 180 days and was discharged or released therefrom with other than a dishonorable discharge, or (2) was discharged or released from active duty because of a service-connected disability.

Local Veterans' Employment Representative (LVER) shall mean a member of the State agency staff designated and assigned by the State agency administrator to serve veterans and eligible persons pursuant to this subpart.

Regional Director for Veterans' Employment and Training Service (RDVETS) is the representative of the ASVET on the staff of the Veterans' Employment and Training Service (VETS) at the regional level; supervises all other VETS staff within the region to which assigned; and shall report to, be responsible to, and be under the administrative direction of the ASVET.

Service Delivery Point (SDP) shall mean a designated local employment service office which serves an area that may also contain extended service locations.

Special disabled veteran shall mean (1) a veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Veterans Administration for a disability rated at 30 percent or more, or (2) a person who was discharged or released from active duty because of a service-connected disability.

State agency means the State governmental unit designated pursuant to section 4 of the Wagner-Peyser Act, as amended, to cooperate with the United States Employment Service in the operation of the public employment service system.

State Director for Veterans' Employment and Training Service (SDVETS) is the representative of ASVET on the staff of the Veterans' Employment and Training Service (VETS) at the State level.

United States Employment Service (USES) shall mean the component of the Employment and Training Administration of the Department of Labor, established under the Wagner-Peyser Act, as amended, to maintain and coordinate a national system of public employment service agencies.

Veteran of the Vietnam era shall mean an eligible veteran who (1) served on active duty for a period of more than 180 days, any part of which occurred during the Vietnam era (August 5, 1964, through May 7, 1975) and was discharged or released therefrom with other than a dishonorable discharge; or (2) was discharged or released from active duty for a service-connected disability if any part of such active duty was performed during the Vietnam era.

Veterans' Employment and Training Service (VETS) shall mean the organizational component of the Department of Labor administered by the Assistant Secretary of Labor for Veterans' Employment and Training established to promulgate and administer policies and regulations to provide eligible veterans and eligible persons the maximum of employment and training opportunities according to 38 U.S.C. 2002.

[49 FR 12919, Mar. 30, 1984. Redesignated and amended at 54 FR 39353, Sept. 26, 1989]

Subpart B—Federal Responsibilities

§ 1001.110 Role of the Assistant Secretary for Veterans' Employment and Training (ASVET).

(a) As the principal veterans' advisor to the Secretary of Labor, the ASVET shall formulate, promulgate, and administer policies, regulations, grant procedures, grant agreements and administrative guidelines and administer them through the Veterans' Employment and Training Service (VETS) so as to provide eligible veterans and eligible persons the maximum of employment and training opportunities, with priority given to the needs of disabled veterans and veterans of the Vietnam era, through existing programs, coordination, and merger of programs and implementation of new programs.

(b) ASVET shall oversee activities carried out by State agencies pursuant to 38 U.S.C., chapters 41 and 42.

(c) ASVET shall ensure that appropriate records and reports are maintained by State agencies within their management information systems to fulfill their obligations under this subpart.

[49 FR 12919, Mar. 30, 1984. Redesignated at 54 FR 39353, Sept. 26, 1989]

Subpart C—Standards of Performance Governing State Agency Services to Veterans and Eligible Persons

SOURCE: 49 FR 12919, Mar. 30, 1984. Redesignated at 54 FR 39353, Sept. 26, 1989.

§ 1001.120 Standards of performance governing State agency services.

(a) To the extent required by 38 U.S.C. 2002 and other applicable law, each State agency shall assure that all of its SDPs, using LVERs and other staff, shall provide maximum employment and training opportunities to eligible veterans and eligible persons with priority given to disabled veterans and veterans of the Vietnam-era, by giving them preference over non-veterans in the provision of employment and training services available at the SDP involved. Services are those activities or efforts including but not limited to registration, counseling, referral to supportive services, job development, etc., which are directed to help applicants find jobs or training. When making referrals from the group of applicants meeting the specific eligibility criteria for a particular program, State agencies shall observe the priority order to referral in paragraph (b).

(b) In making referrals of qualified applicants to job openings and training opportunities, to provide maximum employment and training opportunities under 38 U.S.C., SDPs shall observe the following order of priority:

(1) Special disabled veterans;

(2) Veterans of the Vietnam era;

(3) Disabled veterans other than special disabled veterans;

(4) All other veterans and eligible persons; and

(5) Nonveterans.

§ 1001.121 Performance standard on facilities and support for Veterans' Employment and Training Service (VETS) staff.

Each State agency shall provide adequate and appropriate facilities and administrative support such as office space, furniture, telephone, equipment, and supplies to VETS staff.

§ 1001.122 Reporting and budget requirements.

(a) State agencies shall provide RDVETS, SDVETS, and ASDVETS with access to regular and special internal State agency reports which relate in whole or in part with services to veterans and/or eligible persons.

(b) Each State agency shall make reports and prepare budgets pursuant to instructions issued by the ASVET and in such format as the ASVET shall prescribe.

§ 1001.123 Performance standards governing the assignment and role of Local Veterans' Employment Representatives (LVERs).

(a) To carry out the requirements of 38 U.S.C. 2004, at least one member of each State agency staff, preferably an eligible veteran, shall be designated and assigned by each State agency administrator as a full-time or part-time LVER in each SDP in accordance with terms/requirements of a grant agreement approved by the ASVET. The

ASVET intends to use the following criteria in establishing the terms and requirements of grant agreements:

(1) At least one full-time LVER shall be assigned in each SDP which has had 1,000 new or renewed applications from veterans and eligible persons during the most recent twelve-month report period unless a waiver based on demonstrated lack of need is granted by the ASVET, and

(2) At least one part-time LVER whose time shall be devoted to veterans' services in proportion to the full-time criteria shall be assigned to each SDP not meeting the criteria for full-time LVERs in paragraph (a)(1) of this section.

(b) Additional full-time or part-time LVERs may be assigned based on a determination of need by the State agency administrator and in accordance with terms/requirements of a grant agreement approved by the ASVET.

(c) Each LVER shall perform, at the SDP level, the duties prescribed at 38 U.S.C. 2003(c) required by 38 U.S.C. 2004.

[49 FR 12919, Mar. 30, 1984. Redesignated and amended at 54 FR 39353, Sept. 26, 1989]

§ 1001.124 Standards of performance governing State agency cooperation and coordination with other agencies and organizations.

(a) Each State agency shall establish cooperative working relationships through written agreements with the Veterans Administration (VA) offices serving the State to maximize the use of VA employment and training programs for veterans and eligible persons.

(b) All programs and activities governed by this subpart will be coordinated to the maximum extent feasible with other programs and activities under 38 U.S.C., the Wagner-Peyser Act, the Job Training Partnership Act, and other employment and training programs at the State and local level.

(c) Such relationships or agreements may be described in the Governor's Coordination and Special Services Plan prepared according to section 121(b) of the Job Training Partnership Act (Pub. L. 97–300).

§ 1001.125 Standards of performance governing complaints of veterans and eligible persons.

Each SDP shall display information on the various complaint systems to advise veterans and eligible persons about procedures for filing employment service, Federal contractor, equal opportunity, and other complaints.

Subpart D—State Employment Service Agency Compliance

§ 1001.130 Determination of compliance.

(a) The ASVET shall have authority for applying the requirements and remedial actions necessary to implement 20 CFR part 658, subpart H. In the event of such application, references in 20 CFR part 658, subpart H, to ''ETA'' shall read instead ''OASVET''; references to ''Regional Administrator'' shall read instead ''RDVETS''; and references to ''JS regulations'' shall include this part.

(b) The ASVET shall establish appropriate program and management measurement and appraisal mechanisms to ensure that the standards of performance set forth in §§ 1001.120–1001.125 of this part are met. Specific performance standards designed to measure State agency services provided to veterans and eligible persons required by § 1001.120(a) of this part will be developed administratively through negotiations between State agency administrators and SDVETS and numerical values of the standards will be published as public notices in the FEDERAL REGISTER. A full report of those State agencies in noncompliance with the standards of performance and their corrective action plans shall be incorporated into the Secretary's annual report to the Congress cited at § 1001.131 of this part.

(c) Every effort should be made by the State agency administrator and the SDVETS to resolve all issues informally before proceeding with the formal process.

(d) If it is determined by the ASVET that certain State agencies are not complying with the performance standards at §§ 1001.120–1001.125 of this part, such State agencies shall be required to provide documentary evidence to

the ASVET that their failure is based on good cause. If good cause is not shown, the ASVET, pursuant to subpart H of 20 CFR part 658, shall formally designate the State agency as out of compliance, shall require it to submit a corrective action plan for the following program year, and may take other action against the State agency pursuant to subpart H of 20 CFR part 658.

[49 FR 12919, Mar. 30, 1984. Redesignated and amended at 54 FR 39353, Sept. 26, 1989]

§ 1001.131 Secretary's annual report to Congress.

The Secretary shall report, after the end of each program year, on the success of the Department and State agencies in carrying out the provisions of this part.

[49 FR 12919, Mar. 30, 1984. Redesignated at 54 FR 39353, Sept. 26, 1989, and amended at 54 FR 39354, Sept. 26, 1989]

Subpart E—Standards of Performance Governing the Disabled Veterans Outreach Program (DVOP)

SOURCE: 49 FR 12919, Mar. 30, 1984. Redesignated at 54 FR 39353, Sept. 26, 1989.

§ 1001.140 Administration of DVOP.

(a) The ASVET shall negotiate and enter into grant agreements within each State to carry out the requirements of 38 U.S.C. 2003A for support of a Disabled Veterans Outreach Program (DVOP) to meet the employment needs of veterans, especially disabled veterans of the Vietnam era.

(b) The ASVET shall be responsible forthe supervision and monitoring of the DVOP program, including monitoring of the appointment of DVOP specialists.

(c) DVOP specialists shall be in addition to and shall not supplant local veterans' employment representatives assigned under § 1001.123 of this part.

[49 FR 12919, Mar. 30, 1984. Redesignated at 54 FR 39353, Sept. 26, 1989, and amended at 54 FR 39354, Sept. 26, 1989]

§ 1001.141 Functions of DVOP staff.

Each DVOP specialist shall carry out the duties and functions for providing services to eligible veterans according to provisions of 38 U.S.C. 2003A (b) and (c).

§ 1001.142 Stationing of DVOP staff.

DVOP specialists shall be stationed at various locations in accordance with 38 U.S.C. 2003A(b)(2).

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625.10 Regulation at 55 FR 555 confirmed; (a)(1) and (b)(1) amended 22805
625.12 Regulation at 55 FR 556 confirmed 22805
625.13 Regulation at 55 FR 556 confirmed 22805
625.14 Regulation at 55 FR 556 confirmed 22805
625.20 Regulation at 55 FR 557 confirmed 22805
625.30 Regulation at 55 FR 557 confirmed; heading, (a) and (b)(1) amended 22805
625 Appendix A regulation at 55 FR 558 confirmed 22805
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629.57 (c)(1) amended 54708
636.10 (a)(1) amended 54708
655 Authority citation revised 24666, 54738, 56875
655.0 (c) redesignated as (a)(3); new (c) added; interim; effective to 12–31–91 24667
(d) added; interim 54738
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655.000 (a) amended; interim; effective to 12–31–91 24667
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655.520 Corrected; OMB number 29431
655.550 Corrected; OMB number 29431
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655.600—655.675 (Subpart G) Added; interim; effective to 12–31–91 ..... 24660, 24667
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655.800—655.855 (Subpart I) Added; interim 54734, 54738
655.900—655.950 (Subpart J) Added; interim 56865, 56876
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656 Authority citation revised 54927
656.1 (a) introductory text and (c) amended 54927
656.2 Revised; interim 54927
656.3 Redesignated from 656.50; amended; interim 54930
656.10 Introductory text amended; interim 54927
656.11 Introductory text amended; interim 54927
656.20 (d)(1)(ii)(B) removed; (d)(1)(ii)(B) redesignated as (d)(1)(ii)(A); (d)(1)(i), (ii)(A) and new (d)(1)(ii)(B) amended; (g) and (h) added; interim 54927

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656.21 (b)(3) removed; (b)(4) through (7) redesignated as (b)(3) through (6); (a) introductory text, (b)(1) introductory text, (c), (e), (f) introductory text, (1), (2), (g)(1), (i) introductory text, (1)(i), (2) through (5), (j)(2) and (k) amended; interim 54928
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656.22 Revised; interim 54929
656.23 (a), (b), (c), (d) introductory text and (1) amended; interim 54929
656.24 (a), (b)(2)(i) and (iii) amended; interim 54930
656.26 (c)(2) amended 54708
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656.28 Revised; interim, ... 54930
656.30 (b)(1), (c)(1), (2) and (d) amended; interim 54930
656.50 (Subpart E) Heading removed; interim 54930
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656.60 Amended 54930
658.424 (a)(3) amended 54708
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725.101 (a)(13) amended 54708
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801 Authority citation revised 54538
801.303 Revised 54538
802 Authority citation revised 54538
802.204 Amended 54538

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614.1 (a) amended; interim 59799
614.2 (g) revised; (p)(1) amended; interim 59799
614.3 (e) removed; interim 59799
(c) and (d) revised; interim 59800
614.4 (c) and (d) revised; interim 59800
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626 Revised; interim; effective to 6–1–93 62025
627 Revised; interim; effective to 6–1–93 62030

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628 Revised; interim; effective to 6–1–93 62052
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630 Removed; interim; effective 12–18–92 62061
631 Revised; interim; effective to 6–1–93 62062
637 Revised; interim; effective to 6–1–93 62072
655 Authority citation revised 1337, 40989
655.0 (d) amended 1337
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655.500—655.550 (Subpart F) Regulations at 56 FR 24654 and 24667 effective date extended through 3–31–92 183
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614.3 Regulations at 57 FR 59799 and 59800 confirmed 43783
614.4 Regulation at 57 FR 59800 confirmed 43783
614.27 Regulation at 57 FR 59800 confirmed 43783
626 Regulation at 57 FR 62025 eff. date revised; interim 31472
626.4 Table amended 69099
627 Regulation at 57 FR 62030 eff. date revised; interim 31472
627.900 Revised; interim 31472
627.902 (i) and (j) removed; (h) amended; interim 31472
627.904 (g) revised; (m), (n) and (o) added; interim 31472
627.906 (a) amended; interim 31473
628 Regulation at 57 FR 62052 effective date revised; interim 31472

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629 Regulation at 57 FR 62061 effective date revised; interim 31472
630 Regulation at 57 FR 62061 effective date revised; interim 31472
631 Regulation at 57 FR 62062 effective date revised; interim 31472
637 Regulation at 57 FR 62072 effective date revised; interim 31472
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638.301 (j) added 69100
638.302 Revised 69100
638.400 (a) revised 69100
638.401 (d) added 69100
638.539 (g)(1) revised 69100
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638.542 Existing text designated as (b); (a) added 69100
655 Authority citation revised 69228
655.700 (c) redesignated as (c)(1); (c)(2) added; interim 69228

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621.2 Regulation at 55 FR 50510 confirmed 897
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626.3 (a) amended 26600
626.4 Amended 26601
627 Revised; eff. in part 10–3–94 and 6–30–95 45821
628 Revised; eff. 6–30–95 45845
631 Revised; eff. 6–30–95 45857
637 Revised; eff. 6–30–95 45868
655 Regulation at 55 FR 50510 confirmed 897
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655.0 Regulation at 55 FR 50510 confirmed 897
655.1 Regulation at 55 FR 50510 confirmed 897
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655.204 (d)(2) revised 41876
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625.6 Revised; interim 25568
626 Authority citation revised 58229
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702.243 (b) amended 51348
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702.413 Revised 51348
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703 Authority citation revised 51348
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601.1 (d) added 19983
617.3 (ff) revised 19983
626.5 Amended 19983
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702 Authority citation revised 19984
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702.434 (a), (b) and (c) amended 19984

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702 Authority citation revised 53956
702.204 Revised 53956
702.236 Revised 53956
702.271 (a) revised 53956
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802.204 Amended 10666

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646 Added; interim 15988
656.3 Amended; eff. 5–4–98 13767
656.40 (b) introductory text amended; (c) redesignated as (d); new (c) added; eff. 5–4–98 13767
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652.8 (j)(1) and (5) amended; interim 18762
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654 (Subpart E) Authority citation revised 34965
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655.100 (a)(1) amended 34966
655.101 (c) introductory text, (1), (2) and (3) amended 34966
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