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October 5, 2009

Thomas M. Dowd
Administrator
Office of Policy Development and Research
U.S. Department of Labor
200 Constitution Avenue, N.W., Room N-5641
Washington, D.C. 20210

**Re: Trade Adjustment Assistance; Merit Staffing of State Administration
and Allocation of Training Funds to States; Proposed Rule
(RIN 1205-AB56)**

Dear Mr. Dowd:

In response to the United States Department of Labor's ("Department") request for public comments on this proposed rule, we are writing to express our strong opposition to the Department's proposed federal mandate that only state "merit" staff (also known as state Employment Service (ES) employees) administer TAA-funded benefits and services under the newly improved and expanded Trade Adjustment Assistance (TAA) for Workers program. *See* 74 Fed. Reg. 39198 (Aug. 5, 2009).

Our objections are grounded in the clear expression of Congressional intent on the state ES staff mandate issue in passing the Trade and Globalization Adjustment Assistance Act of 2009 (the "TGAA Act"), the Department's woefully insufficient rationale for imposing such a mandate, and our serious policy concerns over such a mandate and its implications for states. We urge the Department not to impose a state ES staff mandate (whether by rulemaking or contracts with the states) and instead, as Congress intended in passing the TGAA Act, allow each state to continue to choose how best to administer TAA, including by using a mix of staff as some 27 states plus Puerto Rico do today.

The Department's Proposed Federal Mandate Is Inconsistent With Congressional Intent Behind The TGAA Act

The TGAA Act enacted earlier this year was a bipartisan and bicameral compromise reached by leaders of the House Ways and Means and Senate Finance

Committees to improve and expand the TAA program. A crucial part of this compromise was the agreement of Senate and House conferees to drop the requirement in the 2007 House-passed legislation (H.R. 3920) that state ES staff administer the TAA program, which was not contained in bipartisan TAA legislation developed by Senate Finance Committee leaders.

The Department's proposed federal mandate is inconsistent with the clear intent of Congress behind this carefully negotiated legislation. The Department attempts to defend its proposed rule by stating that it "would restore what had been the long-standing practice [from 1975 until 2005] of using merit staffed [state ES] personnel to administer the TAA program." 74 Fed. Reg. at 39199. But the Department ignores Congress' actions in the TGAA Act: While the TAA law and its legislative history may have been silent on the state ES staff issue in the past, the TGAA Act and its legislative history ended this silence in rejecting the state ES staff mandate in the House-passed bill. See H.R. 3920, §§ 121(c), 127(d), 130(a). During Senate-House conference talks this year, House Democratic negotiators sought to include the mandate from the House-passed bill, but ultimately all Senate and House conferees specifically agreed to drop it and maintain the status quo – allowing each state to continue to choose how best to administer TAA services – so as to reach a final compromise. Moreover, the legislative history contains ample evidence of this view, with House Ways and Means Committee Republican Members objecting to such a mandate during Committee markup of this bill and in the Committee report accompanying the bill. See House Report No. 110-414 Part 1, at 116-129 (October 29, 2007).

In short, because Congress specifically considered and intentionally rejected such a mandate in passing the TGAA Act – which constitutes clear legislative intent on this issue – it is not within the Department's discretion to impose such a mandate now.¹ We are disappointed that the Department intends to reverse, rather than respect, this clear Congressional intent, especially because the rejection of this very mandate paved the way for the final TAA conference agreement supported by key House and Senate leaders in both parties and passed by Congress. Instead, the Department's proposed state ES staff mandate ignores, and even undermines, the bipartisan spirit in which the TGAA Act was negotiated and passed. Accordingly, we strongly urge the Department to not move forward with such a mandate.

¹ See, e.g., *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (stating that, in reviewing the permissibility of an agency's construction of a statute, "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.")

A federal district court presented with a similar question found that the fact that Congress had determined not to legislate with respect to requiring ES staff at the state level supported the court's conclusion that the Department's interpretation of the Wagner-Peyser Act to require state ES staffing was reasonable and permissible. *State of Michigan v. Herman*, 81 F. Supp. 2d 840, 849 (Western District, Michigan, 1998). But such is not the case here, as that court decision was made well before the demonstration of clear Congressional intent in the TGAA Act in 2009. Now that Congress has demonstrated its legislative intent as described above, the facts here are analogous to the facts considered by that same court with respect to administering the Wagner-Peyser Act at the federal level. As to that issue, the court noted the presence of Congressional intent when "Congress specifically withdrew a provision in the house and senate bills that required federal employees hired to carry out the provisions of the Act to be civil service employees." 81 F. Supp. 2d at 845.

The Department Fails To Provide A Credible Rationale For Its Proposed Federal Mandate

The Department summarily states in the proposed rule that the purpose of its proposed state ES staff mandate is “to promote consistency, efficiency, accountability, and transparency in the administration of the TAA program” and cites the significance of the principal-agent relationship between it and the states. 74 Fed. Reg. at 39199-39200. However, the Department fails to provide any evidence demonstrating why the current practice of allowing states to decide how best to administer TAA benefits and services is not working, not efficient, not ensuring accountability, not transparent, not ensuring consistency, and somehow undermines the principal-agent relationship today.

In fact, today, 27 states and Puerto Rico use a mix of state ES staff, local staff, and non-ES staff to provide TAA benefits and services, according to May 2009 data from the Department. Yet the Department fails to provide any evidence as to how these states are failing to further the purported purposes behind the Department’s proposed mandate or to fulfill the principal-agent relationship. This failure calls into serious question the evidentiary basis for the Department’s proposed mandate.

The Department’s Proposed Federal Mandate Raises Serious Policy Concerns

We also believe that the Department’s proposed federal mandate will have a profoundly negative impact on the 27 states and Puerto Rico that use a mix of staff to administer TAA benefits and services, particularly to conduct skill assessments as part of individual employment plans for TAA customers. A mandate to use state ES staff exclusively would mean that TAA-funded benefits and services can no longer be provided by local staff, private sector contractors, 501(c)(3) non-profit contractors, or faith or community-based organization contractors, as more than half of the states today do.

The proposed federal mandate would force Governors to disassemble service delivery systems built up over years to administer TAA, at potentially significant cost during these difficult economic times. While the Department states that it is providing TAA case management funds to states, the Department admits that there may be some costs to states using a mix of staff today because they would be required to use only state ES staff. It is incredible to us that the Department also admits that it “does not have data on which to give a reasonable estimate of these costs.” 74 Fed. Reg. at 39206. We question why the Department published its proposed rule with this mandate before gathering data on and better assessing its costs. Especially while so many states are already struggling to adequately serve what for many are record numbers of unemployed workers, this proposed staffing change is an unneeded, unwelcome, and counterproductive distraction, to say the least. Moreover, the Department’s proposed transition period for phasing in its proposed mandate would only serve to delay, not reduce, such costs and disruptions to states.

These 27 states plus Puerto Rico have determined that administering the TAA program as they have been doing is the most effective means of providing services to

their citizens. Specifically, the flexibility allows for a high degree of “one-stop” integration of functional services provided through the Workforce Investment Act (WIA), together with TAA. WIA staff are usually not part of the state ES system. Therefore, these 27 states and Puerto Rico would clearly have to fundamentally change their service delivery systems if required to terminate services through non-state ES staff. In such states, this would likely mean that TAA customers would have to be served by both a TAA case manager and a WIA case manager (versus by one WIA case manager providing TAA and WIA case management and related services today). Such a process would be duplicative, bureaucratic, and customer un-friendly, and at odds with the integration of services within local one-stop centers now.

The Department’s proposed mandate also would likely substantially reduce the quality of case management, skills assessment, and counseling services provided to TAA recipients today and, most importantly, impede their ability to rapidly and successfully return to work. We understand that customers who are enrolled in WIA receive more in-depth assessment, counseling, case management, and post-training assistance. By contrast, the assessments available to TAA customers through state ES staff are more limited in scope and depth. We also understand that state ES staff are not generally trained in vocational counseling, thus limiting the quality of ES-provided assessments, regardless of the type of assessment used. We further understand that assessments provided to customers co-enrolled with WIA are generally considered to be more in-depth and of higher quality because they are more likely to be provided by a staff person with some training in vocational counseling.

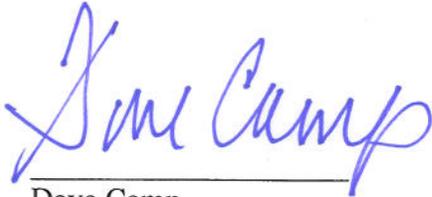
In short, the Department’s proposed mandate that TAA-funded benefits and services be administered only by state ES staff would make it very difficult for TAA participants to receive the full range of wrap-around services available under WIA and to obtain the very best counseling. As such, we believe that any such mandate would be completely inconsistent with the goal of ensuring that the newly improved and expanded TAA law helps individuals retrain and get back to work quickly and in good jobs.

Moreover, even those states that today use only state ES staff to provide all TAA benefits and services stand to be adversely affected by the Department’s proposed mandate. Such states have chosen to use only state ES staff at this time. However, the Department’s proposed federal mandate represents a national, “one size fits all” approach that takes away the ability of these states to make any different staffing choices in the future to provide the best TAA-funded benefits and services, if they determine that such changes are warranted and would better serve laid off workers.

For all the reasons explained above, we urge the Department not to mandate the use of state ES staff to provide TAA-funded benefits and services in all circumstances but instead to continue to allow each state to decide how best to administer the TAA program, which really means how best to assist citizens in need of these services to get back to work.

Thank you for the opportunity to submit these comments.

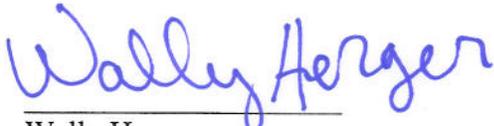
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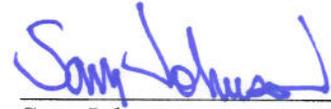
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Kevin Brady



Wally Herger



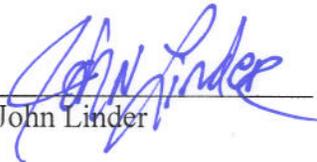
Sam Johnson



Paul Ryan



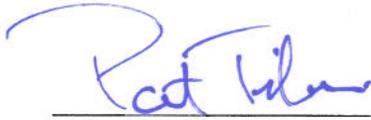
Eric Cantor



John Linder



Devin Nunes



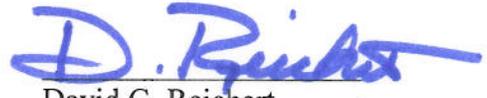
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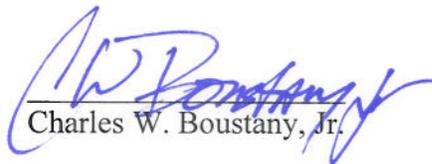
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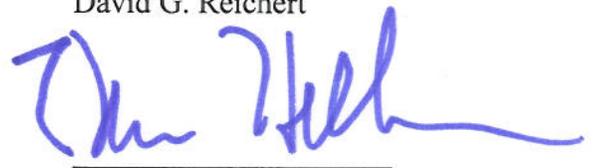
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