

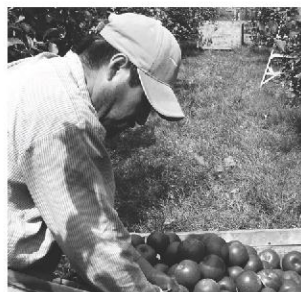
# 2020 AGRICULTURAL AND SEASONAL WORKFORCE SERVICES REPORT

ASWS Committee  
ASWS Office  
Domestic Recruitment  
Budget Overview  
Worker Perspective  
Employer Perspective



**Employment Security Department**  
WASHINGTON STATE

Agricultural and Seasonal Workforce Services Advisory Committee  
January 2021



# 2020 Agricultural and Seasonal Workforce Services Report

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This report was prepared in accordance with the Revised Code of Washington (RCW) [50.75.040](#), previously referred to as Senate Bill 5438.

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## I. Executive summary

The H-2A Program allows U.S. employers or U.S. agents who meet specific regulatory requirements to bring foreign nationals to the United States to fill temporary agricultural jobs. State Workforce Agencies (SWAs) are responsible for processing employer H-2A applications, recruiting domestic workers, and providing oversight of the H-2A program in coordination with other governmental entities.

Revised Code of Washington (RCW) [50.75.040](#) directs the Employment Security Department (ESD) commissioner to appoint an advisory committee comprised of eight voting members: four representing agricultural workers' interests, one of whom is a farmworker, and four representing agricultural employers, one of whom is an agricultural employer. One ex-officio member without a vote represents ESD as chair, and non-voting ex-officio members representing the Departments of Labor & Industries (L&I), Health, and Agriculture also serve on the committee.

The bill requires the committee to prepare a report that identifies and recommends approaches to increase the effectiveness of ESD's recruitment process as part of the H-2A application. The bill requires the report to include an analysis of the costs incurred by the Agricultural and Seasonal Workforce Services (ASWS) office established by the bill to administer the H-2A Program, the funds to administer other department programs for farmworkers, and the amount of funds allocated by the federal government to administer the H-2A Program and all other agricultural programs within the department.

This report also provides an overview of the committee's membership and meeting schedule, as well as activities related to the COVID-19 pandemic, which arrived in Washington state as the report was developed. This report further provides an overview of the newly established ASWS office responsibilities and status, as well as its response to the COVID-19 pandemic. Finally, the report provides worker, employer and shared perspectives on issues related to the state's role in the H-2A temporary agricultural program.

### Recommendations for ESD recruitment processes and systems

The committee thoroughly analyzed recruitment and referral processes, identified gaps, and considered improvement ideas. The committee provides the following recommendations:

- 1. The committee recommends that ESD help facilitate a faster connection of workers and employers through process changes including more direct and ongoing engagement with domestic job applicants.** The committee recommends using texting or apps commonly used by the farmworker community for recruiting and job matching, including using text alerts to notify farmworker applicants of new job openings. *ESD estimates the incremental cost of implementing a texting or app-based outreach to be \$150,000 the first year and \$72,000 each year following. The cost to implement these recommendations can otherwise be met with existing resources. The committee recommends they work with ESD to develop a Request for Information (RFI) to further scope and identify costs for text and/or app-based outreach to farmworkers.*
- 2. The committee recommends ESD directly inform employers of applicants for H-2A job openings, request a waiver from the U.S. Department of Labor (USDOL) to allow H-2A employers to manage and access their own recruitments through ESD's recruitment system, and establish measures to determine the impact and success of the change.** ESD manages H-2A recruitments on behalf of employers

through the WorkSourceWA system following federal guidelines. With other industries, employers manage their own recruitments in WorkSourceWA, which allows them to contact applicants directly. The Agricultural Recruitment System (ARS), relied upon by the H-2A Foreign Labor Certification process, requires ESD to test the local labor market by recruiting for H-2A positions, screening applicants, referring applicants directly to employers, and making the workers aware of their rights and obligations under the contract. By implementing these recommended changes, ESD will help facilitate a faster connection of workers and employers. *ESD does not project any cost to implementing this recommendation.*

3. **The committee recommends that ESD track job referral outcomes more consistently.** More thorough referral tracking and follow-up could be achieved through more proactive engagement with both employers and workers to obtain information regarding referral outcomes, to include outreach by phone or text to farmworker applicants who have been referred using an app to communicate with farmworker applicants. *The committee recommends it work with ESD to develop a Request for Information (RFI) to further scope and identify costs for text and/or app-based outreach to farmworkers. The cost to implement these recommendations can otherwise be met with existing resources.*
4. **The committee recommends that ESD complete a customer experience study to better understand the experience of farmworkers and employers in the ESD application and referral process.** The study should focus on hearing the farmworker and employer perspectives on barriers to accessing jobs, usability of ESD systems, and the disconnect between the number of available jobs compared to the number of successful referrals. *The cost of this recommendation remains to be determined as ESD works with the committee to further develop the study's parameters. The committee recommends ESD develop a Request for Information (RFI) and conduct focus group sessions to design a customer experience study.*
5. **The committee recommends that ESD create enhanced resources and best practices for employers to access in order to increase employer compliance with H-2A laws and rules, streamline hiring and help support employers in successfully meeting program requirements.** Activities would include providing template forms and letters, compliance tips, interview best practices, and sample interview questions. Best practices would focus on educating employers on common mistakes that have been made in the past and how to prevent those mistakes from happening. It is recommended that resources are provided once to all existing employers, provided to new H-2A employers in the future, and provided to employers by email at the time they set up new recruitments. *This cost is assumed in the ASWS office budget and tied into best practices to be provided by ASWS compliance staff in coordination with WorkSource.*
6. **The committee recommends enhancing employer training.** Training may include formal training sessions, communication about employer resources, making sure employers understand the resources available to them, creating designated points of contact for employers with questions, and building relationships for ongoing conversations and education. *This cost is assumed in the ASWS office budget and tied into best practices to be provided by ASWS compliance staff in coordination with WorkSource.*

## Budget

The ESD activities associated with the H-2A Program include reviewing and processing H-2A employer applications, coordinating housing inspections, conducting agricultural prevailing wage and employment practice surveys, outreach and training, field visits and field checks, domestic recruitment and employer verification, managing the employment service complaint process, and discontinuing services when warranted. These activities, as well as other activities that support domestic farmworkers, are funded by the federal Foreign Labor Certification and Wagner-Peyser grants, with state funding, including funds provided in RCW [50.75.040](#), supplementing those grants.

- **Foreign Labor Certification (FLC) Grant:** The ESD received \$400,000 in fiscal year 2019 and \$400,000 in fiscal year 2020 in FLC grant funding. The bulk of the funding provided by the grant is used for reviewing and processing applications for the H-2A and H-2B Programs. While some of the FLC grant is intended to fund survey work, field visits and field checks, the grant instructions only allow for up to 20 percent of the allocated funding (\$80,000 out of \$400,000 in fiscal year 2020) to be spent on these activities. Accordingly, the FLC grant provides inadequate funding for agricultural prevailing wage and employment practice surveys, field checks and field visits.
- **Wagner-Peyser Grant:** The Wagner-Peyser grant supports the state's one-stop system, comprised of WorkSource centers that provide universal access to an array of employment and training services, which are available to any job seeker. Any employer seeking workers is eligible for employer services. Funded activities are provided free of charge to both job seekers and employers through self-service, facilitated self-help services, or staff-assisted services. While duties associated with the ARS used to recruit domestic farmworkers, employment service complaints and the discontinuation of services have been largely funded by Wagner-Peyser, the extent to which that funding has paid for those activities has not been tracked by ESD.
  - ESD received \$15,040,605 in program year (PY) 2019 and \$15,891,995 in PY 2020 in Wagner-Peyser funding. While funding to Washington state has been constant (2.09 percent to 2.38 percent of the nationwide allocation) since PY 2010, the inflation rate has grown by 20 percent while the absolute amount has stayed flat. This means that the value of the federal grant has declined and current available funding is at least 10 percent less than 2010, even while costs have been increasing.
- **Wagner-Peyser 10 Percent:** The Workforce Innovation and Opportunity Act of 2014 requires the Wagner-Peyser grant expenditures to be split 90/10, with 90 percent intended to fund services and activities in the one-stop system, and 10 percent of the sum allotted to Washington state for use by the Governor for performance incentives, supporting exemplary models of service delivery, professional development and career advancement of ESD staff, and services for groups with special needs. In Washington state, Wagner-Peyser 10 percent funds (approximately \$1.58 M in PY 2020) are allocated for positions and services aimed at supporting the agricultural sector.
  - Wagner-Peyser 10 percent funding has largely been centered on funding Migrant Seasonal Farmworker (MSFW) outreach staff required by Wagner-Peyser federal regulations. MSFW staff are required to locate and contact MSFWs who are not being reached by the normal intake activities conducted by WorkSource offices and inform them of available employment services and rights, as well as provide direct assistance

to help them meet employment needs. The primary purpose of MSFW staff is to engage workers and employers where they congregate and initially process complaints. They are not trained as compliance staff. Accordingly, their outreach role is distinct from that of ASWS staff performing compliance outreach during field visits and field checks. The consistent presence of MSFWs in agricultural areas, however, make them a critical resource for collaborating with the ASWS office and maximizing services to agricultural employers and workers.

- **State funding:** ESD's budget consists primarily of federal funding. When federal funding is insufficient or is not available to support specialized employment service needs, ESD relies on state funding sources. State funding from the Employment Services Administrative Account (fund 134, also known as the Claimant Placement Program or CPP) is used by ESD to supplement Wagner-Peyser funding. State funding from CPP, as well as the Administrative Contingency Account (fund 120, also known as Penalties and Interest or P&I) is also used to supplement federal funding for the Agricultural Wage & Employment Practice Survey. In 2020, the survey cost \$698,437, of which \$302,446 was financed with state funds.
- **RCW 50.75.040:** In RCW [50.75.040](#), the legislature declared it to be in the public interest to provide adequate protections for foreign and domestic workers and to provide education and outreach opportunities to help growers maintain the stable workforce they need. The bill created the ASWS office to conduct H-2A Program administrative and oversight activities, as well as authorized funding for some of the work needed to develop and complete the annual Agricultural Prevailing Wage and Employment Practice Surveys. The ESD received \$3,487,432 in CPP funds in the 2019 to 2021 biennium and is requesting \$3,264,000 in CPP funds for activities in 2021 to 2023.

### Shared worker and employer perspectives:

Worker and employer representatives provide perspectives while also identifying the following shared perspectives pertaining to domestic worker placement, budget and oversight matters:

1. The committee believes ESD needs to improve its tracking and monitoring of quarterly domestic worker placements to ensure it is then conducting field checks as federally required (federal statute requires placement of a domestic worker to conduct a field check at an H-2A site).
2. The committee believes ESD needs to measure the impacts of implementing recommendations regarding employer resources and training. The committee intends to measure and track the impact of implementing these recommendations.
3. The committee will work with ESD to examine the allocation of the funding sources for the H-2A administrative functions, and identify gaps in funding and needed resources to address those gaps if they exist. ESD will evaluate the existing charging structure to determine how to more accurately track and report costs associated with H-2A activities.
4. The committee recommends that ESD work to develop mechanisms to strengthen and align coordination with other agencies to effectively and efficiently improve health, safety and working conditions in agriculture.

## II. Introduction

On May 21, 2019, Governor Jay Inslee signed Revised Code of Washington (RCW) [50.75.040](#) relating to establishing the office of Agricultural and Seasonal Workforce Services (ASWS) within the Employment Security Department (ESD). In establishing the office, the legislature declared it to be in the public interest to clarify the state's role in the H-2A temporary agricultural program to provide adequate protections for foreign and domestic workers and provide education and outreach opportunities to help the agricultural industry maintain the stable workforce they need.

The legislation further directed the commissioner to appoint an advisory committee to review issues and topics of interest related to the H-2A temporary agriculture program. The committee is comprised of eight voting members: four representing agricultural workers' interests, one of whom is a farmworker, and four representing agricultural employers, one of whom is an agricultural employer. One ex-officio member without a vote represents ESD as chair, and non-voting ex-officio members representing the Departments of Labor and Industries, Health, and Agriculture also serve on the committee.

The committee is charged with providing comment on department rulemaking, policies, implementation of the H-2A temporary agriculture program and initiatives, and studying issues it determines require consideration. In even years the committee is required to submit a report to the governor and the legislature by October 31st that:

- (a) Identifies and recommends approaches to increase the effectiveness of ESD's recruitment process as part of the H-2A application. If deemed advisable by the committee, the report may include recommended changes to state law that would lead to increased recruitment and hiring of domestic workers in agricultural employment in Washington; and
- (b) Analyzes the costs incurred by the office to administer the H-2A Program, the funds to administer other department programs for farmworkers, and the amount of funds allocated by the federal government to administer the H-2A Program and all other agricultural programs within the department.

In March 2020, the coronavirus (COVID-19) pandemic began to impact Washington and the work of the ASWS office, as well as the committee. This report meets the reporting requirements in RCW [50.75.040](#) while also documenting efforts to stand up the ASWS office, as well as the office and committee's response to the COVID-19 pandemic's impact on agricultural workers and employers.



### III. ASWS advisory committee meetings

#### Background

RCW [50.75.040](#) requires the commissioner to appoint members representing:

- Agricultural workers' interests from a list of at least four names submitted by a recognized statewide organization of workers,
- Agricultural employers from a list of at least 4 names submitted by a recognized statewide organization of agricultural employers.

The commissioner solicited and received nominations from the Washington State Labor Council and Washington Growers League. The first committee meeting was held on August 26, 2019.

#### Membership

For the period covered in this report, the following individuals served on the committee:

##### **Chair – Employment Security Department:**

- Dan Zeitlin, Director, Policy, Data, Performance and Integrity Division

##### **Agricultural Worker Representatives:**

- Michele Besso, Attorney, Northwest Justice Project
- Rosalinda Guillen, Executive Director, Community to Community
- Erik Nicholson, Vice-President, United Farm Workers

##### **Agricultural Farmworker:**

- Ramon Torres, President, Familias Unidas por la Justicia

##### **Agricultural Employer Representatives:**

- Jon DeVaney, President, Washington State Tree Fruit Association
- Michael Gempler, Executive Director, Washington Growers League
- Delia Peña, Director of Orchard HR and H-2A, Zirkle Fruit Company

##### **Agricultural Employer:**

- Rosella Mosby, Owner Operator, Mosby Farms

##### **Department of Labor and Industries Representative:**

- Uriel Iñiguez, Director, Community Relations

##### **Department of Health Representative:**

- Todd Phillips, Director, Environmental Health & Safety

##### **Department of Agriculture Representative:**

- Ignacio Marquez, Regional Assistant to the Director – Eastern/Central WA

## Meeting schedule

Committee meetings are subject to the Washington Open Public Meetings Act (OPMA) and all committee meetings covered in the period of this report were open to the public. The work of the committee, including the charter, committee procedures, approved minutes and recordings, can be found at: <https://www.esd.wa.gov/newsroom/Ag-committee>.

Meetings were initially scheduled once a month as in-person meetings with locations varying throughout Washington. Due to the COVID-19 pandemic, the majority of the sessions were conducted virtually and increased in frequency (*Figure 1*).

**Figure 1.** Meeting dates, times, and locations  
Washington state, 2019 to 2020  
Source: Employment Security Department

Date <sup>1</sup>	Location	Host	Notes
August 26, 2019	Olympia	ESD	212 Maple Park Ave SE, Maple Leaf
October 17, 2019	Olympia	ESD	304 15 <sup>th</sup> Ave SW, JAC ABC Room
November 22, 2019	Union Gap	WorkSource	WorkSource Yakima, 1205 Ahtanum Ridge Dr, Suite A
December 19, 2019	<i>Cancelled</i>		<i>No meeting</i>
January 16, 2020	<i>Cancelled</i>	<del>Rosalinda Guillen</del>	<del>WorkSource Skagit</del>
February 20, 2020	Olympia	ESD	212 Maple Park Ave SE, Maple Leaf
March 19, 2020	SKYPE		
April 2, 2020 <sup>2</sup>	SKYPE		
April 9, 2020 <sup>2</sup>	SKYPE		
April 16, 2020	SKYPE		
April 23, 2020 <sup>2</sup>	SKYPE		
May 7, 2020 <sup>2</sup>	SKYPE		
May 21, 2020	SKYPE		
June 4, 2020 <sup>2</sup>	SKYPE		Recorded meeting <sup>3</sup>
June 18, 2020	SKYPE		Recorded meeting <sup>3</sup>
July 2, 2020 <sup>2</sup>	SKYPE		Recorded meeting <sup>3</sup>
July 16, 2020	SKYPE		Recorded meeting <sup>3</sup>
July 30, 2020 <sup>2</sup>	SKYPE		Recorded meeting <sup>3</sup>
August 20, 2020	<i>Postponed</i>		Rescheduled August 27, 2020
August 27, 2020	<i>Rescheduled</i>		Rescheduled to Sept. 3, 2020 due to lack of quorum
September 3, 2020 <sup>2</sup>	SKYPE		Recorded meeting <sup>3</sup>
September 17, 2020	SKYPE		Recorded meeting <sup>3</sup>
October 1, 2020 <sup>2</sup>	SKYPE		Recorded meeting <sup>3</sup>
October 15, 2020	<i>Cancelled</i>		
October 29, 2020	SKYPE		Recorded meeting <sup>3</sup>
November 4, 2020 <sup>2</sup>	SKYPE		Recorded meeting <sup>3</sup>
November 19, 2020	SKYPE		Recorded meeting <sup>3</sup>
December 17, 2020	SKYPE		Recorded meeting <sup>3</sup>

<sup>1</sup> Third Thursday, unless otherwise indicated.

<sup>2</sup> Extra meeting scheduled due to COVID-19 pandemic.

<sup>3</sup> Meetings are being recorded as of Advisory committee vote on 5/21/2020.

## COVID-19 response

Committee meetings in 2019 and February 2020 established the committee charter, values and expectations followed by discussions concerning domestic recruitment and referral, as well as agricultural employment data. With the onset of COVID-19, the committee's focus shifted in March and April 2020 to weekly meetings to discuss the needs of agricultural workers and employers in the face of the pandemic. While the committee's focus returned to the report in May, COVID-19, as well as wildfire response discussions, remained on the agenda.

Following initial deliberations, the committee wrote a memo on March 19, 2020 urging the Governor to declare food production an essential operation and the health and safety of the workers, managers and owners involved as a priority (*Appendix 1*).

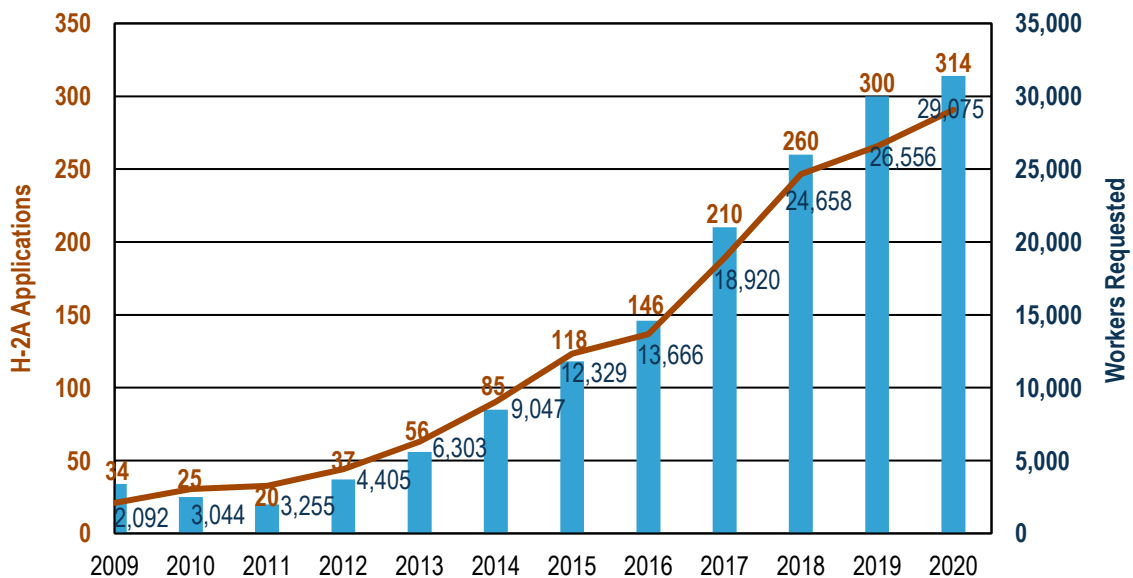
The committee continued with in-depth discussions with the Governor's office and relevant agencies related to quarantine, childcare, unemployment coverage, paid sick leave, paid family medical leave, requests for cleaning and sanitation supplies, requests for assistance to clinics/hospitals for capacity, and protections for farmworkers. The committee also held in-depth discussions concerning changes to temporary housing requirements to align with COVID-19-related public health and safety measures.

## IV. Agricultural seasonal workforce services office

### Background

The committee made a priority of identifying the number of H-2A workers in Washington. As they believe it is important for determining resources needed for the ASWS office and COVID-19 response. While ESD reviews employer applications for H-2A workers, the U.S. Department of Labor (USDOL) approves applications, the U.S. Department of State issues H-2A visas and the U.S. Department of Homeland Security admits H-2A workers into the United States. Data on the number of workers in Washington is not made available by the federal government, and the ASWS office was therefore reliant on a point-in-time voluntary survey of employers to estimate there were approximately 18,178 workers in Washington as of September 15, 2020. The number of H-2A applications in recent years has significantly increased as well as the number of workers requested (*Figure 2*).

**Figure 2.** Number of H-2A applications\* and workers requested Washington state, 2009 through 2020  
Source: Employment Security Department, Employment Connections Division



\*These numbers exclude goat and sheep herder applications through 2018.

### ASWS office responsibilities

In establishing the ASWS office, the legislature found that the agricultural industry in the state of Washington has more than one hundred thousand jobs<sup>1</sup> per year and brings more than \$7 billion of economic activity<sup>2</sup> to the state. The legislature further found that the number of the H-2A temporary agricultural workers coming into the state of Washington to harvest crops has grown by more than 1,000 percent since 2007,<sup>3</sup> and the funding provided by the federal

<sup>1</sup> [Quarterly Census of Employment and Wages \(QCEW\)](#)

<sup>2</sup> [U.S. Bureau of Economic Analysis \(BEA\)](#)

<sup>3</sup> [Engrossed Second Substitute Senate Bill 5438 7-28-2019](#)

government is insufficient to adequately ensure the protection of workers and growers. The legislature also found the need to ensure this growth does not have an adverse impact on the domestic agricultural labor force.

Accordingly, the ASWS office was established in RCW [50.75.040](#) to provide for:

- Processing and adjudicating foreign labor certification applications from employers;
- Processing complaints consistent with [20 CFR Part 658 Subpart E](#);
- Conducting field checks and field visits, as required by the United States Department of Labor (USDOL). When conducting a field check, the office shall coordinate, to the extent possible, with the Department of Labor and Industries (L&I), Department of Health (DOH), and Department of Agriculture (WASDA) in order to limit disruption to agricultural employers and efficiently use government resources;
- Administering the discontinuation and reinstatement of services process pursuant to [20 C.F.R. Part 658, Subpart F](#); and
- Conducting training and outreach activities to employers who are using agricultural and seasonal workforce services and programs within the Employment Security Department.

### ASWS office status

The ESD, with the advice of the committee, hired an ASWS office director who assumed the position on January 1, 2020. The director has 2.5 full-time equivalent (FTE) staff that process and adjudicate foreign labor certification (FLC) applications from employers as required in federal statute ([20 CFR 655.121](#) and RCW [50.75.040](#).) These positions are funded by the federal government through the FLC Grant (detailed below). The FLC staff processed 314 foreign labor certification applications in federal fiscal year 2020 (October 1, 2019 through September 30, 2020).

The ASWS office also includes the Washington State Monitor Advocate (SMA), a position responsible for ensuring domestic migrant and seasonal farmworkers (MSFWs) have equitable access to career services, skill development, and workforce protections offered by WorkSource centers, so they may improve their living and working conditions. The position is funded by the federal government through the Wagner-Peyser Grant (detailed below) and is housed in the ASWS office to ensure enhanced coordination between foreign and domestic farmworker program oversight and administration of services to both populations.

The ASWS office began recruiting in October 2020 to hire compliance positions to meet the requirements in RCW [50.75.040](#) to process complaints, conduct field checks and field visits, administer the discontinuation and reinstatement of services, and conduct training and outreach activities to employers. These recruitments were delayed by the COVID-19 pandemic which led to the closure of ESD offices on March 17, 2020, with staff moving to remote work, and the primacy placed by ESD on re-positioning existing staff and hiring new staff to serve a sudden and unprecedented increase in unemployment benefit claimants. The recruitment of four compliance positions should be completed in 2021, and the ASWS office will gradually make further hires with the goal of completing recruitment of the remaining compliance positions by April 2021.

The ASWS office established strategic priorities that will guide its work in meeting the intent of RCW [50.75.040](#):

- **Strategic alignment** – Create strategic regional enforcement, training, and administrative positions to work with agricultural employers, farmworkers, and key stakeholders to ensure compliance with the H-2A Program requirements. These positions will fill a compliance and training gap by supporting farmworkers and employers to ensure adherence to the employment and worker safety requirements needed to secure an ample supply of agricultural labor to the state of Washington and food source for all. This realignment will move ESD closer to its vision of being “the nation’s best and most future-ready workforce with opportunities for all.”
- **Training and technical assistance** – Work with internal and external stakeholders to develop training and technical assistance curriculum. This will ensure ESD staff and partners are well equipped to assist farmworkers and agricultural employers who participate in the H-2A Program. The training will encompass topics such as the Wagner-Peyser complaint system, requirements and assurances of the H-2A Program, state and federal employment laws (to include state and federal agencies), the agricultural recruitment system, workforce development system, and community resources available to farmworkers and agricultural employers.
- **Outreach to employers** – Provide technical assistance, information, and resources to employers. Federal and state laws are constantly changing, and agricultural employers are not always made aware of the new requirements that would allow for compliance. Conducting outreach to employers and providing them with value-added information and resources will enable ESD to build the strong working relationships that are necessary to ensure the H-2A Program will be successful and allow for the resolution of farmworker complaints at the lowest possible level. Such outreach, in coordination with other state agencies, will also help employers by providing further resources when emergencies arise. For example, the COVID-19 pandemic requires more coordination with health districts, clinics, and state agencies to ensure employers can provide a safe working environment that protects worker health.
- **Communications strategy** – Develop a uniform statewide message delivered via multiple avenues, including the radio, Facebook, Twitter, WhatsApp, flyers, and in person. This would ensure that ESD reaches farmworkers and agricultural employers who engage in the H-2A Program while allowing state and federal agencies to learn and share the services available to farmworkers and agricultural employers. This coordinated communication approach will allow ESD to better respond to employer and farmworker needs, questions and concerns.

## COVID-19 response

In response to the COVID-19 pandemic, the ASWS director conducted significant engagement with groups that support farmworkers and farmworker families. They met with clinics, advocate groups, health districts, hospitals, and other key organizations active in Washington, as well as Oregon, including the Tri-Cities Immigrant Coalition, COVID-19 Supporting Farmworker and Farmworkers’ Families, Migrant Advisory Group, and other stakeholders.

In addition, in May 2020, there were strikes at processing plants in Yakima, Washington. These concerns were related to unemployment insurance and safety at the workplace. The safety concerns alleged lack of social distancing, lack of masks, employers selling masks to workers, lack of personal protective equipment and employers not allowing use of paid sick leave. The ASWS also coordinated with Labor and Industries for safety inspections relating to the concerns and issues brought to the attention of ESD. There were two violations that were cited by Labor and Industries.

In June 2020, at the request of Familias Unidas por la Justicia, further outreach was conducted with the ASWS director and staff, along with partner agencies in Grandview, Washington. The ASWS office provided information on ESD programs, including unemployment benefits, Paid Family Medical Leave, the Washington State Monitor Advocate, and complaint forms. There were four complaints filed by farmworkers and follow-up was conducted.

The outreach continued in July 2020 by ESD staff which included the ASWS director and Labor and Industries' Community Relations team. This outreach was in Brewster, Washington, and followed-up concerns that farmworkers did not have access to COVID-19 testing and did not have access to economic and health program resources. Both ESD and L&I were able to provide information to farmworkers on relevant programs.

In August 2020, there were continued efforts made with ESD MSFW staff, the State Monitor Advocate and the ASWS director on two separate visits to two farms with four different housing units and one worksite. One visit was to assess that workers had information relating to COVID-19 and knew the support programs that they may qualify for in case of infection. There were over 200 workers visited, including those in quarantine. The second visit included coordinated efforts providing oversight of mandated COVID-19 testing<sup>4</sup> on Gebbers Farms in Brewster, Washington. ESD, along with the DOH<sup>5</sup> and L&I, provided information related to programs and resources to over 2,000 workers for four days from August 21st through the 24th. The ASWS director assisted in language that developed the fact sheet for workers relating to H-2A employer requirements.

In September 2020, there were wildfires that affected mostly Okanogan County. This event impacted agricultural workers, including necessitating the delivery of KN95 masks, as cloth masks were insufficient for the smokey air that was surrounding the area. In coordination with the Washington State Governor's Office, ESD and local advocates were able to obtain KN95 masks which were provided to farmworkers for their protection and well-being during the fires.

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<sup>4</sup> [Inslee issues proclamation requiring agricultural worker testing.](#)

<sup>5</sup> [Order of the Secretary of Health 20-04 Gebber Farms – Covid-19 Testing of Workers](#)

## V. Domestic recruitment

RCW [50.75.040](#) (4)(a) requires the committee to include in this report a section that “Identifies and recommends approaches to increase the effectiveness of the Employment Security Department’s recruitment process as part of the H-2A application. If deemed advisable by the committee, the report may include recommended changes to state law that would lead to increased recruitment and hiring of domestic workers in agricultural employment in Washington.”

This section of the report includes an overview of domestic recruitment and verification processes, as well as recommendations from the committee to increase the effectiveness of ESD’s domestic recruitment and referral processes as part of the H-2A Program.

Domestic worker recruitment is a federally required part of the H-2A foreign labor certification process to ensure there is a test of the local labor market before granting an employer access to foreign workers. The recruitment process is also intended to ensure domestic workers are given priority over foreign workers.

### Domestic recruitment process overview

Committee meetings on November 22, 2019 and February 20, 2020, provided members and the general public with an overview of the domestic recruitment and referral process. These briefings provided the foundation from which the committee considered recommended approaches to increase the effectiveness of ESD’s recruitment process as part of the H-2A application.

### Recruitment process

The H-2A Program is governed by federal requirements and implemented through a federal-state partnership involving the USDOL and State Workforce Agencies (SWAs). Domestic recruitment processes are generally governed by federal guidance.

As of October 2020, a prospective H-2A employer submits an application for foreign workers through the [USDOL Foreign Labor Application Gateway \(FLAG\)](#) system no less than 60 and no more than 75 days in advance of the date of need. Upon submission, the FLAG system automatically issues the employer’s application to the appropriate SWA, which in Washington is ESD, for review and approval.

Once that occurs, the ASWS office issues the application to the local WorkSource office that serves the area that has the highest number of worksites identified in the application. This local WorkSource office is responsible for creating a job order on WorkSourceWA that summarizes information such as the duration of employment, job requirements, work schedule, wages and benefits. To comply with federal rules, the local WorkSource office suppresses the name of the employer from job orders ([20 CFR 653.501\(b\)\(2\)](#)). Upon approval from the ASWS office, ESD opens the job order and initiates recruitment of domestic workers. The designated local WorkSource office is the lead office responsible for the recruitment and referral of workers.



Approximately 30 days before the date of need, the USDOL reviews progress made toward filling the desired positions and makes a labor certification determination, approving positions for employers that were not filled during that initial recruitment period. Beyond this initial submission, the employer is required to keep this recruitment report updated until 50 percent of the period of work lapses. The report must be made available for post-certification audits and upon request by authorized representatives, namely USDOL. Elements of the report need to include:

1. The name of each recruitment source;
2. The name and contact information of each referral or applicant and disposition (hired/not hired/no show to the employer, etc.) of each worker;
3. Confirmation that the employer's former U.S. workers were contacted and by what means; and
4. A lawful job-related reason for not hiring any U.S. worker who applied for the position, but was not hired.

Concurrently, USDOL requires ESD staff to upload a recruitment report into the FLAG system no later than 32 days before the date of need or start of the contract. This report contains the names of the applicants referred, contact information, date of referrals, and outcome of the referrals (hired/not hired/no show to the employer, etc.).

An employer's obligation to engage in positive recruitment concludes on the date H-2A workers depart for the employer's place of work which is generally considered to be three days prior to the start date of the contract. Employers, however, must continue to hire all able, willing and qualified workers who apply for positions requested until 50 percent of the work ends. An employer may only reject applicants for lawful, job-related reasons (*Appendix 2*).

As of October 21, 2019, employers are no longer required to recruit by using newspaper advertisements. Instead, USDOL will advertise the employer's job opportunity on [seasonaljobs.dol.gov](https://seasonaljobs.dol.gov), which is an expanded version of USDOL's electronic job register.

### **Referral verification process**

A critical part of the H-2A recruitment process is verifying the outcome of the SWA's referral of U.S. workers. Verification of referral outcomes serves multiple purposes, including ensuring that qualified U.S. workers are interviewed and hired, identifying compliance issues when qualified referrals are not hired, providing information to the USDOL upon request, and providing the information that ESD needs in order to conduct field checks, which are contingent on domestic worker job placements at H-2A worksites. Without the verification of referral outcomes, ESD is unable to meet its responsibilities under the H-2A Program (*Appendix 3*).

When an applicant submits a resume to WorkSource on WorkSourceWA.com, a record of their interest in the job opportunity is recorded in the employer job order. WorkSource staff in the appropriate office then receive an email notifying them that there is a candidate that needs to be screened. As part of the recruitment and referral process, WorkSource staff review the applicant's materials and determine if the individual is qualified. If the individual is not qualified, WorkSource staff change the status of the application to "Reviewed," and the process ends. If WorkSource staff determine that the applicant does meet the minimum qualifications of the job, staff refer the applicant and provide them with employer contact

information, a side-by-side document in both English and Spanish with all of the relevant information on the job opportunity and their rights to H-2A jobs. Applicants are also given information on how to file a complaint in the event they believe they were not hired by an employer for a legitimate reason. Once an applicant is referred to an H-2A job opportunity, the status of the applicant is changed to “Referred” in the job order.

After an applicant is referred to the H-2A job, staff from the referring office will follow up with the customer and/or the employer to determine if the applicant contacted the employer and, if so, the results of the contact. The federal USDOL regulations are not specific as to how soon an employer is required to interview an applicant or inform them of the results of the interview. For this reason, ESD staff usually wait up to a week for the initial follow-up with the applicant. At times, it is difficult to contact the applicant directly, and staff need to rely on the employer’s version of what occurred, including whether the applicant contacted the employer or not. This can make reliable verification difficult.

As noted above, staff attempt to verify whether the applicant contacted the employer, if they were interviewed, if they were offered a job, if they were hired, and if they began work. Determining the status of the referral at various points in the process helps to identify potential compliance issues and ensure that qualified U.S. workers are hired. If at any point in the process WorkSource staff receive a complaint from the applicant about the employer’s hiring process or become aware of an apparent violation of employment law or H-2A regulations, staff will conduct fact finding. Verifying that a violation by the employer occurred can potentially result in the applicant being hired, a referral to an enforcement agency, and/or the discontinuation of employment services by ESD.

Staff are expected to contact the applicant when the H-2A contract starts to confirm that they have begun work. If staff verify that the applicant has gone to work for the employer, the status is changed to “Hired” in the job order. This indicates a placement and will trigger a possible field check on the job order. ESD’s client management system, Efforts to Outcomes (ETO), provides a report that WorkSource and ASWS office staff can run that shows the status of all applicants, including placements on H-2A and H-2B job orders. This report can be run periodically in order to determine H-2A job orders on which field checks can be performed.

*Figure 3* provides a summary of H-2A job postings and applicants. The data highlights key issues mentioned in the “Recruitment and Referral Verification Process Gaps” section below such as:

1. The percentage of individuals referred by ESD to an employer from 2016 to 2019 ranges between 12 to 28 percent of those that applied. The committee will continue to explore drivers for the low percentage of placements. This low referral rate is due to individuals not being determined to be qualified by ESD or instances where the screening process was not completed.
2. From 2016 to 2019, between 14 to 27 percent of applications referred, after being determined to be qualified by ESD, resulted in a hire/placement. The committee will continue to explore drivers for the low percentage of placements.
3. The requirement to confirm a placement prior to conducting a field check limited ESD’s authority to 4 to 13 H-2A job orders per year between 2016 to 2019.

**Figure 3.** Annual summary of H-2A job order referral and hiring activity  
 Washington state, calendar years 2016 through 2019  
 Source: Employment Security Department, Employment Connections Division

Year	Job orders	Total applications made to job orders	Job orders with at least one applicant	Number of individuals applying	Applications referred to employer	Individuals referred to employer	Total hires (placements)	Number of job orders with hires
2016*	151	75	42	54	18	15	4	4
2017	286	583	155	325	104	80	11	8
2018	234	642	199	331	52	41	9	7
2019	314	1318	226	585	110	92	19	13

\*ESD transitioned to the ETO case management system.

### Field checks and field visits

Field checks and field visits are two key activities that are important for ensuring adequate protection for H-2A foreign and domestic workers while also providing education and outreach to employers. Per RCW [50.75.040](#), these activities are defined as follows:

- “Field check” means an unannounced inspection and audit of an employer to determine and document whether the employer is providing wages, hours, and working and housing conditions as specified in the employer’s approved H-2A application, as required by the USDOL.<sup>6</sup>
- “Field visit” means a scheduled visit to an employer’s premises where H-2A workers work, live, and gather to discuss employment services and other employment related programs with workers, as required by the USDOL.<sup>7</sup>

To be granted authority for a field check, ESD must confirm that a WorkSource referral on a WorkSource job order has been hired (known in federal regulations as “placements”). Upon confirmation, ESD must notify the employer in writing that ESD, and/or federal staff, must conduct random, unannounced field checks to determine and document whether wages, hours, working and housing conditions are being provided as specified in the clearance order.

The extent to which ESD is required to conduct field checks is dependent on the extent to which it is able to confirm placements. If ESD made placements on 10 or more agricultural clearance orders during the calendar quarter, then ESD must conduct field checks on at least 25 percent of the total of such orders. Where ESD has made placements on nine or fewer job orders during the quarter (but on at least one job order), ESD must conduct field checks on 100 percent of all such orders. This requirement must be met on a quarterly basis. Field checks must include a visit to the worksite at a time when workers are present. When conducting field checks, ESD staff must consult both the employees and the employer to ensure compliance with the full terms and conditions of employment. More information on field checks is provided in [20 CFR 653.503](#).

<sup>6</sup> [20 CFR 653.503](#)

<sup>7</sup> [20 CFR 653.107](#)

Figure 4 provides a summary of the number of field checks conducted by ESD from 2016 through 2019. As noted in the previous section, ESD only had authority to conduct field checks on approximately 4 to 13 H-2A job orders per year between 2016 and 2019. For 2016, five field checks were done despite placements being reported on four job orders which is likely the result of ESD’s transition from the Service, Knowledge and Information Exchange System (SKIES) case management system to the ETO case management system in 2016. Data in the SKIES system was not included as part of Figure 3, which included additional referral and placement data. **The committee believes ESD needs to improve its tracking and monitoring of quarterly placements to ensure it is then conducting field checks as federally required.**

**Figure 4.** Field checks and field visits conducted by ESD  
Washington state, calendar years 2016 through 2019  
Source: Employment Security Department, Employment Connections Division

Program year	H-2A job orders	Number of job orders with hires	Minimum number field checks required by USDOL	Field checks	Field visits
2016*	151	4	-	5	Data unavailable
2017	286	8	8	2	Data unavailable
2018	234	7	7	0	Data unavailable
2019	314	13	13	1	Data unavailable

\*ESD transitioned to the ETO case management system.

To conduct field checks, ESD relied on staff that are not formally trained in conducting compliance activities given that WorkSource staff primarily focus on helping workers connect to employment, training and community resources. The intent of the ASWS office is to create a team that includes staff that are trained in conducting inspections and investigations. Training will need to encompass skills such as interviewing techniques, evidence collection, reporting standards, maintaining audit records, providing detailed findings, and more.

Unlike field checks, field visits do not require a placement for ESD to be granted authority to meet with workers and employers on site. Under federal statute, H-2A employers are required to allow ESD staff access to employment and housing sites as a condition for participating in the H-2A Program ([20 CFR 653.501](#)). While ESD may achieve more placements, and in turn more field checks, by adopting recommendations made by the committee and otherwise, necessary outreach and education can be achieved through field visits. In 2019, there were 300 H-2A applications filed by 254 employers with over 1,600 work and housing sites. By conducting field visits to these sites, ESD would be able to achieve a higher level of engagement benefiting both workers and employers.

### Recruitment and referral verification process gaps

The labor market test and domestic worker recruitment requirements are designed to protect job opportunities for U.S. workers. Below are common gaps identified by the committee:

1. **The USDOL labor market test** – H-2A regulations ([20 CFR 655](#) Subpart B) require positive recruitment to begin approximately 60 days before work is intended to start. Approximately 30 days later, USDOL decides how many positions to certify based on the number of job seekers ESD and the employer report to have been placed on the

job. It is not customary for agricultural seasonal job seekers to apply for jobs that are set to start in 30 to 60 days. Most field workers look to start work immediately and may not apply for these jobs as a result. Furthermore, employers have communicated that some workers that are hired well in advance of the date of need do not show up for work, which at times results in an employer losing certification for a needed position.

2. **Commitment to fulfill the contract** – While some workers appreciate having the guarantee of work during a certain period of time, some workers have communicated that the commitment to work the entire period of the contract has a discouraging impact, especially in today’s environment where many workers are accustomed to working for employers that pay the best wage rates. Some of the contracts last over six months and cover multiple crops and activities. Committing to a single employer limits their mobility within the market. Employers have stated that the commitment to work the full contract is critical to meeting their needs and consistent with the expectation being set for foreign workers.
3. **Inconsistent ESD follow-up on referrals** – ESD staff have been inconsistent in following up on referrals to employers and recording referral outcome information in ETO, the case management system. A key focus of the ASWS office, in coordination with existing labor exchange staff, is to update policies, procedures, and training, as well as accountability for properly managing referrals.
4. **ESD Oversight** – ESD is federally required to process complaints per [20 CFR 655.185](#) and apparent violations per [20 CFR 658.419](#), as well as to conduct field checks and field visits per [20 CFR 653.503](#). A key focus of the ASWS office, in coordination with WorkSource offices, is to update policies, procedures, and training, as well as accountability, to ensure more timely fact-finding and follow-up on apparent violations of employment law. This will allow follow-up on domestic referrals and job placements with the employer, as well as provide for review of workers who have separated from the employer.
5. **WorkSourceWA.com registration** – To refer a job seeker to an H-2A job in a manner that is trackable in the WorkSource system, a job seeker must have a WorkSourceWA.com account. This requires a job seeker to have some computer literacy, an email account and a resume. In situations where workers do not want to or are unable to establish an account, a referral may still be made. ESD staff do not enter this information into the ETO. Moreover, even if the account is established by the worker, they cannot apply directly and must be screened by an ESD staff member and then referred to the employer if qualified for the position.
6. **Domestic worker loss of confidence** – Given the prevalence of H-2A and, in some cases, the sense that foreign workers receive preference, some domestic workers communicate being discouraged from applying for job opportunities on H-2A sites.
7. **Inconsistent employer follow-up** – While responsive during the labor market test phase of recruitment, some employers do not consistently respond to requests for outcomes of job applicant referrals or do not have staff adequately trained to process H-2A referrals. Employers are not federally required and subsequently do not commonly share recruitment logs once the 50 percent period has ended.

8. **Lack of visibility** – ESD has little information on workers who apply directly to H-2A employers.
9. **Lack of clarity** – With regard to the process, domestic workers should follow up with ESD if they are not considered for employment at a job site at which H-2A workers are employed.
10. **Undocumented workforce** – The USDA has reported that approximately 50 percent of the agricultural workforce may be undocumented.<sup>8</sup>
11. **ESD Referrals** – Employers have expressed that some workers who are referred by ESD have either not been apprised of the conditions of employment or are not qualified. In accordance with the H-2A regulation, ESD may only refer for employment individuals who have been apprised of all the material terms and conditions of employment and have indicated, by accepting referral to the job opportunity, that he or she is qualified, able, willing, and available for employment.

## Committee recommendations for ESD recruitment processes and systems

The committee thoroughly analyzed recruitment and referral processes, identified gaps, and identified improvement ideas over the course of several meetings. The committee provides the following recommendations.

### Faster connection of workers and employers in ESD recruitment process

Currently, ESD facilitates the connection of workers and employers through referrals. When ESD refers a worker to an employer, ESD provides employer contact information to the farmworker applicant. The applicant is then responsible for contacting the employer about the job opening. Currently, ESD does not track whether applicants subsequently contact the employer.

**The committee recommends that ESD facilitate a faster connection of workers and employers through process changes, including:**

- ESD staff should assist applicants in calling employers from the WorkSource office (rather than sending them away with the number to call).
- ESD staff should provide more information to applicants about the next steps in the process after they have applied, including education about the process through workshops and other types of outreach.
- ESD should explore using texting or apps commonly used by the farmworker community for recruiting and job matching, including using text alerts to notify farmworker applicants of new job openings.
- Additional outreach from ESD should include posters, booths, social media and text notifications, including pending number of days remaining on a job order.

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<sup>8</sup> [U.S. Dept. of Agriculture Report](#)

- ESD should conduct a formal “lean” process improvement project to identify additional improvements and to further reduce barriers in recruiting domestic workers as part of the H-2A Program. This should not be confused with the budgetary lean process, but actual reduction in barriers between employers and domestic workers.

Some of these recommendations could be implemented within current processes, including making it a standard practice to assist applicants in calling employers from the WorkSource office and providing applicants with more information about next steps in the process. These changes would require a change management plan for ESD staff to successfully implement.

Implementing the use of texting or apps would require IT changes, potential contracts with external vendors, and possibly significant time and cost associated with implementation. While these changes require more resources for implementation, they are also expected to be high impact.

The formal “lean” process improvement project could incorporate both identifying further improvement ideas and action planning for those proposed improvement ideas. The project would require a one to three-day workshop, regular project check-ins, and time and resources to carry out the action plan developed within the workshop. Most such projects result in three to six-month action plans.

The expected impact of implementing some or all these ideas are increased volume of referrals resulting in connections between applicants and employers, as well as faster connections between farmworkers and employers.

#### *Projected costs*

**The committee recommends ESD develop a Request for Information (RFI) to further scope and identify costs for text and/or app-based outreach to farmworkers.** The cost to implement these recommendations can otherwise be met with existing resources.

Based on 100,000 text messages per month, ESD estimates the cost of implementing text and/or app based outreach to be \$72,000 per year. The cost for IT staff to commence this project would be approximately \$78,000. The total estimated cost for this project would accordingly be \$150,000 for the first year and \$72,000 each year following.

#### **Faster connection of workers and employers in ESD recruitment through disclosure of referrals to employers**

Currently, ESD manages H-2A recruitments on behalf of employers through the WorkSourceWA system. With other industries, employers manage their own recruitments in WorkSourceWA, which allows them to contact applicants directly. The Agricultural Recruitment System, relied upon by the H-2A Foreign Labor Certification process, requires ESD to test the local labor market by recruiting for H-2A positions, screening applicants, referring applicants to contact employers, and making the workers aware of their rights and obligations under the contract. After ESD determines an applicant is qualified, ESD refers farmworker applicants to contact employers directly. Then ESD must follow up with the employer or the farmworker to inquire if an actual placement was made. The ESD is required to track this information because USDOL requires this information to make a determination on the number of foreign workers to certify for admission into the country. The referred applicant is then responsible to follow up with the employer. Employers are unable to access

applicant information in WorkSourceWA, preventing them from reaching out to applicants directly. Sometimes applicants do not reach out to the employer, or they do reach out, but the employer is unaware that the applicant came from an ESD referral.

**The committee recommends that ESD directly inform employers of applicants for H-2A job openings. The committee further recommends ESD request a waiver from the USDOL to allow H-2A employers to manage and access their own recruitments through ESD's recruitment system. Finally, the committee recommends establishing measures to determine the impact and success of the change.**

Allowing the employer to contact the applicant directly would result in a faster connection of workers and employers. If a waiver is not granted by USDOL, ESD could continue to manage the recruitments in the system and notify employers after each referral. This would still provide the employer the opportunity to contact referrals directly.

Implementing this change would require a waiver from USDOL, minor IT changes, and training for ESD employees and H-2A employers. Minor IT changes would be required for ESD to track H-2A recruitment data, otherwise there is a risk of data loss associated with the agricultural recruitment system.

There is an expectation that this recommendation would increase the number of domestic referrals resulting in faster connections between farmworkers and employers. The recommendation may, however, reduce ESDs ability to track referrals and hires of domestic workers.

#### *Projected costs*

No projected costs at this time.

#### **Referral tracking and follow-up**

Currently, ESD's tracking of referrals is inconsistent and doesn't always result in follow-up with farmworker applicants regarding the outcome of the referral. There is an information gap regarding referral outcomes and shared interest from the committee in improving referral tracking.

**The committee recommends that ESD track referral outcomes more consistently.** More thorough referral tracking and follow up could be achieved through:

- Outreach by phone or text to farmworker applicants who have been referred.
- Using an app to communicate with and request information from farmworker applicants regarding referral outcomes.
- Employers providing a copy of USDOL recruitment reports to ESD to determine outcomes.
- Creating incentives for workers to self-report the outcome of referrals.
- Allowing WorkSource staff to create registrations on behalf of customers.

Implementing these ideas would require employer cooperation, IT changes, creating a data collection plan, and establishing, documenting, and communicating a standard process for tracking referrals.



The expected impact of implementing some or all of these changes is more accurate data regarding how many referrals result in hiring, and data regarding the effectiveness of the ESD recruitment and referral processes.

#### *Projected costs*

**The committee recommends it work with ESD to develop a Request for Information (RFI) to further scope and identify costs for text and/or app-based outreach to farmworkers.** The cost to implement these recommendations can otherwise be met with existing resources.

#### **Customer experience study**

**The committee recommends ESD develop a Request for Information (RFI) and conduct focus group sessions to design a customer experience study.** The study should focus on hearing the farmworker and employer perspectives on barriers to accessing jobs, usability of ESD systems, and the disconnect between the number of available jobs compared to the number of successful referrals. The proposed study would help to interpret the qualitative data to make ESD more relevant to employers and farmworkers.

The ESD's approach to a customer experience study could include a combination of some or all of the following:

- Building opportunities for customer feedback into processes, such as during field checks and field visits.
- Conducting interviews with farmworkers and employers, in person or by phone.
- Collecting data and feedback through surveys.
- Collecting data regarding referrals and how workers are applying for jobs.

Implementing this change requires staff time to collect and compile customer feedback, analyze feedback, and identify actionable feedback that could be implemented to improve the customer experience.

#### *Projected costs*

As the recommendation requires ESD to work with the committee to further develop the scope of the study, costs are not yet fully identified. The following estimates, based on the recent costs of surveys conducted by the Paid and Family Medical Leave and Labor Market and Economic Analysis divisions at ESD is meant to capture the cost of similar initiatives. Costs of this study, however, are likely to change once the scope of work is better defined to allow for an initial study design and competitive solicitations.

Farmworker experience study cost: \$325,000

- Surveys \$175,000 (2,100 responses expected)
- ESD staff analysis \$150,000 (0.9 FTE of an Economic Analyst)

Employer experience study cost: \$325,000

- Surveys \$175,000 (500 responses expected)
- ESD staff analysis \$150,000 (0.9 FTE of an Economic Analyst)

The studies would take place over two years and would focus on current recruitment systems. It would analyze each step of the recruitment process. A preliminary report would be available 12 months post budget allocation, and the final report 24 months post budget allocation.

### Employer resources

Currently, some H-2A Program resources and best practices already exist, but not all H-2A employers participate in using or accessing those resources. **The committee recommends that ESD create enhanced resources and best practices for employers to access.** This would include providing template forms and letters, compliance tips, interview best practices, and sample interview questions. Best practices would focus on educating employers on common mistakes that have been made in the past and how to prevent those mistakes from happening. It is recommended that resources are provided once to all existing employers, provided to new H-2A employers in the future, and provided to employers by email at the time they set up new recruitments.

Implementing this change requires staff time dedicated to creating and updating the employer resources, establishing a place to post resources, and establishing processes for sending information out to new and existing employers.

The expected impact of this recommendation is increased compliance by employers with H-2A laws and rules, streamlining in hiring and support for employers in successfully meeting program requirements.

#### *Projected costs*

This cost is assumed in the ASWS office budget and tied into best practices to be provided by ASWS compliance staff in coordination with WorkSource.

### Employer training

**The committee recommends enhancing employer training.** Training may include formal training sessions, communication about employer resources, making sure employers understand the resources available to them, creating designated points of contact for employers with questions, and building relationships for ongoing conversations and education.

In January of 2019, ESD began working with the USDOL National Office of Foreign Labor Certification and USDOL Wage and Hour Division to organize H-2A employer forums in Washington and Oregon. A steering committee consisting of agricultural industry representatives, as well as federal and state agencies, was developed. The exact locations, dates and agenda for the H-2A employer forum were not developed as it was determined in late 2019 that it would be best to schedule the forums after a federal H-2A final rule was published in late 2020.

Implementing this recommendation requires staff time dedicated to creating a training plan, creating and updating training materials, carrying out training, and designated points of contact.

The expected impact of this recommendation is increased compliance by employers with H-2A laws and rules.

#### *Projected costs*

This cost is assumed in the ASWS office budget and is tied into best practices to be provided by ASWS compliance staff in coordination with WorkSource.

## VI. Budget

In accordance with RCW [50.75.040](#), this section of the report provides: 1) Analysis of the costs incurred by the office to administer the H-2A Program; 2) Analysis of the funds to administer other department programs for farmworkers, and 3) Analysis of the amount of funds allocated by the federal government to administer the H-2A Program and all other agricultural programs within the department. For the purposes of this report, the analysis of funds to administer other department programs for farmworkers was covered as part of the section providing an analysis of the amount of funds allocated by the federal government to administer the H-2A Program and *all other agricultural programs within the department*.

Committee meetings on April 23rd, May 21st, June 18th, July 2nd, September 17th, and October 1st of 2020, provided members and the general public with a forum to analyze the budget. While RCW [50.75.040](#) does not require the committee to make any recommendations related to this section of the report, perspectives of the committee are included.

Figure 5 provides a breakdown of activities and the current funding source used by ESD to support the execution of each activity. While some of the funding sources shown, such as the FLC Grant, may allow for additional activities to be funded (outreach, training, field checks and field visits), those activities are not accounted for in the table given current funding does not pay for those activities. Each funding source represented below are described in greater detail in this section.

**Figure 5.** H-2A activities and supporting federal and state funding sources  
Washington state, 2020  
Source: Employment Security Department

Required activity	Federal Foreign Labor Certification grant	Federal Wagner-Peyser grant	State SB 5438 funding	Other state funding**
Review and process of H-2A employer applications	✓		*	
Coordinate housing inspections	✓	✓	*	*
Agricultural prevailing wage and employment practice	✓	✓	✓	✓
Outreach and training	*	✓	✓	*
Field visits and field checks	*	*	✓	*
Domestic recruitment and employment verification		✓		*
Employment service complaint process		✓	✓	*
Discontinuation of services		*	✓	*

\* Allowed but not currently used.

\*\* Other state funding consists of the Employment Services Administrative Account: Claimant Placement Program and the Administrative Contingency Account: Penalties and Interest.

Figure 6 provides a brief comparison of each major funding source, its purpose and the amount allocated to ESD or by ESD in FY 2019. Each funding source's contribution toward the administration of the H-2A Program may or may not be tracked depending on its purpose. For example, the FLC Grant supports the administration of the H-2A and the H-2B Programs. This includes the number of H-2A and H-2B applications that need to be reviewed,

the number of housing facilities that need to be inspected and licensed, and limited education and outreach per the FLC annual plan. Staff carrying out these responsibilities reside within the ASWS office and do not distinguish their charging for H-2A and H-2B activities. ESD intends to evaluate the existing charging structure to determine how to more accurately track and report costs associated with H-2A activities. **The committee in conjunction with ESD will examine the allocation of the funding sources for the H-2A administrative functions. The committee will also work with ESD to identify gaps in funding and needed resources to address those gaps if they exist.**

**Figure 6.** Overview of major ESD funding sources supporting H-2A activities  
Washington state, 2020  
Source: Employment Security Department

Funding source	Purpose	FY 2020 allocation
Federal Foreign Labor Certification Grant	To fund services provided by state agencies that support the administration of the H-2A and H-2B foreign labor certification programs.  ESD charges to this grant in alignment with this scope and does not track funding spent on H-2A and H-2B separately.	\$400,000
Federal Wagner-Peyser Grant*	To improve the functioning of the nation's labor markets by bringing together individuals who are seeking employment and employers who are seeking qualified workers.  Of these funds, 10 percent, roughly \$1.5 million in FY 2020, is allocated for employment services specifically targeted to support agricultural workers and employers.  ESD does not track Wagner-Peyser funding spent on all H-2A-related activities.	\$15,891,995
State RCW <a href="#">50.75.040</a> funding	Establishes the office of Agricultural and Seasonal Workforce Services. This funding is from the Employment Services Administrative Account. Funding for the program is included in the ESD budget request for 2021 through 2023.  All funding supports H-2A Program-related activities.	\$1,728,437
Other state funding	The Employment Services Administrative Account and the Administrative Contingency Account support employment services for which federal funding is not available or sufficient.  Both accounts help pay for a portion of the Prevailing Wage and Employment Practice Survey that supports administration of the H-2A Program.	\$302,466 (survey only)

### Funds allocated by the federal government to administer the H-2A Program and all other agricultural programs within ESD

The USDOL allocates funding to state workforce agencies, like ESD, to support the federal government's obligation to process H-2A applications filed by agricultural employers while ensuring conditions of certification are met.

The conditions for certification are:

- Qualified U.S. domestic workers are not available to meet employer needs; and
- The employment of foreign workers does not adversely affect the wages and working conditions of similarly employed U.S. domestic workers.

The USDOL provides funding to ESD through two federal grants to administer aspects of the H-2A Program – the FLC Grant and the Wagner-Peyser Grant. When those funding sources are insufficient, ESD relies on state funding sources to meet customer needs.

### The Foreign Labor Certification (FLC) Grant

This FLC Grant is intended to fund services provided by state agencies that support the administration of the H-2A and H-2B foreign labor certification programs. The following activities are allowed, but not all fully funded by the FLC Grant:

- Reviewing and processing employer H-2A and H-2B applications as required by [20 CFR 655.121](#) and [20 CFR 655.16](#);
- Coordinating with the state DOH and L&I to ensure temporary housing used for the H-2A Program is inspected and licensed in compliance with local, state and federal regulations including those described by [20 CFR 655.122\(d\)](#);
- Conducting agricultural wage and prevailing practice surveys to satisfy conditions described by [20 CFR 655.120](#);
- Stakeholder engagement and outreach activities; and
- Conducting field visits and field checks as required by Wagner-Peyser regulations [20 CFR 653.501\(c\)\(3\)\(vii\)](#) and [20 CFR 653.503](#), respectively.

The USDOL publishes an annual Training Employment Guidance Letter (TEGL) that provides grant planning instructions to all state workforce agencies. [TEGL 14-19](#), issued on April 13, 2020, provided ESD the most recent instructions. [Attachment 6 to TEGL 14-19](#) provides a comparison FLC Grant funding by state for FY 2020. At the time of this report, Congress was considering an increase in FLC Grant funding for FY 2021, but appropriations legislation was not finalized. The following *Figure 7* provides a summary of FLC Grant funding awarded to ESD over the last five years.

**Figure 7.** FLC Grant funding awarded to ESD for FY 2015 to 2020

Washington state, 2020

Source: Employment Security Department

Fiscal year	Amount awarded to ESD
2015	\$179,907
2016	\$179,907
2017	\$237,354*
2018	\$450,000
2019	\$400,000
2020	\$400,000

\*ESD received an additional supplemental allocation of \$325,000 intended to enhance coordination of housing inspections required as a condition of USDOL certification.

The bulk of the funding provided by the FLC Grant is used for reviewing and processing applications for the H-2A and H-2B Programs, which includes coordinating with USDOL, DOH, and L&I. While some of the FLC Grant is intended to fund survey work, field visits and field checks, the grant instructions only allow for up to 20 percent of the allocated funding (\$80,000 out of \$400,000 in PY 2020) to be spent on these activities. Accordingly, the FLC Grant provides inadequate funding for agricultural prevailing wage and employment practice surveys, field checks and field visits.

In recognition of the limited funding provided to ESD and the increase in use of the H-2A Program, in January 2017, ESD issued a letter to USDOL (*Appendix 4.*) regarding the unclear formula used to distribute FLC Grant funding to states, as it did not appear to take into account state workloads. A recommendation was offered to USDOL that considered the number of H-2A applications and the number of workers certified.

In 2019 and 2020, USDOL disclosed grant awards to state workforce agencies at the beginning of the grant application process. In prior years, grant amounts were not disclosed to states until after applications were received and evaluated. This new approach indicates funding is allocated to states without the use of a formula that accounts for workloads. This remains a matter of concern to Washington state given the rise in use of the H-2A Program. As shown in *Figure 8*, USDOL reported Washington state ranked 3rd in the number of positions certified at 26,226 for FY 2019. Yet Washington state ranked 6th with the level of funding. For that same year, ESD received 2.8 percent of U.S. FLC funding while accounting for 10.2 percent of all certified positions nationally. *Figure 8* does not account for H-2B activity, although it is generally recognized that administering the H-2A Program carries substantially more work due to the additional federal expectations placed on state workforce agencies.

**Figure 8.** Review of H-2A positions certified and FLC funding for top 10 states in FY 2019

Washington state, 2020

Sources: Office of Foreign Labor Certification – H-2A temporary agricultural labor certification program selected statistics, FY 2019 and [Training and Employment Guidance Letter 21-18](#)

State	Number of positions certified	Percent of total certified in U.S.	FLC funding level	Percent of U.S. FLC funding
Florida	33,598	13.00%	\$470,000	3.29%
Georgia	29,480	11.40%	\$480,000	3.36%
Washington	26,226	10.20%	\$400,000	2.80%
California	23,321	9.10%	\$1,500,000	10.50%
North Carolina	21,605	8.40%	\$483,800	3.39%
Louisiana	10,816	4.20%	\$255,000	1.79%
Michigan	9,096	3.50%	\$300,000	2.10%
Kentucky	8,315	3.20%	\$300,000	2.10%
New York	8,104	3.10%	\$1,400,000	9.80%
South Carolina	6,082	2.40%	\$209,000	1.46%

## The Wagner-Peyser Grant

Originally passed in 1933, the Wagner-Peyser Act established a nationwide system of public employment offices known as the Employment Service (ES) to improve the functioning of the nation's labor markets by bringing together individuals who are seeking employment and employers who are seeking qualified workers. The act was amended in the late 1990s and, as a result in Washington, Wagner-Peyser became a key part of the state's one-stop system, called WorkSource.

WorkSource centers provide universal access to an array of employment and training services, which are available to any job seeker, regardless of employment status. Veterans receive priority and disabled veterans receive the highest priority. States can provide specialized assistance to other targeted populations such as individuals with disabilities, ex-offenders, youth, minorities, older workers, and migrant and seasonal farmworkers (MSFWs). Any employer seeking workers is eligible for employer services. Funded activities are provided free of charge to both job seekers and employers through self-service, facilitated self-help services, or staff-assisted services.

State allocations are based on federal formula provisions defined in the Wagner-Peyser Act. [Attachment B to TEGL 16-19](#) outlines the formula in detail, which is as follows:

- Formula for 97 percent of funds:
  - 2/3: state relative share of civilian labor force (average 12 months ending 9/30 [preliminary] or 12/31 [final])
  - 1/3: state relative share of total unemployment (average 12 months ending 9/30 [preliminary] or 12/31 [final])
    - Minimums:
      - 90 percent of state relative share of prior year funding
      - 0.28 percent of total available funds for states
- Distribution of 3 percent of funds (not applied to Washington state due to the size the state civilian labor force):
  - States with civilian labor force below one million, and under the national median civilian labor force density, receive an amount which, when added to their share of the 97 portion, will result in an amount equal to 100 percent of their relative share of the prior year funding.
  - Remaining states losing in relative share receive a share of the remaining funds prorated based on the amount needed to achieve 100 percent of their relative share of prior year funding.

For PY 2019 (July 1, 2019 to June 30, 2020), Washington state was allotted \$15,040,605. The funding was used to pay for a total of 141 full-time employees (FTEs) within the Employment Connections Division, the division within ESD responsible for providing direct services to customers (businesses, job seekers and future job seekers). These FTEs are spread across over 30 WorkSource offices statewide. They deliver services to job seekers and employers in close alignment with local service delivery strategies developed by local workforce boards in 12 distinct regions across the state. Services provided range from hiring events to customer assessments, orientations, resume assistance, partner resource referrals and more. *Figure 9*

shows the amount of Wagner-Peyser funds ESD has received since the year 2010, which have remained relatively flat. [TEGL 16-19](#) offers the most recent allotments to states, with a comparison of allotments by state for PY 2019 and PY 2020 in [Attachment I](#).

**Figure 9.** Washington state and U.S. Wagner-Peyser allotments for PY 2010 through 2020

Washington state, 2020

Source: Employment Security Department

Program year	Washington	U.S.	Percent of U.S allocation
2010	\$14,688,343	\$703,576,000	2.09%
2011	\$14,651,411	\$702,168,848	2.09%
2012	\$14,673,520	\$700,841,900	2.09%
2013	\$13,893,830	\$664,183,664	2.09%
2014	\$13,819,721	\$664,184,000	2.08%
2015	\$13,756,839	\$664,184,000	2.07%
2016	\$14,323,487	\$680,000,000	2.11%
2017	\$14,769,360	\$671,413,000	2.20%
2018	\$14,707,432	\$666,413,000	2.21%
2019	\$15,040,605	\$663,052,000	2.27%
2020	\$15,891,995	\$668,052,000	2.38%

Since PY 2010, the inflation rate has grown by 20 percent, which means that the value of the federal grant has declined and current available funding is at least 10 percent less than 2010, even while costs have been increasing. State employee salaries have also risen during this time. Over the last six years (2015 to 2020), the Office of Financial Management (OFM) reported state employee wage adjustments ranging from 1.8 percent to 3 percent annually. A historical account of state employee salary adjustments over the last 25 years is available from OFM.<sup>9</sup>

Wagner-Peyser Act regulations speak extensively to services to MSFWs in 20 CFR Parts [653](#), [654](#) and [658](#). Those regulations are a direct result of the U.S. District Court of the District of Columbia’s ruling in May 1973 on *NAACP, Western Region v. Brennan* (a.k.a., the *Richey Decision* for presiding judge, Charles R. Richey). In that court case, it was ruled that then Labor Secretary Peter Brennan and USDOL were not providing MSFW customers quantitatively equivalent and qualitatively proportionate Wagner-Peyser employment services. The regulations created by the Richey Decision intend to reverse the conditions at issue by creating special requirements to better ensure the delivery of employment services is sensitive to the needs of MSFWs. Also required is a more aggressive approach, through outreach, to enhance access to WorkSource services so that MSFWs have more opportunities to acquire new job skills that allow them to obtain higher wages and more stable employment.

While the intent of these requirements, which relate to domestic workers, are not directly intended to support the administration of the H-2A Program, there are several Wagner-Peyser requirements that have synergies with H-2A administration service needs. *Figure 10* provides a summary of Wagner-Peyser requirements that are relevant to the administration of the H-2A Program.

<sup>9</sup> [State employee salary adjustments](#)



**Figure 10.** Major Wagner-Peyser requirements tied to the administration of H-2A Washington state, 2020  
Source: Employment Security Department

Requirement	Connection to H-2A administration
Full-time State Monitor Advocate – <a href="#">20 CFR 653.108</a>	This position reviews WorkSource offices for compliance with MSFW service requirements, serves as a subject matter expert on complaints and conducts field visits, which may include H-2A employment sites when both domestic and foreign workers are present. ESD has a Monitor Advocate fully funded by the Wagner-Peyser Grant.
At least one MSFW outreach FTE per one-stop MSFW significant office – <a href="#">20 CFR 653.107</a>	ESD has 8.5 FTEs dedicated to MSFW outreach activities to engage farmworkers at places where they live, work and congregate with the goal of connecting workers to employment and training services. This may include providing H-2A-related information to workers when both domestic and foreign workers are present.
Agricultural Recruitment System (ARS) for U.S. workers – <a href="#">20 CFR 653 Subpart F</a>	This system requires state agencies and employers to ensure the orderly movement of workers that relocate to seek temporary agricultural employment. Several requirements extend beyond standard services provided to general employers (on-going verification of placements, job order entry, notice of rights to workers, field checks, etc.). While open to all agricultural employers, the ARS is primarily used by H-2A employers in Washington state.
Employment Service (ES) Complaint System – <a href="#">20 CFR 658 Subpart E</a>	The ES Complaint System handles all complaints and apparent violations alleging an employer’s failure to comply with Wagner-Peyser regulations. The ES Complaint System also accepts, refers, and, under certain circumstances, tracks complaints involving employment-related laws that may occur on sites with H-2A workers.
Discontinuation of Services – <a href="#">20 CFR 658 Subpart F</a>	Discontinuation of services procedures are used when employers are found to be out of compliance with Wagner-Peyser regulations and/or employment laws, including H-2A Program requirements.

As detailed in the following section, ESD has primarily relied on 10 percent of Wagner-Peyser funding to cover minimum staffing requirements related to the Monitor Advocate and MSFW outreach positions. Duties associated with the ARS, the ES Complaint System and discontinuation of services have been largely funded by the Wagner-Peyser Grant, although the extent to which that funding has paid for those activities has not been tracked.

### Wagner-Peyser 10 percent funds

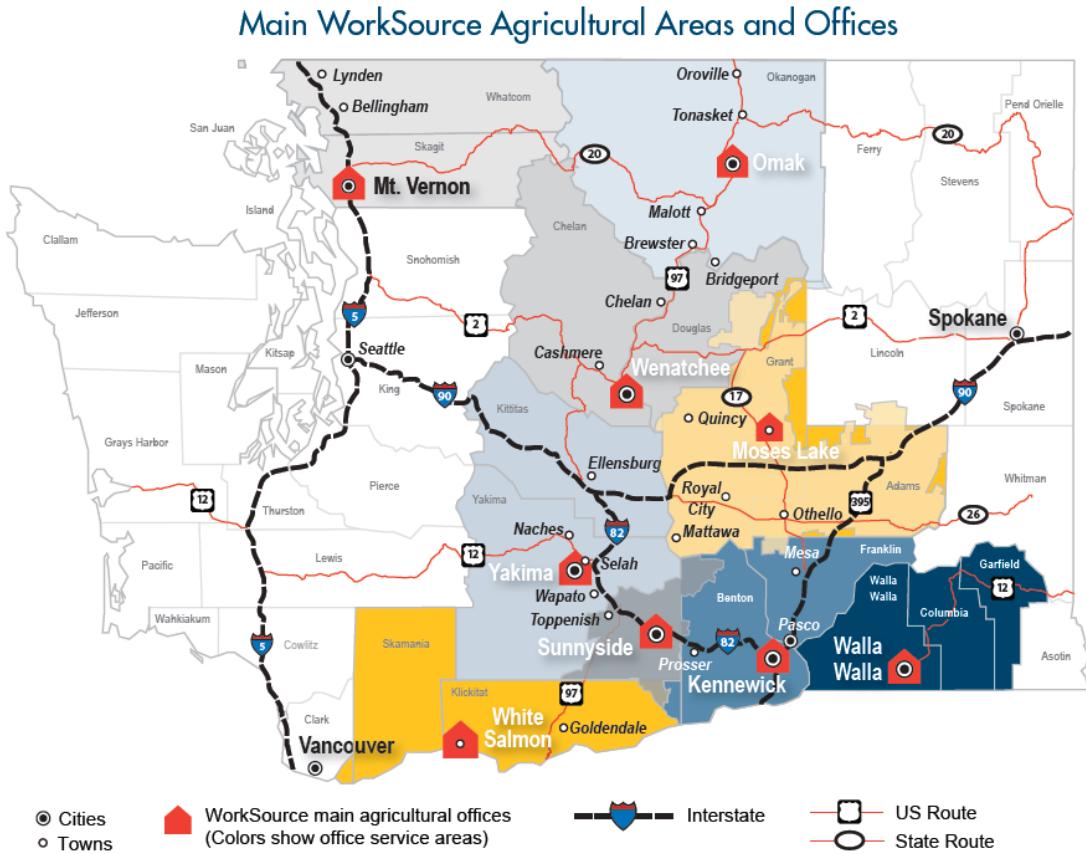
Section 7 of the Wagner-Peyser Act, as amended by the Workforce Investment Act of 1998 and the Workforce Innovation and Opportunity Act of 2014 require the Wagner-Peyser Grant expenditures to be split 90/10 with 90 percent intended to fund services and activities in the one-stop system and 10 percent reserved for use by the Governor for performance incentives, supporting exemplary models of service delivery, professional develop and career advancement of SWA staff, and services for groups with special needs ([Section 7\(b\)](#) and [20 CFR 652.204](#)).

In Washington state, Wagner-Peyser 10 percent funds (approximately \$1.58 million in PY 2020) are allocated for positions and services aimed at supporting the agricultural sector. As Wagner-Peyser 10 percent and other flexible sources have continued to remain stagnant over time, funding has largely been centered on funding MSFW Outreach FTEs (including the Monitor Advocate) required by Wagner-Peyser regulations and a few additional staff in agricultural areas serving farmworker customers and agricultural employers. A small percentage has also been allocated to paying for administrative staff (supervisors and administrative assistants). ESD’s allocation of Wagner-Peyser 10 percent funds within the ESD’s Employment Connections Division and the ASWS office is shown in *Figure 11*. While most of Wagner-Peyser 10 percent funds are centered on positions providing direct customer support and outreach (approximately \$1.2 million), the remaining funds (approximately \$350,000) are allocated for ESD support services (communications, IT and policy). As shown in *Figure 12*, most of the Wagner-Peyser 10 percent FTEs are allocated to areas with significant agricultural industry.

**Figure 11.** Wagner-Peyser 10 percent ESD field operations allocation for FY 2020  
Washington state, 2020  
Source: Employment Security Department

Office	FTE budget	Budget allocated
Agricultural and Seasonal Workforce Office (Monitor Advocate position)	1	\$118,625
Employment Connections Central Office	0.17	\$7,507
Skagit (Mt. Vernon) WorkSource	1.21	\$117,687
Central Basin (Moses Lake) WorkSource	1.83	\$171,273
Okanogan County (Omak) WorkSource	1.21	\$121,535
Wenatchee WorkSource Affiliate	1.4	\$140,140
Yakima County (Union Gap) WorkSource	1.31	\$126,131
White Salmon WorkSource Affiliate	0.6	\$60,233
Sunnyside WorkSource Affiliate	1.26	\$131,227
Columbia Basin (Kennewick) WorkSource	1.3	\$115,881
Walla Walla WorkSource	1.11	\$89,918
<b>Operating FTE total</b>	<b>12.4</b>	<b>\$1,200,157</b>

**Figure 12.** WorkSource offices located in agricultural service areas  
 Washington state, 2020  
 Source: Employment Security Department



The ESD is expected to further define roles and responsibilities in a manner that maximizes MSFW outreach staff efforts to connect all MSFWs and all agricultural employers to employment and training resources while also providing support needed for the H-2A Program administration. Per [20 CFR 653.107\(b\)](#), MSFW staff are required to locate and contact MSFWs who are not being reached by the normal intake activities conducted by WorkSource offices. Outreach staff responsibilities, as defined in federal regulation, must include:

- Explaining to MSFWs at their working, living, or gathering areas the following:
  - The services available at their local WorkSource center and other related services;
  - Information on the Employment Service (ES) and Employment-related Law Complaint System;
  - Information on the other organizations serving MSFWs in the area; and
  - A basic summary of farmworker rights, including farmworker rights with respect to the terms and conditions of employment.

- Attempting to connect MSFWs to their local WorkSource center to obtain the full range of employment and training services.
- If an MSFW cannot or does not wish to visit a WorkSource Center, the outreach worker must offer to provide on-site the following:
  - Assistance in the preparation of applications for employment services;
  - Assistance in obtaining referral(s) to current and future employment opportunities;
  - Assistance in the preparation of either ES or employment-related law complaints;
  - Referral of complaints to the ES office Complaint System Representative or local WorkSource office manager;
  - Referral to supportive services and/or career services in which the individual or a family member may be interested; and
  - As needed, assistance in making appointments and arranging transportation for individual MSFW(s) or members of his/her family to and from local one-stop centers or other appropriate agencies.
- Making follow-up contacts as necessary and appropriate to provide the assistance.
- Being alert to observing 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, documenting and referring information to the local WorkSource office manager.

The MSFW staff, while intended to engage workers and employers where they congregate and trained to initially process complaints, are not trained as compliance staff given their primary purpose is to extend WorkSource services to MSFWs. Accordingly, their outreach role is distinct from that of ASWS staff performing compliance outreach during field checks and field visits. The consistent presence of MSFWs in agricultural areas, however, make them a critical resource for collaborating with the ASWS office and maximizing services to agricultural employers and workers.

### Other state funding

The ESD's budget consists primarily of federal funding. When federal funding is insufficient or is not available to support specialized employment service needs, ESD relies on state funding sources.

The ESD has two main sources of state funding: The Administrative Contingency Account (Fund 120, also known as Penalties and Interest or P&I) and the Employment Services Administrative Account (Fund 134, also known as the Claimant Placement Program or CPP). The Administrative Contingency Account receives revenues from penalties and interest from employers for late or incorrect unemployment taxes and interest from unemployment insurance recipients who must repay benefits to which they were not entitled. The Employment Services Administrative Account, established in 1985, receives its revenues from an employer tax of 0.02 percent of taxable wages (for most classes of employers). *Figure 15* illustrates the contributions made by CPP and P&I to fund the Agricultural Wage & Employment Practice Survey which totaled \$302,446 combined.

During the presentation to the committee on May 21, 2020, ESD noted that the Wagner-Peyser Grant was fully spent and relied on CPP funding in FY 2020 to continue to provide basic employment services to all Washingtonians. This reinforces the need for federal financing reform and adequate funding of employment program activities. It is also important to preserve these funds so they can be available to support state activities until reform occurs. Available CPP funding is expected to be reduced as employer contributions decline due to the impact of COVID-19, only complicating ESD’s efforts to support essential agricultural workers.

A more comprehensive account of ESD’s finances is available through Employment Security Department’s Financial Report to the Legislature and Governor (*Appendix 5*), published in September 2020, in response to Engrossed Substitute Senate Bill 6168.<sup>10</sup>

### Costs incurred by the office to administer the H-2A Program

In RCW [50.75.040](#), the Legislature declared it to be in the public interest to provide adequate protections for foreign and domestic workers and to provide education and outreach opportunities to help growers maintain the stable workforce they need. Accordingly, RCW [50.75.040](#) created the ASWS office. Funding for RCW [50.75.040](#) is also intended to fund some of the work needed to develop and complete the annual Agricultural Prevailing Wage and Employment Practice Surveys that provide USDOL information required to make a determination on setting minimum prevailing wages and employment practices for foreign workers.

### Current funding for the H-2A Program

The fiscal note attached to RCW [50.75.040](#) provided an estimate of the FTE support and funding to carry out key functions of the program. When developing the 2021 to 2023 biennium budget request (decision package) to continue the program, the positions and other costs were refined to reflect how the program is now expected to be staffed (*Figure 13*).

**Figure 13.** Annual budget request by job classification (2021 to 2023 Biennium)  
Washington state, 2020  
Source: Employment Security Department

ASWS staffing	FTE	Salaries	Benefits
WMS 3 - ASWS Director	1	\$117,000	\$47,000
Administrative Assistant 3	1	\$42,000	\$17,000
Program Specialist 2	1	\$48,000	\$19,000
Program Specialist 3	7	\$408,000	\$163,000
Program Specialist 5 (Lead)	1	\$69,000	\$28,000
Agricultural wage survey staffing	FTE	Salaries	Benefits
WMS 2 - Econometrics and Actuarial Analysis Manager	0.2	\$14,000	\$6,000
Operations Research Specialist - Surveys and Agricultural Analysis Supervisor	0.6	\$52,000	\$21,000
Economic Analysis 3 - Research Economist	0.9	\$76,000	\$30,000
Agency Services and Technology	1.8	\$134,000	\$89,000
<b>Total</b>	<b>14.5</b>	<b>\$960,000</b>	<b>\$420,000</b>

<sup>10</sup> [ESSB 6168](#)

Figure 14 provides a breakdown of the budget by object or purpose for FY 2021 to 2025. Funding is allocated to cover two years (biennium). The budget associated with RCW [50.75.040](#) does not account for FTEs and services related to H-2A already covered by other funding sources, namely the FLC and the Wagner-Peyser Grants.

**Figure 14.** Budget by object or purpose for FY 2020 to 2025  
Washington state, 2020  
Source: Employment Security Department

Description	FY 2019-2021	FY 2021-2023	FY 2023-2025
FTE staff years	13.9	14.4	14.4
A – Salaries and wages	\$1,753,751	\$1,652,000	\$1,652,000
B – Employee benefits	\$613,814	\$662,000	\$662,000
E – Goods and other services	\$368,995	\$384,000	\$384,000
G – Travel	\$17,819	\$122,000	\$122,000
T – Intra-agency reimbursements	\$525,234	\$444,000	\$444,000
<b>Total</b>	<b>\$3,487,432 *</b>	<b>\$3,264,000</b>	<b>\$3,264,000</b>

\*Projected expenditures for FY 2019-21 are expected to be approximately \$2 million due to delays in hiring related to COVID. All staff are expected to be hired before the end of FY 2021 which will enable field check and field visit federal requirements to be met.

### Prevailing wage and employment practice survey costs

The agricultural wage survey is intended protect the wages of domestic farmworkers by ensuring they are not adversely impacted by an employer’s use of the H-2A Program.

Per [20 CFR 655.120 \(a\)](#) “an employer must offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR [Adverse Effect Wage Rate], the prevailing hourly wage or piece rate, the agreed-upon collective bargaining wage, or the Federal or State minimum wage, except where a special procedure is approved for an occupation or specific class of agricultural employment.”

Per [20 CFR 655.1300 \(c\)](#) the “Prevailing hourly wage means the hourly wage determined by the SWA [State Workforce Agency] to be prevailing in the area in accordance with State-based wage surveys.” The “Prevailing piece rate means that amount that is typically paid to an agricultural worker per piece (which includes, but is not limited to, a load, bin, pallet, bag, bushel, etc.), to be determined by the SWA according to a methodology published by the Department [U.S. Department of Labor].”: [ETA handbook 385](#).

To meet this requirement, ESD conducts voluntary employer and worker surveys to establish prevailing hourly wage or piece rates that are posted by USDOL in its [Agriculture Online Wage Library](#) if the survey findings meet the requirements in the ETA Handbook 385.

Figure 15 lists the expected 2020 agricultural survey costs by funding source capturing the ESD and UW portions. The UW and ESD did not conduct a worker field survey in 2020, due to COVID-19. In the past, UW and ESD have conducted a field worker survey, which increased the survey cost by 10 percent. The 2020 worker survey will only include web and phone survey modes.

**Figure 15.** Expected cost of the 2020 Agricultural Wage and Employment Practices surveys Washington state, 2020  
Source: Employment Security Department, LMEA and Budget

Funding source	UW-employer <sup>1</sup>	UW-worker <sup>1</sup>	LMEA staff	Attorney General - Legal fee	Sum
Foreign Labor Certification	\$50,721	\$29,279	\$0	\$0	<b>\$80,000</b>
Wagner-Peyser 90 percent	\$0	\$0	\$220,991	\$0	<b>\$220,991</b>
<a href="#">Administrative Contingency Account (P&amp;I)</a>	\$185,416	\$107,030	\$0	\$0	<b>\$292,446</b>
<a href="#">Employment Services Administrative Account (CPP - including ESSB 5438)</a>	\$0	\$0	\$95,000	\$10,000	<b>\$105,000</b>
<b>Sum</b>	<b>\$236,137</b>	<b>\$136,309</b>	<b>\$315,991</b>	<b>\$10,000</b>	<b>\$698,437</b>

<sup>1</sup> Estimated distribution of cost based on 2020 ESD and UW survey interagency agreement. Estimated UW 2020 total cost is \$372,446.

## VII. Worker perspective

This report needs to be understood in the context of the larger set of fundamental inequities that currently face farm workers, including workers in the H-2A system. In establishing the ASWS committee, the Legislature recognized the need to provide adequate protections for foreign and domestic workers, as well as to clarify the state's role in the H-2A Program and provide education and outreach opportunities to growers. This report is limited to the initial narrow issues that the committee was asked to tackle, focused on recommendations for improving ESD recruitment of local workers for H-2A jobs and an analysis of the costs of the H-2A Program. This committee has a great deal of work ahead of it to provide for effective oversight of worker protections in the H-2A Program in Washington state.

In October 2019, members identified a number of concerns that needed to be addressed as part of the committee process, including the H-2A workers' vulnerability to the threat of retaliation. Other concerns are the need for work site inspections to be done outside the presence of employers' supervisors, more and better worker housing, how to provide for effective oversight, building an effective complaint system, and the need for data on the farmworker workforce and care for injured H-2A workers. Additional areas of concern to address are effective interagency coordination, oversight of foreign recruitment, concerns regarding human trafficking, as well as the issues addressed in this report concerning domestic recruitment, analysis of the budget and increased employer and worker outreach and training. These issues will continue to be addressed in future committee meetings.

Full participation by working farmworkers on the committee will require that support be provided in recognition of the barriers they face. Equitable representation from farmworkers in this committee must include the additional appointment of an alternate. Farmworker representatives need to be compensated for their time in order to participate without endangering their family's economic well-being. Professional interpreters must be employed who can accurately communicate farmworkers' testimony.

Worker recommendations related to the topics covered by this report are as follows:

- **Lack of data:** The Employment Security Department must develop the capacity to gather the following data:
  - The number of local workers that are referred by ESD to employers with H-2A contracts.
  - The number of local workers who seek out these jobs directly with agricultural employers.
  - The number of local workers who are ultimately hired by ag employers with H-2A contracts.
  - The number of local worker applicants who are not hired for H-2A contract jobs, and the reasons why not.
  - The number of foreign workers brought to Washington state to work on H-2A visas each year, and their location within the state. (This information is crucial to respond during emergencies such as wildfires and pandemics.)
  - The number of foreign workers transferred from one contract to another.
  - The number of foreign workers who are fired during the contract and sent home.



- The number of foreign workers who are not brought back on contracts the following year and the reasons why not.
  - During the pandemic and future pandemics and disasters, relevant data must be collected to ensure this committee continues to improve oversight:
    - How many H-2A workers got sick with COVID-19?
    - How many workers received medical treatment for COVID-19?
    - How many incidents of COVID-19 were among residents of temporary worker housing?
    - How many workers actually got tested for COVID-19?
  - Accurate data as to agricultural wages. Eliminating the monthly agricultural wage survey has left the state without accurate information about the wages being earned in agriculture.
- **Verification and follow through on worker referrals:** Employers should be required to report back the results of the referrals made by WorkSource, including whether workers were hired, or the reasons for failure to hire. Employers should be required to share a copy of their H-2A recruitment reports with ESD.
  - **Prevailing wage survey:** Just as the Trump administration recently wrongly attempted to end the USDA's Farm Labor Survey (FLS), Washington growers are trying to end the state's prevailing wage survey. The desired outcome is the same; **further reduce farmworker wages.** Both surveys are clearly required by law. They are critical to ensure guestworkers do not depress wages and working conditions for domestic workers. Absent the data these surveys establish; farmworkers will become further impoverished. For example, workers picking cherries regularly can make \$20 an hour or more. Yet these earnings are only captured in surveys. Without this information, growers could instead pay workers, both H-2A and domestic, \$15.83 an hour. Farmworkers' advocates were successful in federal court blocking the Trump Administration's efforts to stop the FLS; we need Washington state's Legislature support to protect the state's more than 100,000 domestic farmworkers and ensure the funding and integrity of the prevailing wage survey.
  - **Access to WorkSource.WA:** The committee should continue to work with ESD to find ways for farmworkers to find jobs without using the WorkSource.WA system. It is a significant barrier to many domestic farmworkers who might otherwise seek the jobs being filled through the H-2A Program. The referral system must be accessible to workers who do not have the capacity to open and operate a WorkSourceWA account.
  - **Barriers to customer experience study:** The recommendation to study the user experience in the ESD referral systems is a good one, but it must recognize explicitly and make a plan to remedy the economic, cultural, and language barriers that workers face in participating in a study. Many farmworkers are living in poverty; they should not be expected to donate their time to these efforts without compensation.
  - **Field checks and field visits:** Employment Security Department must meet its obligations under Wagner-Peyser regulations as well as its oversight responsibility under [RCW 50.75.040](#) to carry out the required number of field checks and field visits and increase its presence at agricultural work and housing sites throughout the state of Washington.

## VIII. Employer perspective

- **Prevailing wage survey:** The committee examined the annual wage and practices survey, which is funded by a combination of state and federal grants, and costs almost \$700,000. Worker representatives want to require the survey as well as additional monthly surveys. Employer members do not think that the survey is required, but is an available option that a majority of other states, including California and Oregon, do not use. Employer representatives have requested ESD to inquire from USDOL whether a survey is legally required, but the agency has not done so.
- **Foreign and domestic workers:** The Legislature found that the number of H-2A temporary agricultural workers coming into the state of Washington to harvest crops has grown by more than 1,000 percent since 2007. Information presented to the committee calls this finding into question.
  - ESD explained that it is not able to track the number of H-2A workers who come into Washington state, however, the number of workers who come into the state is far fewer than the number of workers requested.
  - In 2020, employers requested greater than 29,000 workers. During early September 2020, ESD surveyed employers to determine the number of workers actually present in the state and found it to be fewer than 20,000. Based on ESD's figures, the recommendation is that the Legislature revise its findings to reflect that the actual number of workers in the state is far less than the number of workers requested.
- **Referrals:** ESD is not a significant source of referrals for agricultural jobs. In 2019, the last year that statistics were provided, ESD states that it received 636 unique applicants for H-2A jobs, but only referred 87 applicants to employers, and only 23 of these applicants were hired.
- **Source of funds:** ESD explained that it receives a federal Wagner-Peyser Grant in excess of \$15 million per year, of which 10 percent is earmarked for the agricultural industry. This grant is used to fund 12.4 FTEs who are designated as Migrant and Seasonal Farmworker Specialists.
  - The recommendation is that ESD utilize the MSFW staff to provide outreach, monitoring and compliance visits to all workers and employers, including employers who use the H-2A Program.
- **Claimant Placement Program funding:** ESD explained that it receives state funding in excess of \$11 million to fund its "Claimant Placement Program." This is in addition to the Wagner-Peyser Grant. The Claimant Placement Program may be used for surveys, domestic worker recruiting, and other activities in support of domestic workers.
  - The committee focused on the H-2A Program, and did not closely examine other programs for farmworkers. Generally speaking, worker members favor additional state funding for H-2A administration and compliance, and employer representatives do not; instead stressing better use of existing resources, which they feel offer significant opportunities for increased efficiency and effectiveness in H-2A inspection and compliance programs. While we can't predict the level of federal

funding that will be available in the near future for H-2A administration, the agricultural industry is pursuing additional federal funds for H-2A administration in Washington state, and is making progress towards an expanded appropriation.

- **Coordination with agencies:** Employers also recommend that the ASWS office, plan and coordinate compliance visits to H-2A employer locations in a partnership with the Washington State Department of Labor and Industries as a means of achieving operational efficiencies while increasing enforcement of H-2A regulations.

## Appendices

This report links to all of the appendices due to the size and configuration of Appendices 2, 3, and 5. You can select a linked appendix below to open and review the content.

**Appendix 1.** – [ASWS COVID-19 Recommendations Memo – FINAL](#)

Washington state, March 19, 2020

**Appendix 2.** – [H-2A U.S. worker referral process - ESD](#)

Washington state, December 2020

**Appendix 3.** – [H-2A U.S. worker verification process - ESD](#)

Washington state, December 2020

**Appendix 4.** – [Letter to USDOL regarding FLC allocation](#)

Washington state, January 10, 2017

**Appendix 5.** – [ESD financial report to the legislature and Governor](#)

Washington state, September, 2020