Comments of UWC Strategic Services on Unemployment & Workers' Compensation in Response to the Notice of Proposed Rulemaking Published on April 16, 2015 By the Employment and Training Administration (ETA), United States Department of Labor (RIN 1205-AB73)

Thank you for the opportunity to comment on the Workforce Innovation and Opportunity Act (WIOA); Notice of Proposed Rulemaking (NPRM).

UWC – Strategic Services on Unemployment & Workers' Compensation is a nationwide not for profit association that counts as members a broad cross section of the nation's employers interested in unemployment insurance issues as well as a number of state workforce agencies. The organization and its predecessor organization have advocated for a sound unemployment insurance system since 1933.

The NPRM would amend regulations at 20 CFR part 603 to "help States comply with the WIOA. WIOA requires that States use "quarterly wage records" in assessing the performance of certain Federally-funded employment and training programs".

State wage information and wage records that include wage information collected and maintained by the state are not "governed" by Section 1137 of the Social Security Act or WIOA.

Section 116(i) (2) of WIOA provides that
(2) WAGE RECORDS.—In measuring the progress of the State on State and local performance accountability measures, a State shall utilize quarterly wage records, **consistent with State law**. The Secretary of Labor shall make arrangements, **consistent with State law,** to ensure that the wage records of any State are available to any other State **to the extent that such wage records are required by the State** in carrying out the State plan of the State or completing the annual report described in subsection (d). (Emphasis Added)

The provisions of WIOA require that utilization of quarterly wage records must be consistent with state law.

Section 1137 (a) (2) and (3) of the Social Security Act provide in part that

SEC. 1137. **[**42 U.S.C. 1320b–7**]** (a) In order to meet the requirements of this section, a State must have in effect an income and eligibility verification system which meets the requirements of subsection (d) and under which—

(2) wage information from agencies administering State unemployment compensation laws available pursuant to section 3304(a)(16) of the Internal Revenue Code of 1954[91], wage information reported pursuant to paragraph (3) of this subsection, and wage, income, and other information from the Social Security Administration and the Internal Revenue Service available pursuant to section 6103(l)(7) of such Code[92], shall be requested and utilized to the extent that such information may be useful in verifying eligibility for, and the amount of, benefits available under any program listed in subsection (b), as determined by the Secretary of Health and Human Services (or, in the case of the unemployment compensation program, by the Secretary of Labor, or, in the case of the supplemental nutrition assistance program, by the Secretary of Agriculture);

The purpose of Section 1137 is to enable programs to improve benefit eligibility integrity with respect to the listed programs and was not enacted to create a data base to be used for program performance evaluation.

Wage information and wage records (reported quarterly or otherwise) are utilized and maintained under state law. Federal law and regulation address general minimum confidentiality requirements connected to the concern that wage information should be used to enable the proper determination of unemployment compensation and/or to ensure that tax information is not disclosed.

State laws vary in the definition of "quarterly wage information" that must be reported by employers and the circumstances under which information received and maintained by the workforce agency (or other agency) may be disclosed.

There is no federal preemption. To the contrary, federal law requires that state law control.

The UI program has a long history of requesting and maintaining wage information from employers going back to the enactment of the program in 1935. The requirement that there be quarterly wage reports by employers in all states, however, was not implemented until the 1980s, and many state laws addressing confidentiality were enacted prior to the 1980s.

States are already permitted to enact state laws to align with the proposed WIOA regulations. They are just not required by statute to do so.

The cost of implementing new national employer reporting to meet a national definition of wage information or wage records would be significant, particularly as it would be in addition to and not in place of the existing reporting requirements directly related to the UI program.

Employers would be obligated to create new record layouts and respond to new definitions that would overlay the existing reports, creating confusion about responsibility for reporting

and imposing different confidentiality standards based on the data to be collected and reported and the differing confidentiality standards under state and federal law.

If the proposed definition of "quarterly wage record information" for purposes of performance reporting under WIOA, included "wages earned" instead of "wages paid", there would be significant confusion and cost for employers and the workforce system.

The narrative in the NPRM indicates that 20 CFR 677.15 would include three data elements: (1) A program participant's SSN(s); (2) information about the wages program participants earn after exiting from the program; and (3) the name, address, State and (when known) the Federal Employer Identification Number (FEIN) of the employer paying those wages.

The actual regulatory language proposed for the section in pertinent part is

§ 677.175 What responsibility do States have to use quarterly wage record information for performance accountability?
(a) States must, consistent with State laws, use quarterly wage record information in measuring the progress on State adjusted levels of performance for the primary indicators outlined in § 677.155 and local performance indicators identified in § 677.205. The use of social security numbers from participants and such other information as is necessary to measure the progress of those participants through quarterly wage record information is authorized.

(b) ''Quarterly wage record information'' means intrastate and interstate **wages paid** to an individual, the social security number (or numbers, if more than one) of the individual and the name, address, State, and the Federal employer identification number of the employer paying the wages to the individual.

Wages "earned" information is not maintained by states in quarterly wage record systems because the obligation to report on the part of employers is to report wages "paid" with respect to a quarter which often differs from "earnings".

Creating a new quarterly reporting requirement of earnings would impose a new responsibility to gather additional information, systems to track it and to report it in addition to quarterly wages paid.

Clarification is needed to determine the extent to which the new proposal would seek to obtain information that is not required by state law to be reported by employers and then to determine the additional cost associated with any additional information that may be requested under WIOA.

The definition of wage record information in the regulations is not specific enough to be used as an interstate or national point of comparison.

In the summary narrative, the NPRM indicates that the "the employer-provided wage reports collected under Section 1137 of the Social Security Act "are the reports that the State UC

agency obtains from employers for determining UC tax liability, monetary eligibility, or for cross-matching against State UC agencies' files to determine if improper payments have been made. There is no single file of wage reports that is uniformly used for all of these purposes.

As a practical matter, states collect and maintain wage information in a number of forms. Wage information is collected quarterly along with quarterly total and taxable wage information used for UI tax administration. The reported amounts may not match. In some states the reports may be received and maintained by different agencies.

Wage information reported quarterly by employers may be overlaid based on claimant affidavits, wage information transfers from other states, or corrections. Because the data base is principally used as the basis for UI benefit monetary determinations it may be adjusted at any time.

Which quarterly wage record file should be used in performance evaluation? One would think that the most recent and presumably accurate wage records would be used, but that may not be the quarterly wage record reports initially reported by employers.

The additional definition of "wage records" further complicates administration and the law that controls the use and disclosure of wage information.

The Department of Labor proposes to add a definition of "wage record" to be used for purposes of administration of the Wagner Peyser Act and Labor Market Information.

The proposed Section 652.301 defines "wage records" to mean "records that contain "wage information" as defined in the Department regulations at 20 CFR part 603." However, the NPRM goes on to indicate that additional data could be included within the definition of "wage records".

This creates some legal issues with respect to the "additional" information that might be added to wage information as defined in 20 CFR part 603. Could the additional information be maintained in a separate file and shared under different confidentiality standards? What if some of the additional information cross references wage information? If the wage information included in wage records is modified to some degree as part of a broader file is it still subject to the same confidentiality standards? What does this mean for WIOA reports that seek to publish performance on a local area basis where the report identifies individuals?

Recommendations and Conclusion

From an employer's perspective, additional reporting requirements increase administrative costs with respect to gathering additional information, increasing staff costs and increasing systems costs. Employers are currently coping with a wave of additional program regulations and reporting for a variety of programs, including the Affordable Care Act, OSHA, EPA, and other programs.

A number of interstate initiatives have been developed over the years through which to enable interstate administration of unemployment claims (ICON) and to enable the sharing of wage information through interstate agreements to assist in proper UI administration and as part of performance reviews under WIA (WRIS).

There are interstate agreements for the exchange of information not only to determine interstate and combined wage claims, but also to identify fraud and collect overpayments.

The IRS and SSA sought to harmonize the reporting of wages based on the Simplified Tax and Wage Record Study (STAWRS) initiative and found that there were over 100 definitional differences between state UI laws, the Federal Unemployment Tax Act (FUTA), the Federal Insurance Contributions Act (FICA), and Income Tax Withholding laws.

There are already agreements in place between states for research projects, and to exchange information with federal and state programs. Special authority has been enacted for the National Directory of New Hires (child support); SNAP; Medicaid, TANF, HUD, and SSA. Beyond special federal authorization and agreements are state based cross-matches and exchanges with workers' compensation, unemployment compensation, economic development, education and training, and research. How would these definitions and special agreements be affected by changes in the definition of wage record information?

Recommendation: Begin implementation with the current state based definitions and evaluate state specific best practices that may be considered for adoption by other states.

Systems Issues

The range of data definitions, programming and systems issues is considerable.
If there is an expansion of required data, what data elements will be included? How will they be defined? Are current systems sufficient to add more data elements to existing record lay outs? What programming would be needed to effectively capture the additional data?

The Interstate Conference of State Employment Security Agencies (ICESA), the forerunner of NASWA, developed uniform record layouts for states. In recent years a number of tax and wage record system designs have been developed independently by states. Many states and state consortia have developed record layouts and new reporting requirements specific to newly designed multi-state systems.

Will additional confidentiality measures be needed to assure that only authorized individuals have access? Will some data be encrypted but other data not be encrypted? What standards will apply with respect to public disclosure at the individual and aggregate level in each data cell?

How will hacking of the broader data base be avoided? What additional security measures will be required, particularly as a larger group of program users is identified?

How will system access be monitored on line and with respect to data downloads and uploads? Will state based wage information be subject to restrictions against disclosure that apply to information about individuals maintained in federal data bases?

The preliminary report of the Wage information Council (WIC) work group has only touched the surface of the complexity of state and federal system differences.

Recommendation: A more complete review of federal and state systems currently used to receive, maintain and disclose wage information is needed.

Legal Issues

What sanctions will be imposed for unauthorized disclosure and/or receipt of confidential information? Will individuals be subject to state and/or federal law with respect to penalties? Who will enforce and prosecute? Are new criminal statutes needed in addition to fines?

Will the additional information be available for use in benefit eligibility and or employer status and liability issues for UI? Will determinations arising from new wage information, fines for failure to report, and criminal prosecution be subject to appeal; and by whom? Is the additional information provided discoverable in collateral legal actions? Can it be used for purposes other than performance evaluation? How will use be regulated?

If there is an unauthorized disclosure must the individual be notified of the unauthorized disclosure? Is the expanded information subject to trade secrets protection for employers?

What notice to individuals, applicants, claimants and employers will be required as a condition of disclosure? Who will monitor notice requirements and enforce agreements and laws?

Will Consumer Reporting Agencies (CRAs) have access to the expanded wage information? In a number of states unauthorized disclosures have resulted in negative press and the discharge of officials. A review of existing state definitions and agreements is needed as part of the evaluation.

Recommendation: A clear delineation of application of federal and/or state law in the reporting, maintenance and disclosure of wage information is needed before moving ahead with new agreements and arrangements for use of the information.

Administrative Burden and Cost

There is considerable administrative burden and cost of compliance for employers and state workforce agencies to provide, receive, maintain and use expanded wage information. Employers would be required to review their current systems configurations for each state, the reporting methods currently being used, the programming costs that would be incurred, the costs of staff to be trained and time necessary to add information to reports, costs of transition, costs of legal review, and costs of confidentiality compliance. State agencies would also be

faced with significant additional administrative burden with insufficient funding. The extent of some of the suggestions would trigger increased review as federal unfunded mandates.

The administrative burden and cost will be considerable and the reporting changes would be made for the employer's entire workforce even though a relatively small percentage of its workers are likely to participate in program services provided through WIOA.

Recommendation: As part of any initiative to expand or significantly change employer wage reporting requirements, employers and their contractors engaged in producing wage information must be actively engaged in the evaluation of cost and administrative burden. The payroll industry must also be actively engaged as well as state agencies and state agency contractors currently involved as support for federal and state systems.

Conclusion

Expansion in wage information to be reported, received, maintained and effectively used requires extensive analysis to minimize unnecessary costs, improve efficiency and effectiveness before considering its use as a basis for WIOA performance measurement. A system that is not clear about definitions and is not properly funded to assure timely, consistent and credible information upon which to base performance will not meet the objectives of WIOA. Less complicated and less costly alternatives should be considered in addition to the currently available wage reports, including access to federal income tax information and the use of employer surveys with respect to services provided and outcomes for individuals served through WIOA programs.