

DEPARTMENT OF LABOR**Veterans' Employment and Training Service****20 CFR Part 1001**

RIN 1293-AA10

Funding Formula for Grants to States

AGENCY: Veterans' Employment and Training Service (VETS), Department of Labor.

ACTION: Interim final rule; request for comments.

SUMMARY: The Department of Labor is issuing an interim final rule implementing the Jobs for Veterans Act (Act). This rule establishes formula criteria for making funds available to each State. This rule will add a new Subpart F to 20 CFR part 1001.

DATES: This interim final rule is effective on July 30, 2003. The Department is requesting comments to be considered on this interim final rule. Comments will be considered and a final rule published as quickly as possible. To ensure consideration, comments must be received on or before August 29, 2003. This interim final rule expires September 30, 2004. A notice of proposed rulemaking will be published and the final rule will be issued before September 30, 2004, which addresses funding beyond fiscal year 2004.

ADDRESSES: Comments shall be sent to Paul Robertson, Legislative Analysis Division, VETS, U.S. Department of Labor, Room S-1325, 200 Constitution Avenue NW., Washington, DC 20210. Electronic mail is the preferred method for submitting comments. Comments must be clearly identified as pertaining to the interim final rule and sent to robertson-paul@dol.gov. Brief comments, limited to ten pages or fewer may be transmitted by facsimile (FAX) at (202) 693-4754. Individuals with hearing impairments may call (800) 670-7008 (TTY/TDD).

Where necessary, hard copies of comments also may be delivered to Paul Robertson, Legislative Analysis Division, VETS, U.S. Department of Labor, Room S-1325, 200 Constitution Avenue NW., Washington, DC 20210. Because of heightened security measures, mail in Washington, DC is sometimes delayed. For this reason we will only consider comments, postmarked on or before the deadline for comments.

Receipt of submissions, whether by e-mail, FAX transmittal, or U.S. Mail, will not be acknowledged; however, the sender may request confirmation that a submission has been received, by telephoning VETS at (202) 693-4714, or by making a request for confirmation

(separate from the submission) via the above e-mail.

Comments will be available for public inspection during normal business hours at the above address. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this interim final rule will be made available in the following formats: large print, electronic file on computer disk, and audiotape. To schedule an appointment to review the comments and/or to obtain the interim final rule in an alternate format, contact VETS at the e-mail address, telephone number, or mail address listed above.

FOR FURTHER INFORMATION: Contact Paul Robertson, Legislative Analysis Division, VETS, U.S. Department of Labor, Room S-1325, 200 Constitution Avenue NW., Washington, DC 20210, or by e-mail at robertson-paul@dol.gov.

SUPPLEMENTARY INFORMATION: The preamble to this interim final rule is organized as follows:

- I. Background—provides a brief description of the development of the interim final rule.
- II. Authority—cites the statutory provisions and rationale supporting the interim final rule.
- III. Section-by-Section Review of the Rule—summarizes pertinent aspects of the regulatory text and describes its purposes and application.
- IV. Regulatory Flexibility and Regulatory Impact Analysis—sets forth the applicable regulatory requirements.

I. Background

The President signed the Jobs for Veterans Act (Pub. L. 107-288) into law on November 7, 2002. The statute amends title 38 of the United States Code to revise and improve employment, training, and placement services furnished to veterans. This rule implements the provisions of 38 U.S.C. 4102A(c) as amended by section 4 of the Act that establishes a new funding formula for making funds available to each State, with an approved State plan, to support the Disabled Veterans Outreach Program (DVOP) and the Local Veterans Employment Representative (LVER) program.

II. Authority

The statutory authority for this interim final rule is 38 U.S.C. 4102A(c)(2)(B), as amended by the Jobs for Veterans Act, enacted November 7, 2002, as Public Law 107-288. Congress allowed for the phasing in of this requirement "over the three fiscal-year period" beginning in fiscal year 2003, which started on October 1, 2002 (38 U.S.C. 4102A(c)(2)(B)(ii), as amended by

the Act). Because of the late enactment of the law, one year of the phase-in had already lapsed on the date of enactment. There are only two years, therefore, to phase-in the funding formula. Congress intended that the formula will be phased-in and be fully implemented by the beginning of fiscal year 2006, which is October 1, 2005. The phase-in provision was not intended to delay the anticipated date of full implementation of the formula. The only practical way to adhere to the implementation expectations of Congress is to begin the phase-in process in FY 2004. The Secretary of Labor (Secretary) is publishing an interim final rule for the first phase-in year, to be followed by a notice of proposed rulemaking, because full notice and comment to begin implementation of the statutory phase-in period would result in impracticable delay and would be contrary to the public interest. Full notice and comment would be impracticable because the statutory duty to execute the law in a timely manner cannot be accomplished by strictly adhering to such requirements.

Solely using full notice and comment would be contrary to the public interest because enacting a requirement in one year that, by statutory design, was to take effect over a three-year period would unduly impact States. The effective date of the law caused a reduction of the phase-in to two years. If there are further delays brought about through a full notice and comment period, then the second year of the three-year phase-in period would be lost and the States would lose even more of the benefit intended by the phase-in provision. Because the new funding formula required by the Act will result in significant changes to States' funding allocations, the Secretary has determined it is in the public interest to act expediently to ensure States receive as much of the benefit of the phase-in period as possible. This will enable those States whose funding will be reduced more time to adjust to the reduced funding and will avoid disruptions in service to the greatest extent possible. It will also permit States, which gain funding to more sensibly plan how to administer their programs.

These concerns provide a sufficient good cause basis to forgo full notice and comment requirements for the first year in which the new formula will be phased-in. To accommodate a full notice and comment period and implement the formula beyond the first phase-in year, a notice of proposed rulemaking will be published. The upcoming notice of proposed

rulemaking will address the funding formula for FY 2005 (the last year of the phase-in period) and subsequent years.

III. Section-by-Section Review of the Rule

A. Funding Formula—Basic Grant

The Act requires the Secretary to make funds available to each State, upon approval of an “application” (*i.e.*, a State plan), to support the DVOP and LVER programs designed to provide employment services to veterans and transitioning servicemembers (38 U.S.C. 4102A(c)(2)(B), as amended by the Act). The Act further allows the Secretary to use such criteria as the Secretary may establish in regulation, including civilian labor force and unemployment data in determining the funding levels (38 U.S.C. 4102A(c)(B)(i), as amended by the Act). The statute requires that the amount of funding available to each State reflect the ratio of: (1) The total number of veterans residing in the State that are seeking employment; to (2) the total number of veterans seeking employment in all States (38 U.S.C. 4102A(c)(B)(i)(I) and (II), as amended by the Act). Additionally, the Act permits the Secretary to establish minimum funding levels and hold harmless criteria, in order to mitigate the impact upon states whose funding levels may be significantly affected by the implementation of the new formula (38 U.S.C. 4102A(c)(B)(i)(iii), as amended by the Act).

The Act states that the use of this formula be phased-in over the three fiscal-year period beginning October 1, 2002. Since the statute was not enacted until November 7, 2002, after the beginning of fiscal year 2003, we interpret this to mean that the first phase-in year for the funding formula will be fiscal year 2004, which begins on October 1, 2003. This will only allow a 2-year phase-in period, fiscal years 2004 and 2005, instead of the 3 years as contemplated by the statute.

1. Basic Grant Funding Formula and Data and Methodology

It has been determined that the ratio of the number of veterans seeking employment in each State to the number of veterans seeking employment in all States can be best determined using data collected through the Current Population Survey (CPS) and the Local Area Unemployment Statistics (LAUS), both of which are administered by the Bureau of Labor Statistics (BLS). The CPS is the most reliable source of current State level data on the number of veterans in the civilian labor force. However, because the sample size of

veterans at the State level is so small, the use of CPS to determine veterans’ unemployment rates at the State level is subject to large relative sampling errors. LAUS data are considered as the most highly reliable data on the general rate of unemployment at the State level and do not contain the large sampling error found in the CPS. Therefore, we determined to use LAUS data to measure the State unemployment rate. Furthermore, the Office of Management and Budget (OMB) requires Agencies allocating federal funds that include unemployment as a factor, to use LAUS as the indicator of unemployment, unless the authorizing statute specifies otherwise (OMB Statistical Policy Directive 11). Since LAUS data is based on total unemployment for a State, we concluded that LAUS data is the best available measure of veterans who are seeking work. Accordingly, we concluded the number of unemployed veterans in each State can be best determined by using a ratio of the general unemployment level in each State to the unemployment level in all States (from LAUS for the individual States ÷ LAUS for all States) and the number of veterans in the civilian labor force in each State compared to the total number of veterans in the civilian labor force across all States (from CPS for the individual States ÷ CPS for all States). The result of these two ratios will be averaged and converted to a percentage of veterans seeking employment in the State compared to the percentage of veterans seeking employment in all States. Three-year averages of the CPS and LAUS data are used in calculating the funding formula to stabilize the effect of annual fluctuations in the data in order to avoid undue fluctuations in the annual amounts allocated to States.

2. Minimum Funding Levels and Hold Harmless Criteria

The Act authorizes the Secretary to establish hold harmless criteria and minimum funding levels (38 U.S.C. 4102A(c)(2)(B)(iii), as amended by the Act). This interim final rule establishes a hold harmless rate of eighty percent for the phase-in period for fiscal year 2004 to mitigate the impact of the most significant reductions to States’ prior funding levels. With the eighty percent hold harmless during fiscal year 2004 each State will be provided no less than eighty percent of its previous year’s allocation. The eighty percent hold harmless will allow the reduction of funding, to those States impacted, to be implemented incrementally. To give States the maximum available period to adjust to changes in funding, the Department is implementing the first

year’s hold harmless rate through this interim final rule and will propose a second year hold harmless rate in the notice of proposed rulemaking to be published later. Finally, a minimum funding level of 0.28 percent of the prior year’s total funding level will be applied, meaning that no State may receive less than that amount, which is the same percentage applied in section 6 of the Wagner-Peyser Act (29 U.S.C. 49e(b)(3)).

3. Other Funding Criteria

In addition to requiring the Secretary to use civilian labor force and unemployment data in establishing States’ funding levels, the Act states that the Secretary “shall make available to each State * * * an amount of funding * * * using such criteria as the Secretary may establish in regulation * * *” (38 U.S.C. 4102A(c)(2)(B)(i), as amended by the Act). In addition to the amount awarded based on the basic grant funding formula, described in section 1 of this document, the Secretary will distribute four percent of the total amount made available for allocation to the States based on Transition Assistance Program (TAP) workload and exigent circumstances (38 U.S.C. 4102, 4102A(b), and 4107(c)(1), and 10 U.S.C. 1141). These other funding criteria are discussed more fully below.

a. Transition Assistance Program Workload

The Act requires the Secretary to implement programs to ease the transition of servicemembers to civilian careers (38 U.S.C. 4102. See also 10 U.S.C. 1141). Transition Assistance Program workshops provide such employment services for transitioning servicemembers. Since active military personnel are not included in the CPS civilian labor force data, or in the LAUS unemployment data, the level of need for Transition Assistance Program workshops are not reflected in the funding formula for the basic grant. Therefore, in order to ensure that each State has adequate funding to provide Transition Assistance Program workshops, supplemental funding is warranted. This funding will be proportional to each State’s Transition Assistance Program workload as identified in its State plan. Policy guidance will be provided to States to assist them in determining the amounts needed for this additional workload, which will be calculated on a per workshop basis as identified in the State plan.

b. Exigent Circumstances

Funding will be made available for exigencies, including but not limited to, needs based on sharp or unanticipated fluctuations in State unemployment levels and services to transitioning servicemembers as required by the Act. Economic and unemployment conditions at the time of the grant application may not reflect actual conditions. In such cases, program needs may warrant additional funding. These funds will be made available to States based on need and as supported by an approved modified plan.

Regulatory Flexibility and Regulatory Impact Analysis

The Regulatory Flexibility Act of 1980, as amended in 1996 (5 U.S.C. chapter 6), requires the Federal government to anticipate and minimize the impact of rules and paperwork requirements on small entities. "Small entities" are defined as small businesses (those with fewer than 500 employees, except where otherwise provided), small non-profit organizations (those with fewer than 500 employees, except where otherwise provided), and small governmental entities (those in areas with fewer than 50,000 residents). We have assessed the potential impact of this interim final rule by consulting with a wide range of small entities, in order to identify and address any areas of concern. Based on that assessment, we certify that the interim final rule, as promulgated, will not have a significant impact on a substantial number of small entities. We are transmitting a copy of our certification to the Chief Counsel for Advocacy of the Small Business Administration.

This interim final rule implements reforms to the nation's job training system. The Act will provide resources to States to assist veterans in preparing for, obtaining and retaining employment. This rule sets forth the conditions under which State governments receive funding. This rule does not directly impact small governmental entities.

Paperwork Reduction Act

This rule does not contain information collection that is subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

Executive Order 12866, Regulatory Planning and Review

The Department of Labor has determined that this rule is not a "significant regulatory action" under Executive Order 12866 because this action will not: (1) Have an annual

effect on the economy of \$100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency, or otherwise interfere, with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. Therefore, no regulatory impact analysis is required.

Unfunded Mandates

Executive Order 12875—This rule will not create an unfunded Federal Mandate upon any State, local, or tribal government.

Unfunded Mandate Reform Act of 1995—This rule will not include any Federal mandate that may result in increased expenditures by State, local and tribal governments in the aggregate of \$100 million or more, or increased expenditures by the private sector of \$100 million or more.

Executive Order 13132, Federalism

This rule will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, the requirements of section 6 of Executive Order 13132 do not apply to this rule.

Executive Order 12988

This rule has been drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The rule has been written so as to minimize litigation and provide a clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities.

■ For the reasons set forth in the preamble, 20 CFR chapter IX is amended as set forth below.

PART 1001—SERVICES FOR VETERANS

■ 1. The authority citation continues to read as follows:

Authority: Sec. 4(a), Pub. L. 107-288; 38 U.S.C. 4102A.

■ 2. Part 1001 is amended by adding a new Subpart F to read as follows:

Subpart F—Formula for the Allocation of Grant Funds to State Agencies

Sec.

1001.150 Method of calculating State base grant awards.

1001.151 Other funding criteria.

1001.152 Hold harmless criteria and minimum funding level.

Subpart F—Formula for the Allocation of Grant Funds to State Agencies

§ 1001.150 Method of calculating State base grant awards.

(a) In determining the amount of funds available to each state, the ratio of the number of veterans seeking employment in the state to the number of veterans seeking employment in all states will be used.

(b) The number of veterans seeking employment will be determined based on the number of veterans in the civilian labor force and the unemployment rate. The civilian labor force data will be obtained from the Current Population Survey (CPS) and the unemployment rate will be obtained from the Local Area Unemployment Statistics (LAUS).

(c) Each state's allocation will be determined by dividing the sum of the corresponding figures across all states for the number of unemployed veterans in each state (LAUS for the individual states ÷ LAUS for all sStates) and the number of veterans in the civilian labor force in each state compared to the total number of veterans in the civilian labor force across all states (CPS for the individual states ÷ CPS for all states). The result of these two ratios will be averaged and converted to a percentage of veterans seeking employment in the state compared to the percentage of veterans seeking employment in all states. Three-year averages of the CPS and LAUS data will be used in calculating the funding formula to stabilize the effect of annual fluctuations in the data in order to avoid undue fluctuations in the annual amounts allocated to states.

§ 1001.151 Other funding criteria.

(a) Four percent of the total amount available at the national level for allocation to the states will be distributed to the states based on Transition Assistance Program (TAP) workload and other exigencies.

(b) Funding for TAP workshops will be provided on a per workshop basis as described in the approved state plan submitted by the state.

(c) Funds for exigent circumstances, such as unusually high levels of unemployment, surges in the demand for transitioning services, including the

need for TAP workshops, will be allocated based on need as supported by an approved or modified state plan.

§ 1001.152 Hold harmless criteria and minimum funding level.

(a) A hold harmless rate of 80 percent of the prior year's funding level will be applied for fiscal year 2004.

(b) A minimum funding level is established to ensure that in any year, no state will receive less than 0.28 percent of the previous year's total funding for all states.

Signed at Washington, DC this 25th day of June, 2003.

Frederico Juarbe Jr.,

Assistant Secretary of Labor for Veterans' Employment and Training.

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