WIOA Pay for Performance Guidance Recommendations

On December 7, 2020, the U.S. Department of Labor (DOL) released guidance for the Pay-for-Performance provisions (PFP) under the Workforce Innovation and Opportunity Act (WIOA). DOL also released additional PFP resources in February 2021, including an FAQ and webcast. Workforce boards may be excited to learn of the ability provided by this guidance to begin to accumulate each year's ten percent set-aside of "funds available for extended disbursement," or funding that remains available until expended, until they have sufficient funds to launch their PFP initiative. However, workforce boards are limited as to what outcomes they can target in their PFP initiatives, and even what services can be provided; missing an important opportunity by not allowing local areas to select the outcomes most meaningful to their communities and populations.

Pay-for-Performance vs. Performance-Based WIOA Contracts

It is important to note that the PFP guidance does not apply to traditional performance-based contracting. DOL's WIOA Final Rule clarified that WIOA PFP contracting is just one type of a performance-based contract: "Performance-based contracts are still an available option for local areas and there is no limit on the use of funds for typical performance-based contracts, as defined in the Federal Acquisition Regulations (FAR), [Subpart 37.6 – Performance-Based Acquisition]. Contracts that are not executed under the WIOA PFP contracting authority may continue to include performance incentives, both positive or negative." Traditional performance-based contracts must make all payments within the two-year budget window for WIOA funds, whereas PFP contracts may make payments beyond that window. It has become clear that the differences between the two are not always understood, and additional guidance, examples, and technical assistance would be quite helpful.

What Does PFP Include?

The biggest benefit to leveraging PFP is the ability to pay for outcomes that occur outside of the normal two-year WIOA funding cycle. With the ability to set aside up to ten percent of WIOA funds to be held until expended, workforce boards will now be able to allow for longer intervention timelines. While PFP will not necessarily save money, the expanded ability to tie outcomes and impacts to expenditures will allow boards to begin to build a more longitudinal understanding of the success of their programs and investments. With these expanded flexibilities, comes expanded compliance requirements, including a feasibility study (which can be done in-house), an independent data validator, and an evaluation plan.

1. PFP requires "1) contracts where a fixed amount is paid to an eligible provider based on the achievement of specified levels of performance on WIOA's primary indicators of performance for target populations within a defined timetable (this includes a new restriction, discussed more below); 2) an independent validation of the performance achieved; and 3) a description of how state or local areas will reallocate funds to other PFP contract strategies if the funds were not used because the performance outcomes were not met."
2. Focus on outcomes and potential for longer-term interventions: States and local workforce areas may set aside annually up to ten percent of WIOA Title I Adult, Dislocated Worker, and Youth formula funds for PFP contracts to pay for priority outcomes and bonus payments. These funds become "available for extended disbursement" in that they are available until expended, allowing workforce agencies to incentivize outcomes that may occur outside of the normal two-year WIOA funding cycle. If performance targets are not met, these funds stay with the local agency and can be recycled into a future PFP initiative.
   a. To leverage the 10% funding available for extended disbursement, workforce boards must notify ETA. Because a single year's ten percent set-aside might be insufficient to fund a PFP contract, the set-aside funds may accumulate over multiple years.
3. PFP-related activities, including feasibility studies, technical assistance, and PFP evaluation activities, do not count towards the ten percent limitation, and in fact cannot be paid for using the set-aside. These activities can be paid for using other WIOA funding outside of the ten percent set-aside, private funding, or other state and local workforce funding. But the ten percent set aside may only be used to make outcomes payments. This limitation on the paying for necessary, related activities could eliminate local boards' ability to even use the PFP authority. For smaller boards, particularly those that are part of government agencies, they will not be able to set non-PFP funds aside until they have enough to afford these activities and processes, and they may not be allowed to pursue private funds, essentially putting PFP out of their reach.

Areas of the PFP Guidance Where Clarification or Changes Are Needed

1. **Additional guidance is needed to clarify how workforce boards should handle their PFP funds that are available until expended.** DOL's guidance notes that "ETA will administratively move PFP funds from the original WIOA grant document to a PFP-specific grant document with the same Treasury account (but a different subaccount) and a separate Payment Management System account. The PFP grant document and PMS account effectively do not expire." However, the guidance is not clear on how states should interact with local areas regarding PFP funds. Additional guidance, including examples, would be helpful on the following aspects:

a. Who should hold the funds? Given that only local boards can leverage the 10% funding as part of PFP, they will be the entities to hold the funds. DOL clarified this in their webcast, and it would be helpful to have this more clearly detailed in writing, along with examples of how local boards have done this.
b. How to hold the funds? Informally, DOL has suggested that local boards will likely need to hold the funds in a separate account, but clarifying this in writing and sharing some scenarios of how this might happen would be helpful. Additional guidance on how states and local boards should interact with PFP given current drawdown rules is also needed.
c. What strategies should local boards use to roll these funds over into new PFP activities if performance is not achieved? If set outcomes are not achieved, funds would remain in the set aside account, the local area would report to the state that funds were not, and the funds could then be used for a different or new PFP contract. Written guidance on what the plan should contain and confirmation that reporting to the state and the PFP contracts themselves serve as the record of plans for using those funds.

Because there are currently limitations on how much cash local areas are allowed to draw down, if local boards are responsible for drawing down the PFP funds and holding them in a separate account, states will need to make an exception to the "drawdown rule." It is unclear whether states can make that exception, but more importantly, it is unclear whether it is needed. We know that some states have been unwilling to make this exception, stating that DOL must make the exception. Guidance on this issue would be very helpful.

2. **Adjustments and clarification are needed regarding what performance indicators may be linked to payment and on what timetable.** DOL specifies that PFP "performance outcomes must be based on the primary performance indicators in WIOA §116(b)(2)(A)...The indicators must be applied to the relevant target population, within the same WIOA time frames identified in §116(b)(2)(A) for these indicators." However, the guidance also explains that PFP contracts may use "performance indicators in addition to the WIOA primary indicators." Providers must first meet or exceed the targets set for the primary indicators before receiving performance payments based on alternative metrics. The additional performance metrics "must be related to the WIOA title I, subtitle B allowable PFP activities." Additional guidance, including examples of alternative metrics, would be incredibly useful. For instance:

a. Whether additional outcomes such as these would be permissible alternative metrics, and if so, providing them as examples for state and local boards: 1) percentage of program participants that are in unsubsidized employment in the first quarter after program exit, 2) median earnings of program participants in the fourth quarter after program exit, 3) increase in earnings for previously employed individuals, 4) reduction in recidivism in the criminal justice system, 5) placement in stable housing for people who are unhoused, 6) earnings beyond fourth quarter after program exit, and 7) percentage of program participants placed into high quality jobs.
b. Guidance is needed on how to treat performance measures for populations that face intersecting forms of oppression, such as out of area may be impacted for these populations and DOL guidance that encourages states to provide flexibility on performance measures to local areas that are re-focusing services on these populations is critical to serving these individuals well.
c. Since some metrics would be collected concurrently, additional guidance on payment for related outcomes is needed. For example, job placement in the first quarter would be collected at the same time as whether that job was at or above a living wage. If one quarter a provider meets WIOA required placement and living wage goals, the workforce board could pay on both the core metric and the additional metric. However, if another quarter the provider does not meet the WIOA core metric, is the board restricted from paying on anything? Alternatively, does this mean that boards have to wait until the end of the contract to see if the provider hits every single WIOA metric and only then can pay on the alternative metrics? There would be a strong disincentive to using this approach to serve special populations as one of the attractions is to be able to look at metrics specific to the population, for example in serving justice-involved and paying on reduced recidivism.
d. A positive aspect of PFP is the ability for local boards to focus on longer-term, higher-bar outcomes for the individuals served. It is conceivable, then, that a provider might miss some of the near-term targets in order to better achieve the longer-term targets, getting someone into a high-quality job, which may take a bit more time, for example. removing the local board's ability to decide which metrics to incentivize through PFP greatly diminishes the power of this contracting strategy. Given that boards will have to report on WIOA measures regardless, it seems unnecessarily prescriptive to force boards to link PFP payments to the same measures. If the WIOA measures were the right ones for every community, we might not need strategies like PFP in the first place.

e. Guidance on how a local board might leverage bonus payments in relation to these performance metric requirements. Northern Virginia is a good example of using PFP bonus payments to incentivize service and outcomes for youth who have been involved in foster care or justice systems. The bonus payments are based on a per individual and per outcome basis, and it will be important that the provider can receive bonus payments on any outcomes they are able to reach. The DOL guidance seems to imply that PFP payments could only be made if the provider was able to achieve all of the outcomes.

3. **The guidance does not clarify the rationale for why there is a limitation on what activities are allowable, given that PFP payments are linked to outcomes, nor what documentation is needed to verify activities.** According to DOL's guidance, PFP contracts must "must provide the adult and dislocated worker program training services in WIOA §134(c)(3), and/or the youth program activities in WIOA §129(c)(2)."
    a. This was an unfortunate limitation included in the original WIOA legislation that shifts the focus away from priority outcomes and back to activities. It is not clear how a local board would enforce this requirement since PFP payments are linked to achieving outcomes, not the underlying activities. Local boards need clarity on what documentation will be required as evidence of the activities. If the same documentation is required as in a cost-reimbursement contract, this will make PFP very undesirable to the contractor as they will have to do all the same cost reimbursement paperwork while taking on the additional risk associated with a performance contract.

4. **The guidance does not clarify whether PFP indirect costs can be drawn down regardless of outcomes.** Because a workforce board will need to spend administrative funds to study and develop PFP contracting strategies, further guidance should clarify that boards may draw down PFP funds on direct and indirect cost rates for administrative expenses, regardless of whether a PFP contract is ultimately issued or whether outcome targets are achieved. In DOL's FAQ, they clarify that "all costs for PFP contract strategies are considered program costs. PFP related-activities (e.g., the feasibility study, technical assistance, and evaluation) should be classified as program costs or administrative costs based on 20 CFR 683.215." While this provides some clarity, the issue of the administrative drawdown remains confusing for many boards.

5. **Local and state boards are eager for examples of PFP contracts.** Given the newness of this guidance, along with the complexities of the compliance requirements, we are glad to hear that DOL will be providing a few examples of how a PFP contract could be structured, including population of interest, intervention, outcome metrics, evaluation method, and payment allocation arrangement as states and localities consider the utilization of the pay for performance authority. PFP examples could include:
    a. 100% payment upon the achievement of outcomes via a PFP contract.
    b. 65% payment that is contingent upon the achievement of outcomes via PFP contracting strategy and 35% payment that is contingent upon achieving outputs via performance-based contracting
    c. 50% payment that is contingent upon the achievement of outcomes via PFP contracting strategy, 35% payment that is contingent upon achieving outputs via performance-based contracting, and 15% payment that is non-contingent.
    d. 100% of contract payment based on traditional cost reimbursement for services rendered with an additional bonus payment built in for achievement of longer-term outcomes.
    e. Northern Virginia's use of PFP bonus payments to improve youth workforce outcomes could be shared widely as the first instance of PFP implementation.