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29 CFR Part 38

Implementation of the Nondiscrimination and Equal Opportunity Provisions  
of the Workforce Innovation and Opportunity Act; Proposed Rule

**DEPARTMENT OF LABOR****Office of the Secretary****29 CFR Part 38**

RIN 1291-AA36

**Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act****AGENCY:** Office of the Secretary, Labor.**ACTION:** Notice of Proposed Rulemaking.

**SUMMARY:** The U.S. Department of Labor (Department) is proposing to issue nondiscrimination and equal opportunity regulations replacing its regulation which implemented Section 188 of the Workforce Innovation and Opportunity Act (WIOA). Signed by President Obama on July 22, 2014, WIOA supersedes the Workforce Investment Act of 1998 (WIA) as the Department's primary mechanism for providing financial assistance for a comprehensive system of job training and placement services for adults and eligible youth. Section 188 of WIOA prohibits the exclusion of an individual from participation in, denial of the benefits of, discrimination in, or denial of employment in the administration of or in connection with, any programs and activities funded or otherwise financially assisted in whole or in part under Title I of WIOA because of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries only, citizenship status, or participation in a program or activity that receives financial assistance under Title I of WIOA. These proposed regulations would update the nondiscrimination and equal opportunity regulation consistent with current law and address its application to current workforce development and workplace practices and issues.

Most of the provisions of WIOA took effect on July 1, 2015, except where otherwise specified in the law. WIOA contains the identical provisions of Section 188 as appeared in WIA, and these WIOA provisions took effect on July 1, 2015. To ensure no regulatory gap while this proposed rulemaking progresses toward a final rule, the Department issued a final rule implementing Section 188 of WIOA, which applies until issuance of the final rule based on this NPRM. The final rule issued separately in July 2015 retains the provisions in part 37 but substitutes all references to WIA with WIOA to reflect the proper statutory authority. This NPRM revises the final rule issued

in July 2015. This NPRM generally carries over the policies and procedures found in Department regulations, which implement the equal opportunity and nondiscrimination provisions of WIA and WIOA. Like the final rule issued separately in July 2015, this rule is organized by the same subparts A through E, and refers to "changes" or "revisions" made to the final rule. Certain sections in each subpart have significant revisions.

**DATES:** To be assured of consideration, comments must be received on or before March 28, 2016.

**ADDRESSES:** Comments may be submitted, identified by Regulatory Information Number (RIN) 1291-AA36, by any one of the following methods:

- *Federal e-Rulemaking Portal* [www.regulations.gov](http://www.regulations.gov). Follow the instructions for submitting comments.
- *Fax:* (202) 693-6505 (for comments of six pages or less).
- *Mail or Hand Delivery/Courier:* Naomi Barry-Perez, Director, Civil Rights Center (CRC), U.S. Department of Labor, 200 Constitution Avenue NW., Room N-4123, Washington, DC 20210.
- *Email at* [CRC-WIOA@dol.gov](mailto:CRC-WIOA@dol.gov).

Please submit comments by only one method. Receipt of comments will not be acknowledged; however, the Department will post all comments received on <http://www.regulations.gov> without making any change to the comments, including any personal information provided. The <http://www.regulations.gov> Web site is the Federal e-rulemaking portal, and all comments posted there are available and accessible to the public.

The Department cautions commenters not to include personal information, such as Social Security Numbers, personal addresses, telephone numbers and email addresses, in comments, as such submitted information will become viewable by the public via <http://www.regulations.gov>. It is the responsibility of the commenter to safeguard personal information. Comments submitted through <http://www.regulations.gov> will not include the commenter's email address unless the commenter chooses to include that information as a part of a comment.

Postal delivery in Washington, DC, may be delayed due to security concerns. Therefore, the Department encourages the public to submit comments via the Web site indicated above.

The Department will also make all the comments it receives available for public inspection during normal business hours at the Civil Rights Center at the above address. If you need

assistance to review the comments, the Department will provide you with appropriate aids such as readers or print magnifiers. The Department will make copies of this NPRM available, upon request, in large print and as an electronic file on computer disk. The Department will consider providing the proposed rule in other formats upon request. To schedule an appointment to review the comments and/or obtain the rule in an alternate format, contact CRC at (202) 693-6500 (VOICE) or (202) 877-8339 (TTY).

**FOR FURTHER INFORMATION CONTACT:**

Naomi Barry-Perez, Director, Civil Rights Center, U.S. Department of Labor, 200 Constitution Avenue NW., Room N-4123, Washington, DC 20210. *CRC-WIOA@dol.gov*, telephone (202) 693-6500 (VOICE) or (202) 877-8339 (Federal Relay Service—for TTY).

**SUPPLEMENTARY INFORMATION:****Executive Summary***Purpose of the Regulatory Action*

The Civil Rights Center (CRC) of the Department is charged with enforcing Section 188 of WIA and, successively, WIOA, which prohibits exclusion of an individual from participation in, denial of the benefits of, discrimination in, or denial of employment in the administration of or in connection with, any programs and activities funded or otherwise financially assisted in whole or in part under Title I of WIOA because of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries, applicants, and participants only, citizenship status, or participation in a program or activity that receives financial assistance under Title I of WIOA. Section 188 of WIOA incorporates the prohibitions against discrimination in programs and activities that receive Federal financial assistance under certain civil rights laws including Title VI of the Civil Rights Act of 1964 (prohibiting discrimination based on race, color, and national origin in programs and activities receiving federal financial assistance),<sup>1</sup> Title IX of the Education Amendments of 1972 (prohibiting discrimination based on sex in education and training programs receiving federal financial assistance),<sup>2</sup> Age Discrimination Act of 1975 (prohibiting discrimination based on age),<sup>3</sup> and Section 504 of the Rehabilitation Act (prohibiting discrimination based on disability).<sup>4</sup>

<sup>1</sup> 42 U.S.C. 2000d *et seq.*

<sup>2</sup> 20 U.S.C. 1681 *et seq.*

<sup>3</sup> 42 U.S.C. 6101 *et seq.*

<sup>4</sup> 29 U.S.C. 794.

CRC interprets the nondiscrimination provisions of WIOA consistent with the principles of Title VII of the Civil Rights Act (Title VII),<sup>5</sup> the Americans with Disabilities Act (ADA),<sup>6</sup> as amended by the Americans with Disabilities Act Amendments Act (ADAAA),<sup>7</sup> and Section 501 of the Rehabilitation Act, as amended,<sup>8</sup> which are enforced by the Equal Employment Opportunity Commission (EEOC); Executive Order 11246, as amended,<sup>9</sup> and Section 503 of the Rehabilitation Act, as amended,<sup>10</sup> which are enforced by the Department's Office of Federal Contract Compliance Programs (OFCCP); Title VI of the Civil Rights Act (Title VI), the Age Discrimination Act of 1975, and Section 504 of the Rehabilitation Act, which are enforced by each Federal funding agency; and Title IX of the Education Amendments of 1972 (Title IX), which is enforced by each Federal funding agency that assists an education or training program.

The regulations at 29 CFR part 38 set forth the equal opportunity and nondiscrimination requirements and obligations for recipients of financial assistance under Title I of WIOA and the enforcement procedures for implementing the nondiscrimination and equal opportunity provisions of WIOA. As set forth in the Part 38 final rule, WIOA did not change the nondiscrimination and equal opportunity provisions in Section 188, but Congress mandated that the Department issue regulations to implement the section not later than one year after the date of enactment of WIOA.<sup>11</sup> The regulations must contain standards for determining discrimination and enforcement procedures, including complaint processes for Section 188 of WIOA.<sup>12</sup>

Since their promulgation in 1999, the regulations implementing Section 188 of WIA at part 37 have only been amended once, in 2004, specifically to revise § 37.6 to provide that faith-based and community organizations are able to participate in the Department's social service programs without regard to their religious character or affiliation.<sup>13</sup>

Because the part 38 regulations made only technical revisions from the part 37 rule, changing references from "WIA" to "WIOA," the current rule does not reflect recent developments in equal opportunity and nondiscrimination jurisprudence. Moreover, procedures and processes for enforcement of the nondiscrimination and equal opportunity provisions of Section 188 have not been revised to reflect changes in the practices of recipients since 1999, including the use of computer-based and Internet-based systems to provide aid, benefit, service, and training through WIOA Title I-financially assisted programs and activities.

For the reasons stated above, the Department proposes to revise the regulations at part 38 to set forth recipients' nondiscrimination and equal opportunity obligations under WIOA Section 188 in accordance with existing law and policy. This NPRM proposes to update the regulations to address current compliance issues in the workforce system, and to reflect existing law under Title VI and Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the ADA and the Rehabilitation Act as related to WIOA Title I-financially assisted programs and activities. This NPRM also incorporates developments and interpretations of existing law by the Department of Justice (DOJ), the EEOC, the Department of Education, and this Department's corresponding interpretation of Title VII and the Rehabilitation Act, as amended, into the workforce development system. The proposed rule is intended to reflect current law and legal principles applicable to a recipient's obligation to refrain from discrimination and to ensure equal opportunity.

The first category of proposed updates to the part 38 regulations in this NPRM improves the overall readability of the regulations through revisions, limited reorganization of sections and more explicit descriptions of recipient obligations. The NPRM revises the current question and answer format in the title of each section to make it more straightforward and to more closely mirror other nondiscrimination and equal opportunity regulations issued by the Department. This NPRM also replaces "he or she" with "the individual," "person," or other appropriate identifier wherever possible to avoid the gender binary. The plain language of the regulations is retained for ease of comprehension and application.

The second category of proposed changes in this NPRM updates the nondiscrimination and equal

opportunity provisions to align them with current law and legal principles. As discussed above, in enforcing the nondiscrimination obligations of recipients set forth in this part, CRC follows the case law principles developed under, among other statutes, Title VI and Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act, as amended by the ADAAA. Since the issuance of the WIA Section 188 regulations in 1999, the principles of nondiscrimination and equal opportunity law under these statutes have evolved significantly and the ADA has been amended. Agencies enforcing these statutes have issued regulations and guidance impacting WIOA Title I-financially assisted programs and activities to reflect these legal developments.<sup>14</sup> During that time, the Department has issued final rules under Section 503 of the Rehabilitation Act and Executive Order 13672, which amended Executive Order 11246.<sup>15</sup>

The third category of proposed changes in this NPRM improves the effectiveness of the Department's enforcement program to support compliance with this rule. The compliance review and complaint procedures sections have been updated based on the Department's experience enforcing 29 CFR part 37. The proposed changes also reflect feedback received from stakeholders such as recipients and their Equal Opportunity Officers (EO Officers) and are intended to increase compliance through clearer descriptions of recipient responsibilities, more effective EO, enhanced data collection, and consistent monitoring and oversight by Governors. The Department maintains regular contact with the regulated community, and this contact has informed certain proposed revisions to the provisions in the part 38 rule. For example, proposed § 38.35 provides that recipients must include in their equal opportunity notice or poster a parenthetical noting that sex, as a prohibited basis for discrimination, includes pregnancy, childbirth and related medical conditions, sex stereotyping, transgender status, and gender identity. Similarly, the notice or

<sup>5</sup> 42 U.S.C. 2000e *et seq.*

<sup>6</sup> 42 U.S.C. 12101 *et seq.*

<sup>7</sup> 42 U.S.C. 12101 *et seq.*, Public Law 110-325, § 2(b)(1), 122 Stat. 3553 (2008).

<sup>8</sup> 29 U.S.C. 791.

<sup>9</sup> Executive Order 11246 (30 FR 12319), as amended by Executive Order 11375 (32 FR 14303), Executive Order 12086 (43 FR 46501), Executive Order 13279 (67 FR 77141), Executive Order 13665 (79 FR 20749) and Executive Order 13672 (79 FR 42971).

<sup>10</sup> 29 U.S.C. 793.

<sup>11</sup> 29 U.S.C. 3248(e).

<sup>12</sup> *Id.*

<sup>13</sup> 69 FR 41894, July 12, 2004.

<sup>14</sup> See 29 CFR part 1630, 76 FR 16978, March 25, 2011 (EEOC regulations implementing ADA Title I); 79 FR 4839, January 30, 2014 (DOJ NPRM amending ADA Title II and III regulations).

<sup>15</sup> 41 CFR part 60-741, 78 FR 58862, Sept. 24, 2013 (OFCCP final rule implementing Section 503); 41 CFR parts 60-1 through 60-50, 79 FR 72985, Dec. 9, 2014 (OFCCP final rule implementing E.O. 13672).

poster would be modified to note in another parenthetical that includes limited English proficiency (LEP) as a form of national origin discrimination. These changes, although slight, identify the scope of the nondiscrimination obligation with more specificity and inform those who may not otherwise be aware of the developments in law.

The Department has participated in annual training conferences, including national conferences on equal opportunity attended by officials and staff of the State and local agencies that are responsible for ensuring nondiscrimination in the programs receiving financial assistance under WIA and/or WIOA Title I. The Department's participation in conferences offered leaders of State and other local agencies the opportunity to exchange—with each other and with the CRC—tips, tools, and practices, and to discuss more efficient and effective means of supporting compliance with this rule. Those exchanges have informed this NPRM. For example, to assist with compliance, the NPRM includes an Appendix that lists best practices for a recipient to consider when developing a written LEP plan. By including this information, recipients may be better prepared to meet their obligations.

The Department also received feedback from EO Officers at trainings and listening sessions conducted by the CRC and through technical assistance calls. EO Officers, designated by the recipients, are responsible for carrying out the recipients' obligations under Section 188 and its implementing regulations. Their feedback reflects a shared concern among EO Officers that the regulations at 29 CFR part 38 applicable to the role of the EO Officers do not sufficiently reflect the responsibilities of the role. For example, EO Officers have advised that the part 37 rule did not provide them with sufficient authority or require the recipients to provide EO Officers with sufficient resources to enable them to effectively meet their obligations. Many of the changes, both substantive and stylistic, that are proposed in this rule reflect their input. Specifically, proposed § 38.28 would require that the Governor designate a State level EO Officer who reports directly to the Governor, and that this EO Officer be given staff and resources sufficient to carry out the required responsibilities. These requirements are designed to provide the EO Officer with sufficient authority to fulfill the obligation to coordinate statewide compliance with the nondiscrimination and equal opportunity provisions in WIOA;

current part 38 does not similarly support the work of the EO Officer.

### Statement of Legal Authority

#### Statutory Authority

The statutory authorities for this NPRM are: Section 134(b), 116(d)(2)(F), 116(e), 169(a), 183(c), 185(c)(2), 185(d)(1)(E), 186, 187 and 188 of WIOA. Public Law 113–128, 128 Stat. 1429; Title VI of the Civil Rights Act of 1964, as amended. Public Law 88–352, 78 Stat. 252 (42 U.S.C. 2000d, *et seq.*); Section 504 of the Rehabilitation Act of 1973, as amended, Public Law 93–112, 87 Stat. 390 (29 U.S.C. 794); the Age Discrimination Act of 1975, as amended, Public Law 94–135; 89 Stat. 728 (42 U.S.C. 6101); and Title IX of the Education Amendments of 1972, as amended, Public Law 92–318, 86 Stat. 373 (20 U.S.C. 1681).

#### Departmental Authorization

Secretary's Order 04–2000 delegated to CRC responsibility for developing, implementing and monitoring the Department's civil rights enforcement program under all equal opportunity and nondiscrimination requirements applicable to programs or activities financially assisted or conducted by the Department, including Section 188 of WIA. Section 5 of the Secretary's Order also authorized the Assistant Secretary for Administration and Management, working through the CRC Director, to establish and formulate all policies, standards, and procedures for, as well as to issue rules and regulations governing, the enforcement of statutes applying nondiscrimination and equal opportunity requirements to programs and activities receiving financial assistance from the Department.<sup>16</sup> Section 5(j) of the Order also delegates authority and assigns responsibility to CRC for “other similarly related laws, executive orders and statutes.” Thus, this delegation also covers CRC's enforcement of Section 188 of WIOA, and no new delegation is necessary.

#### Interagency Coordination

The DOJ, under Section 1–201 of Executive Order 12250, 45 FR 72995 (November 4, 1980), is responsible for coordinating Federal enforcement of most nondiscrimination laws that apply to federally-assisted programs and activities. Executive Order 12067, 43 FR 28967 (July 5, 1978) requires Federal departments and agencies to consult with the EEOC about regulations involving equal employment opportunity. Pursuant to Executive Order 12067, the EEOC is the lead

federal agency responsible for defining the nature of employment discrimination on the basis of race, color, religion, sex, national origin, age, or disability under all Federal statutes, Executive orders, regulations, and policies which require equal employment opportunity. The Age Discrimination Act of 1975, as amended, assigns the Secretary of Health and Human Services the responsibility for coordinating the federal enforcement effort of that Act. Accordingly, this NPRM has been coordinated with the DOJ and the EEOC as well as the Department of Health and Human Services.

In addition, this NPRM has been coordinated with other appropriate Federal grant-making agencies, including the Departments of Education and Housing and Urban Development.

### I. Overview of the Rule

This rule retains the organization of 29 CFR part 38 as well as the majority of the provisions in part 38.

Subpart A—General Provisions. This subpart outlines the purpose and application of part 38, provides definitions, outlines prohibited grounds for and forms of discrimination, and establishes CRC's enforcement authority and recipients' nondiscrimination obligations.

Subpart B—Recordkeeping and Other Affirmative Obligations of Recipients. This subpart sets forth the affirmative obligations of recipients of, and grant applicants for, financial assistance under WIOA Title I, including the role of EO Officers, notice and communication requirements, and the data and information collection and maintenance obligations of recipients.

Subpart C—Governor's Responsibilities to Implement the Nondiscrimination and Equal Opportunity Requirements of WIOA. This subpart describes a Governor's responsibilities to implement the nondiscrimination and equal opportunity provisions of WIOA and this part, including oversight and monitoring of WIOA Title I-financially assisted State Programs, and development of a Nondiscrimination Plan.

Subpart D—Compliance Procedures. This subpart describes procedures for compliance reviews, complaint processing, issuing determinations, and procedures for breaches of conciliation agreements.

Subpart E—Federal Procedures For Effecting Compliance. This subpart describes the procedures for effecting compliance, including actions the Department is authorized to take upon

<sup>16</sup> 65 FR 69184, Nov. 15, 2000.

finding noncompliance when voluntary compliance cannot be achieved, the rights of parties upon such a finding, and hearing procedures, sanctions, and post-termination procedures.

#### *Reasons for Proposed Revisions Generally*

These revisions incorporate current jurisprudence under Title VII and EEOC Guidance interpreting the nondiscrimination obligation in the employment context, because WIOA Section 188 also applies to employment in the administration of or in connection with Title I-financially assisted programs and activities. Pursuant to Executive Order 12067, because the EEOC is the lead federal agency responsible for defining the nature of employment discrimination on the basis of race, color, religion, sex, national origin, age, or disability under all Federal statutes, Executive orders, regulations, and policies which require equal employment opportunity, the Department generally defers to the EEOC's interpretations of Title VII law as it applies to applicants and employees of employers receiving WIOA Title I financial assistance.

Pursuant to Executive Order 12250<sup>17</sup> and Title VI, the DOJ is the lead federal agency responsible for defining the nature and scope of the nondiscrimination prohibition based on, among other things, race, color and national origin in programs and activities receiving Federal financial assistance. Thus, CRC generally defers to the DOJ's interpretations of Title VI regarding discrimination based on race, color and national origin in programs and activities receiving Federal financial assistance. Further, pursuant to ADA Title II, DOJ is the lead federal agency responsible for defining the parameters of the nondiscrimination and equal opportunity provisions of Title II of the ADA.

#### *Developments in National Origin and Language Access Jurisprudence*

Consistent with Title VI case law and the DOJ's guidance on ensuring equal opportunity and nondiscrimination for individuals who are limited English proficient (LEP),<sup>18</sup> this rule proposes to create a provision stating that discrimination against individuals based on their limited English

proficiency may be unlawful national origin discrimination.

Title VI provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance.”<sup>19</sup> Prohibited discrimination under Title VI and its implementing regulations includes: (1) Intentional acts; and (2) unintentional acts that result in an unjustified disparate impact on the basis of race, color, or national origin. 29 CFR 31.3 (DOL Title VI regulations). Indeed, the Supreme Court in *Lau v. Nichols*, 414 U.S. 563 (1974), held that excluding LEP children from effective participation in an educational program because of their inability to speak and understand English constitutes national origin discrimination prohibited by Title VI. Courts have consistently found that a recipient's failure to provide meaningful access to LEP individuals can violate Title VI's prohibition of national origin discrimination. *See, e.g., Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1116–17 (9th Cir. 2009) (noting that *Lau* concluded “discrimination against LEP individuals was discrimination based on national origin in violation of Title VI”); *United States v. Maricopa Cnty.*, 915 F. Supp. 2d 1073, 1079 (D. Ariz. 2012) (citing *Lau*); *Faith Action for Cmty. Equity v. Hawaii*, No. 13–00450 SOM, 2014 WL 1691622 at \*14 (D. Haw. Apr. 28, 2014) (Title VI intent claim was properly alleged by LEP plaintiffs when it was based on the “foreseeable disparate impact of the English-only policy,” a pretextual justification for the policy, and potentially derogatory comments by a state agency). As a result, the proposed rule indicates that the definition of national origin discrimination includes discrimination based on limited English proficiency. Accordingly, the proposed rule sets forth the responsibilities of recipients to meet their compliance obligations for ensuring that LEP individuals have meaningful access to WIOA programs and services.

This proposal is also generally consistent with guidance issued by the Department in 2003,<sup>20</sup> advising Federal financial assistance recipients of the Title VI prohibition against national

origin discrimination affecting LEP individuals. This 2003 DOL Recipient LEP Guidance was issued pursuant to Executive Order 13166, which directed each federal agency that extends assistance subject to the requirements of Title VI to publish guidance for its respective recipients clarifying that obligation.<sup>21</sup> Executive Order 13166 further directs that all such guidance documents be consistent with the compliance standards and framework detailed in the Department of Justice (DOJ) Policy Guidance entitled “Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency.”<sup>22</sup> The LEP provisions of this NPRM are drawn from, and thus are consistent with, the DOJ Title VI LEP Guidance.

#### *Developments in ADA Jurisprudence*

Congress passed the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), amending the ADA and the Rehabilitation Act, both of which apply, in distinct ways, to different groups of recipients of WIOA Title I-financial assistance. Consistent with Executive Order 13563's instruction to Federal agencies to coordinate rules across agencies and harmonize regulatory requirements where appropriate, this rule proposes, where appropriate, to adopt regulatory language that is consistent with the ADAAA and corresponding revisions to the EEOC regulations implementing Title I<sup>23</sup> of the ADA and the NPRM issued by the DOJ implementing Title II and Title III of the ADA.<sup>24</sup> This proposal will promote consistent application of nondiscrimination obligations across Federal enforcement programs and accordingly enhance compliance among entities subject to WIOA Section 188 and the various titles of the ADA. If the DOJ changes its proposal in its final rule implementing ADA Titles II and III, the Department will review those changes to determine their impact on this proposal and take appropriate action.

Title I of the ADA prohibits private employers, State and local governments, employment agencies and labor unions with 15 or more employees from discriminating in employment against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions,

<sup>17</sup> 45 FR 72995, November 2, 1980.

<sup>18</sup> *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, 67 FR 41455, June 18, 2002.

<sup>19</sup> 42 U.S.C. 2000d.

<sup>20</sup> Civil Rights Center; Enforcement of Title VI of the Civil Rights Act of 1964; Policy Guidance to Federal Financial Assistance Recipients Regarding the Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons; Notice, 68 FR 32290, May 29, 2003 [hereinafter DOL LEP Guidance].

<sup>21</sup> 65 FR 50121, August 16, 2000.

<sup>22</sup> 65 FR 50123, August 16, 2000.

<sup>23</sup> See 76 FR 16978, Mar. 25, 2011.

<sup>24</sup> See 79 FR 4839, Jan. 30, 2014.

and privileges of employment.<sup>25</sup> Title I applies to WIOA Title I-financially assisted programs and activities because WIOA Section 188 prohibits discrimination in employment in the administration of or in connection with WIOA Title I financially-assisted programs and activities. The EEOC issued final regulations implementing the amendments to Title I of the ADA in March 2011.<sup>26</sup>

Title II of the ADA applies to State and local government entities, many of which may also be recipients of WIOA Title I financial assistance, and, in subtitle A, protects qualified individuals with disabilities from discrimination on the basis of disability in services, programs, and activities provided by State and local government entities.<sup>27</sup> Title II extends the prohibition against discrimination established by Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, to all activities of State and local governments regardless of whether these entities receive financial assistance<sup>28</sup> and requires compliance with the ADA Standards of Accessible Design.<sup>29</sup> The Department is responsible for implementing the compliance procedures of Title II for components of State and local governments that exercise responsibilities, regulate, or administer services, programs, or activities in “relating to labor and the work force.”<sup>30</sup>

Title III, enforced by the DOJ, prohibits discrimination on the basis of disability in the full enjoyment of the goods, services, facilities, privileges or advantages, or accommodations of any place of public accommodation by a person who owns, leases, or operates that place of public accommodation.<sup>31</sup> Title III applies to businesses that are generally open to the public and that fall into one of 12 categories listed in the ADA, such as restaurants, day care facilities, and doctor’s offices,<sup>32</sup> and requires newly constructed or altered places of public accommodation—as well as commercial facilities (privately owned, nonresidential facilities such as factories, warehouses, or office buildings)—to comply with the ADA Standards for Accessible Design.<sup>33</sup> Many recipients of WIOA Title I

financial assistance are places of public accommodation and thus are subject to Title III of the ADA and its accessible design standards. The DOJ issued an NPRM in January 2014 that would implement amendments to Title II and Title III of the ADA.<sup>34</sup> The DOJ is responsible for handling complaints of noncompliance with Title III.

This rule proposes making revisions to part 38 consistent with the ADA Amendments Act of 2008 (ADAAA) and the implementing regulations issued by the EEOC and the proposed regulations issued by the DOJ. The ADAAA and implementing regulations made it easier for an individual seeking protection under the ADA to establish that the individual has a disability within the meaning of the statute.<sup>35</sup> This NPRM proposes to incorporate the rules of construction set out in the ADAAA that specify that the definition of “disability” is to be interpreted broadly, that the primary inquiry should be whether covered entities have complied with their statutory obligations and that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis. This NPRM also proposes revisions to the definition of “disability” and its component parts, including “qualified individual,” “reasonable accommodation,” “major life activity,” “regarded as having a disability,” and “physical or mental impairment” based on specific provisions in the ADAAA, as well as the EEOC’s final and the DOJ’s proposed implementing regulations. For example, the proposed revisions expand the definition of “major life activities” by providing a non-exhaustive list of major life activities, which specifically includes the operation of major bodily functions. The revisions also add rules of construction that should be applied when determining whether an impairment substantially limits a major life activity. If the DOJ changes its proposal in its final rule implementing ADA Titles II and III, the Department will review those changes to determine their impact on this proposal and take appropriate action.

#### *Developments in Sex Discrimination Jurisprudence*

##### *Pregnancy*

The proposed rule also includes a new section to provide direction regarding an existing obligation of recipients of WIOA Title I-financially assisted programs and activities to

refrain from discrimination based on pregnancy, childbirth or related medical conditions as a form of sex discrimination. Although the Pregnancy Discrimination Act (PDA) was enacted in 1978,<sup>36</sup> the WIA Section 188 regulations, and the part 38 final rule implementing WIOA, do not refer specifically to pregnancy discrimination as a form of sex discrimination. This NPRM corrects that omission and sets out the standards that CRC would apply in enforcing the prohibition against pregnancy discrimination, consistent with the PDA, Title IX, and Title VII, in WIOA Title I-financially assisted programs, activities, training, and services.

Because the PDA amended Title VII, it does not directly govern the nondiscrimination obligations of a program or activity receiving Federal financial assistance outside of the employment context. The principles underlying the PDA, however, rest on Title IX’s prohibitions against discrimination on the basis of pregnancy and actual or potential parental status and thus are applicable to WIOA Title I recipients.<sup>37</sup>

Pregnancy discrimination remains a significant issue. Between fiscal year 2001 and fiscal year 2013, charges of pregnancy discrimination filed with the EEOC and state and local agencies increased from 4,287 to 5,342.<sup>38</sup> In addition, a 2011 review of reported “family responsibility discrimination” cases (brought by men as well as women) found that low-income workers face “extreme hostility to pregnancy.”<sup>39</sup> The EEOC’s findings and related research are relevant to this NPRM because the workforce development system is the pipeline through which many women find employment opportunities, and thus these programs must operate free of pregnancy discrimination. In other words, the discrimination that pregnant women experience in the private sector is

<sup>36</sup> 42 U.S.C. 2000e(k).

<sup>37</sup> See *infra* Section by Section § 38.8 discussing the intersection of both the PDA and Title IX.

<sup>38</sup> U.S. Equal Employment Opportunity Commission, *Pregnancy Discrimination Charges, EEOC & FEPA’s Combined: FY 1997–FY 2011*, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm> (last accessed Oct. 6, 2014); U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Pregnancy Discrimination and Related Issues*, (July 14, 2014), available at [http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm) (last accessed Oct. 6, 2014).

<sup>39</sup> Stephanie Bornstein, Center for WorkLifeLaw, UC Hastings College of the Law, *Poor, Pregnant and Fired: Caregiver Discrimination Against Low-Wage Workers 2* (2011), available at <http://worklifelaw.org/pubs/PoorPregnantAndFired.pdf> (last accessed Oct. 3, 2014).

<sup>25</sup> 29 CFR 1630.2(e).

<sup>26</sup> See 76 FR 16978, March 25, 2011.

<sup>27</sup> See 42 U.S.C. 12131–12165.

<sup>28</sup> 42 U.S.C. 12132.

<sup>29</sup> 28 CFR part 35 (Title II); 28 CFR part 36 (Title III).

<sup>30</sup> 28 CFR 35.190(b)(7).

<sup>31</sup> 42 U.S.C. 12182.

<sup>32</sup> 42 U.S.C. 12181.

<sup>33</sup> 28 CFR part 35 (Title II); 28 CFR part 36 (Title III).

<sup>34</sup> See 76 FR 16978, March 25, 2011; 79 FR 4839, January 30, 2014.

<sup>35</sup> See 42 U.S.C. 12102(1)(A)–(C).

relevant to federally financially assisted programs and activities.

### Sex Stereotyping

One of the most significant barriers for women in access to services, benefits, training, programs and employment in and through the workforce development system is sex stereotyping. Decades of social science research has documented the extent to which sex stereotypes about the roles of women and men and their respective capabilities in the workplace can influence decisions about hiring, training, promotions, pay raises, and other conditions of employment.<sup>40</sup> The NPRM adopts the well-recognized principle that employment decisions made on the basis of stereotypes about how males and/or females are expected to look, speak, or act are forms of sex-based employment discrimination and applies that principle to the provisions of aid, benefit, service, and training through WIOA Title I programs and activities. The Supreme Court recognized in 1989 that an employer violates Title VII if its employees' chances of promotion depend on whether they fit their managers' preconceived notions of how men or women should dress and act.<sup>41</sup> As the Supreme Court stated in *Price Waterhouse v. Hopkins*, "we are beyond the day when an employer can evaluate employees by assuming or insisting that they match the stereotype associated with their . . . [sex]."<sup>42</sup> In *Price Waterhouse*, the Court held that an employer's failure to promote a female senior manager to partner because of the decision-maker's sex-stereotyped perceptions that she was too aggressive and did not "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" was unlawful sex-based employment discrimination.<sup>43</sup> The principle that sex stereotyping is a form of sex discrimination has been applied

<sup>40</sup> See, e.g., Susan Fiske et al., *Controlling Other People: The Impact of Power on Stereotyping*, 48 Am. Psychol. 621 (1993); Marzarin Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem and Stereotypes*, 102 Psychol. Rev. 4 (1995); Brian Welle & Madeline Heilman, *Formal and Informal Discrimination Against Women at Work in Managing Social and Ethical Issues in Organizations* 23 (Stephen Gilliland, Dirk Douglas Steiner & Daniel Skarlicki eds., 2007); Susan Bruckmüller et al., *Beyond the Glass Ceiling: The Glass Cliff and Its Lessons for Organizational Policy*, 8 Soc. Issues & Pol. Rev. 202 (2014) (describing the role of sex stereotypes in the workplace).

<sup>41</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>42</sup> Id. at 251.

<sup>43</sup> Id. at 235.

consistently in subsequent Supreme Court and lower-court decisions. See, e.g., *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (stereotype-based beliefs about the allocation of family duties on which state employers relied in establishing discriminatory leave policies held to be sex discrimination under the Constitution); *Chadwick v. Wellpoint, Inc.*, 561 F.3d 38 (1st Cir. 2009) (making employment decision based on the belief that women with young children neglect their job responsibilities is unlawful sex discrimination); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009) (harassment based on a man's effeminacy); *Terveer v. Billington*, Civil Action No. 12–1290, 2014 WL 1280301 (D. D.C. March 31, 2014) (hostile work environment based on stereotyped beliefs about the appropriate gender with which an individual should form an intimate relationship). Cf. *U.S. v. Virginia*, 518 U.S. 515, 533 (1996) (in making classifications based on sex, state governments "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females").

Research demonstrates that widely held social attitudes and biases can lead to discriminatory decisions, even where there is no formal sex-based (or race-based) policy or practice in place.<sup>44</sup> Sex stereotyping may have even more severe consequences for transgender applicants and employees, the vast majority of whom report that they have experienced discrimination in the workplace.<sup>45</sup>

As the EEOC has recognized, claims of gender identity discrimination, including discrimination grounded in stereotypes about how persons express their gender, are claims of sex discrimination under Title VII. See *Macy v. Dep't of Justice*, E.E.O.C. Appeal No. 0120120821, 2012 WL

<sup>44</sup> See, e.g., Kevin Lang & Jee-Yeon K. Lehmann, *Racial Discrimination in the Labor Market: Theory and Empirics* (NBER Working Paper No. 17450, 2010), available at <http://www.nber.org/papers/w17450> (last accessed March 19, 2015); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Brendan More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94(4) American Econ. Rev. 991 (2004); Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85(3) Am. Econ. Rev. 304 (1995); Marc Bendick, Charles Jackson & Victor Reinoso, *Measuring Employment Discrimination Through Controlled Experiments*, 23 Rev. of Black Pol. Econ. 25 (1994).

<sup>45</sup> Jaime M. Grant, Lisa M. Mottet, & Justin Tanis, National Center for Transgender Equality & National Gay and Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, (2011), available at <http://transequality.org/issues/resources/national-transgender-discrimination-survey-full-report> (last accessed March 19, 2015).

1435995 (April 20, 2012).<sup>46</sup> The Commission also has found that "discrimination against lesbian, gay, and bisexual individuals based on sex-stereotypes is discrimination on the basis of sex under Title VII."<sup>47</sup> See e.g., *Veretto v. United States Postal Service*, E.E.O.C. Appeal No. 0120110873, 2011 WL 2663401 (July 1, 2011) (finding allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on the sex stereotype that marrying a woman is an essential part of being a man); *Castello v. United States Postal Service*, E.E.O.C. Request No. 0520110649, 2011 WL 6960810 (Dec. 20, 2011) (finding allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on the sex stereotype that having relationships with men is an essential part of being a woman); *Complainant v. Dep't of Homeland Sec.*, E.E.O.C. Appeal No. 0120110576, 2014 WL 4407422 (Aug. 20, 2014) (finding that sex discrimination claims intersect with sexual orientation discrimination claims such that allegations of discrimination on the basis of sexual orientation can be construed as claims of discrimination on the basis of sex); *Baldwin v. Dep't of Transp.*, E.E.O.C. Appeal No. 012013080, 2015 WL 4397641 (July 15, 2015).

The Department of Education has interpreted Title IX's prohibition against discrimination on the basis of sex in federally-funded education programs and activities as including claims of sex discrimination related to a person's failure to conform to stereotypical

<sup>46</sup> The EEOC also has concluded that discrimination on the basis of gender identity is inherently discrimination on the basis of sex and that a transgender plaintiff can prove sex discrimination without tying the discrimination to a sex stereotype. See *Macy*, E.E.O.C. Appeal No. 0120120821, 2012 WL 1435995 at \*10 ("While evidence that an employer has acted based on stereotypes about how men or women should act is certainly one means of demonstrating disparate treatment based on sex, "sex stereotyping" is not itself an independent cause of action . . . [I]f Complainant can prove that the reason that she did not get the job is [because the employer] was willing to hire her when he thought she was a man, but was not willing to hire her once he found out that she was now a woman—she will have proven that the [employer] discriminated on the basis of sex.").

<sup>47</sup> In the *Baldwin* decision, the EEOC stated that sexual orientation discrimination is inherently discrimination on the basis of sex because it involves treatment that would not have occurred but for the sex of the employee; because it takes the employee's sex into account by treating him or her differently due to the sex of the person he or she associates with; and because it is premised on fundamental sex stereotypes, norms, or expectations. *Baldwin v. Dep't of Transp.*, E.E.O.C. Appeal No. 012013080, 2015 WL 4397641,\*10 (July 15, 2015).

norms of masculinity and femininity.<sup>48</sup> A Department of Education guidance document states: “Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and [the Department of Education’s Office for Civil Rights] accepts such complaints for investigation.”<sup>49</sup>

These agency interpretations are consistent with court opinions holding that disparate treatment of a transgender employee may constitute discrimination because of the individual’s non-conformity to sex stereotypes. *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (holding that transgender woman was a member of a protected class based on her failure to conform to sex stereotypes and thus her title VII claim was actionable); *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004) (“discrimination against a plaintiff who is a transsexual [sic]—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against [the plaintiff] in *Price Waterhouse* who, in sex-stereotypical terms, did not act like a woman”). See also *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (termination of a transgender employee constituted discrimination on the basis of gender non-conformity and sex-stereotyping discrimination under Equal Protection Clause). Cf. *Oncala v. Sundowner Offshore Servs.*, 523 U.S. 75, 78 (1998) (same-sex harassment may be sex discrimination under Title VII).

In addition to these cases, “[t]here has likewise been a steady stream of district court decisions recognizing that discrimination against transgender individuals on the basis of sex-based stereotyping constitutes discrimination because of sex.” *Macy*, 2012 WL 1435995. See also *Schroer*, 577 F. Supp. 2d at 305–06 (withdrawal of a job offer from a transgender applicant constituted sex-stereotyping discrimination in

violation of title VII).<sup>50</sup> There are also a growing number of courts recognizing that sexual orientation discrimination constitutes discrimination on the basis of sex when the discrimination is rooted in fundamental sex-based norms and stereotypes. See, e.g., *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); *Heller v. Columbia Edgewater*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002); *Koren v. Ohio Bell*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116, 2014 WL 1280301 (D.D.C. 2014); *Isaacs v. Felder Servs.*, 2015 WL 6560655, \*3–4 (M.D. Ala. 2015) (slip op.); *Videckis v. Pepperdine Univ.*, 2014 WL 8916764 (C.D. Cal. 2015) (slip op); cf. *Latta v. Otter*, 771 F.3d 456, 495 (9th Cir. 2014) (Berzon, J. concurring).

Furthermore, Federal contractors that operate Job Corps Centers, who are covered by Section 188 and this part,<sup>51</sup> may also be covered by the requirements of Executive Order 11246, which requires that contractors meeting certain dollar threshold requirements refrain from discrimination in employment based on race, color, religion, national origin, sex, sexual orientation, and gender identity and take affirmative action to ensure equal employment opportunity. Executive Order 13672, issued on July 21, 2014, amended Executive Order 11246 to add sexual orientation and gender identity as protected bases, and applies to government contracts entered into or modified on or after April 8, 2015, the effective date of OFCCP’s implementing regulations promulgated thereunder.<sup>52</sup>

Consistent with the above jurisprudence and agency interpretations, the Department proposes that complaints of discrimination based on transgender status and gender identity be treated as complaints of sex discrimination. The Department also proposes that for purposes of this rule, complaints of discrimination based on sex stereotyping be treated as complaints of sex discrimination.

## Harassment

This rule also proposes a new section to provide direction as to a recipient’s existing obligation regarding unlawful harassment. Courts have recognized for many years that harassment on the basis of a protected category may give rise to a violation of Title VI and Title VII of the Civil Rights Act, Section 504, and Title IX and that unlawful harassment may take many forms.<sup>53</sup> The NPRM adds a section that sets out the prohibition against these various forms of unlawful harassment.

In 2001, 2011, and 2014, the Department of Education issued guidance documents interpreting the scope of prohibitions against sexual harassment including acts of sexual violence, under Title IX that apply to WIOA Title I-financially assisted educational and training programs.<sup>54</sup> Title IX protects individuals from discrimination based on sex in education programs or activities that receive Federal financial assistance, including WIOA Title I programs and activities that are education and training programs.<sup>55</sup> The proposed rule incorporates language in Subpart A that reflects the current Department of Education interpretation of the scope of Title IX’s prohibition against harassment based on sex. In doing so, this rule makes the Department’s enforcement of current legal standards

<sup>53</sup> See, e.g., *Harris v. Forklift Sys.*, 510 U.S. 17 (1993) (harassment based on sex); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (sex); *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1274 (7th Cir. 1991) (race); *Rogers v. Western-Southern Life Ins. Co.*, 792 F. Supp. 628 (E.D. Wis. 1992) (race); *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) (school can be held liable if a teacher sexually harasses a student); *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) (holding a school liable when one student sexually harasses another student); *Zeno v. Pine Plains Center School District*, 702 F.3d 655 (2nd Cir. 2011) (racial harassment under Title VI); *Booth v. Houston*, 2014 WL 5590822 (M.D. Alabama 2014) (disability harassment); See Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 FR 5512, January 19, 2001 (available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>); Dear Colleague letter concerning recipients’ obligations to protect students from student-on-student harassment on the basis of sex, race, national origin, and disability (October 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> (last accessed March 13, 2015).

<sup>54</sup> See Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 FR 5512, January 19, 2001 (available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>); April 4, 2011 Dear Colleague letter on Sexual Violence, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; April 29, 2014 Questions and Answers on Title IX and Sexual Violence, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

<sup>55</sup> 20 U.S.C. 1681 *et seq.*

<sup>48</sup> See Questions and Answers on Title IX and Sexual Violence B–2 at 5 (available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (last accessed March 19, 2015)) (stating that Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity) (April 29, 2014); Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 FR 5512, January 19, 2001 (available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>).

<sup>49</sup> See Questions and Answers on Title IX and Sexual Violence B–2 at 5 (available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (last accessed March 19, 2015)).

<sup>50</sup> See also *id.* at 306–07 (analogizing to cases involving discrimination based on an employee’s religious conversion, which undeniably constitutes discrimination “because of . . . religion” under Title VII). See also *Michaels v. Akal Security, Inc.*, No. 09-cv-1300, 2010 WL 2573988, at \* 4 (D. Colo. June 24, 2010); *Lopez v. River Oaks Imaging & Diag. Group, Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); *Mitchell v. Axcan Scandipharm, Inc.*, No. Vic. A. 05–243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03–CV–0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); *Doe v. United Consumer Fin. Servs.*, No. 1:01 CV 111, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001).

<sup>51</sup> See 29 CFR 38.2(b)(4).

<sup>52</sup> 79 FR 72985, December 9, 2014.



consistent with those of one of the agencies that also regulate the same recipient community.

#### *Increased Provision of Services Using Technology, Including the Internet*

The increased turn toward the integration of, and in some instances complete shift to, online service delivery models in the public workforce development system since 1999 requires that the part 38 regulations be updated to address the nondiscrimination and equal opportunity implications raised by these changes. As of 2011, one in five American adults did not use the Internet.<sup>56</sup> In particular, research suggests that a larger percentage of older individuals may not possess sufficient knowledge and understanding of computers and web-based programs to be able to access information via a Web site or file for benefits through an online system.<sup>57</sup> Additionally, as of 2011, 32% of Hispanic individuals (including those who are proficient in English) and 29% of Black, non-Hispanic individuals, respectively, were not using the Internet.<sup>58</sup> Similarly, adults with disabilities were significantly less likely to use the Internet than adults without a disability.<sup>59</sup>

#### *Revisions to Subparts B Through E*

Subpart B, Recordkeeping and Other Affirmative Obligations, includes revisions to written assurance language that grant applicants are required to include in their grant applications, as well as revisions to the sections regarding the role of Equal Opportunity Officers, and recipient's responsibilities to ensure that they designate EO Officers with sufficient expertise, authority, staff and resources to carry out their responsibilities. The NPRM also proposes revised requirements regarding data and information collection and maintenance and revises the section on outreach responsibilities of recipients.

Proposed changes to Subpart C, regarding the Governor's responsibilities to implement the nondiscrimination and equal opportunity requirements of WIOA, include changing the title of the Methods of Administration, the tool used by Governors to implement their

monitoring and oversight responsibilities, to "Nondiscrimination Plan." In addition, the proposal provides more direction as to the Governor's responsibilities and the CRC's procedures for enforcing those responsibilities, thus addressing an inadvertent gap in the existing regulations.

Proposed changes to Subpart D regarding compliance procedures includes language to strengthen the preapproval compliance review process by requiring Departmental grant-making agencies to consult with the Director of the CRC to review whether CRC has issued a Notice to Show Cause or a Final Determination against an applicant that has been identified as a probable awardee. This rule also proposes to expand the situations under which CRC may issue a Notice to Show Cause, merges some of the existing sections about the complaint processing procedures for better readability, and adds some language to clarify that any person or their representative may file a complaint based on discrimination and retaliation under WIOA and this part. The NPRM proposes that complainants and recipients may use a form of alternative dispute resolution, rather than mediation alone, to resolve complaints so as to expand the options available to recipients and complainants to use to achieve resolution of complaints.

Subpart E, Federal Procedures for Effecting Compliance, substitutes the Administrative Review Board for the Secretary as the entity that issues final agency decisions, and makes several other technical revisions.

#### *Benefits of the Proposed Rule*

The proposed rule would benefit both recipients of financial assistance under Title I of WIOA and the beneficiaries of that assistance in several ways. First, by updating and clearly and accurately stating the existing principles of applicable law, the proposed rule will facilitate recipient understanding and compliance, thereby reducing costs incurred when noncompliant. The NPRM would also benefit recipients' beneficiaries, employees, and job applicants by allowing them to participate in programs and activities or work free from discrimination. Importantly, recipients are already subject to the nondiscrimination federal laws that these updated regulations incorporate, so many of the new substantive nondiscrimination provisions do not impose new obligations.

This regulation would increase equality of opportunity for the

thousands of applicants, participants, beneficiaries and employees of recipients. It would clarify that adverse treatment of applicants, beneficiaries, or participants of recipients' WIOA Title I programs and activities and their employees or applicants for employment, because of gender-based assumptions constitutes sex discrimination. By stating that discrimination against an individual because of their gender identity or transgender status is unlawful sex discrimination, the NPRM would provide much-needed regulatory protection to transgender individuals, the majority of whom report they have experienced discrimination in the workplace.<sup>60</sup> In addition, by providing that pregnant employees or applicants may be entitled to accommodations when such accommodations or modification are provided to other participants not so affected but similar in their ability or inability to work, this NPRM will protect pregnant individuals who work for recipients, and applicants for job training programs and similar activities from losing jobs or access to educational and training opportunities.

Finally, the NPRM would benefit public understanding of the law. This public interest is reflected in Section 6 of Executive Order 13563, which requires agencies to engage in retrospective analyses of their rules "and to modify, streamline, expand, or repeal [such rules] in accordance with what has been learned."

The detailed Section-by-Section Analysis below identifies and discusses all proposed changes in each section. The Department welcomes comments on all of the provisions discussed below.

## **II. Section-By-Section Analysis**

As explained above, the Department is proposing a revised part 38 and in doing so has adopted much of the language of current part 38. Therefore, this NPRM refers to the changes made to the existing part 38 rule to highlight differences. The Department proposes several global changes to the current part 38 rule.

First, this NPRM removes the question and answer format of the section titles and replaces each title with statements or phrases to make them easier to understand.

<sup>60</sup> Jaime M. Grant, Lisa M. Mottet, & Justin Tanis, *National Center for Transgender Equality and National Gay and Lesbian Task Force, Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011), available at [http://transequality.org/PDFs/Executive\\_Summary.pdf](http://transequality.org/PDFs/Executive_Summary.pdf) (last accessed March 19, 2015).

<sup>56</sup> *Digital differences: While increased Internet adoption and the rise of mobile connectivity have reduced many gaps in technology access over the past decade, for some groups, digital disparities still remain* at 5, Pew Internet & American Life Project, Pew Research Center (April 2013) available at [http://pewinternet.org/~media/Files/Reports/2012/PIP\\_Digital\\_differences\\_041312.pdf](http://pewinternet.org/~media/Files/Reports/2012/PIP_Digital_differences_041312.pdf). (last accessed March 19, 2015).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

Second, this NPRM makes technical revisions to ensure that the regulations are consistent with terms used in WIOA and the proposed regulations published by the Department to implement the program obligations under Title I of WIOA.

Third, the proposed rule removes and replaces the term “on the grounds of” with “on the basis of” throughout the regulatory text for purposes of consistency with other nondiscrimination regulations and Federal statutes.

Fourth, it replaces the terms “her” and “him” with “individual” wherever possible.

Fifth, the proposed rule also includes substantive revisions related to the nondiscrimination obligation to reflect changes in the law since publication of part 37 in 1999.

Sixth, this proposal contains changes to certain enforcement procedures that will enhance their effectiveness and provide clearer direction to the recipient community as to the scope of their obligations under this part. Each of these revisions is explained below.

#### *Subpart A—General Provisions*

##### *Purpose § 38.1*

Proposed § 38.1 makes minor revisions to the language that is used in § 38.1. First, the title of proposed § 38.1 is revised to read: “Purpose.” The NPRM replaces the term “on the grounds of” with “on the basis of” to be consistent with nondiscrimination language in other Department civil rights regulations.

##### *Applicability § 38.2*

This NPRM makes minor revisions to the language that is used in § 38.2. First, the title of this section is changed to “Applicability.” Reference to the Job Training Partnership Act of 1982, “JTPA,”<sup>61</sup> is replaced with reference to “WIA” in paragraph (b)(1) to reflect the ongoing applicability of the nondiscrimination and equal opportunity regulations at 29 CFR part 37 to WIA Title I-financially assisted programs and activities after the effective date of WIOA. Subpart (a)(3) is revised to explain that the scope of this rule regarding employment practices is limited to any program or activity that is operated by a recipient and/or a One-Stop<sup>62</sup> partner, to the extent that the employment is in the administration of

or in connection with programs and activities that are being conducted as a part of WIOA Title I or the One-Stop delivery system. This limitation tracks the statutory provision in Section 188(a)(2) of WIOA.<sup>63</sup> Finally, the proposed rule deletes subsection (b)(5), which under § 38.2 excludes Federally-operated Job Corps Centers from application of the provisions of part 38. The Department’s Employment and Training Administration (ETA), which has responsibility for administering WIOA generally, proposes new language in its WIOA NPRM at 20 CFR 686.350, stating that nondiscrimination requirements, procedures, complaint processing, and compliance reviews applicable to Federally-operated Job Corps Centers would be governed by provisions of Department of Labor regulations, as applicable.<sup>64</sup> This provision is consistent with the language of WIOA Section 188(d), which does not distinguish between Federally- and privately-operated Job Corps Centers. “For purposes of this section, Job Corps members shall be considered to be the ultimate beneficiaries of Federal financial assistance.”<sup>65</sup> Moreover, based on complaints arising in Federally-operated Job Corps Centers, it has become apparent to CRC that uniform complaint handling processes need to apply throughout the Job Corps system. Additionally, this section is consistent with the Job Corps’ Policy and Requirements Handbook (PRH), particularly Section 6.8, R5, Appendix 602 and Exhibit 6–11, which makes no distinction between Federally- and privately-operated centers with regard to student complaints. Moreover, this revised section memorializes the current practice used by federally-operated Job Corps Centers.<sup>66</sup>

##### *Effect on Other Obligations § 38.3*

The title of § 38.3 is revised to read: “Effect on other obligations.” Proposed § 38.3 retains the majority of the language in this section from § 38.3. To establish parity with parallel provisions in other federal nondiscrimination regulations,<sup>67</sup> proposed § 38.3 also includes paragraph (c) explaining that “This part does not invalidate or limit the remedies, rights and procedures under any Federal law, or the law of any State or political subdivision, that provides equal or greater protection for

the rights of persons as compared to this part.” This addition replaces § 38.3(f) of this subsection which states, “This rule does not preempt consistent State and local requirements.” The NPRM also adds Executive Order 13160<sup>68</sup> to the provision that states that compliance with this part does not affect additional obligations under the listed laws. Executive Order 13160 prohibits discrimination on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, and status as a parent in federally conducted education and training programs and activities. This Executive Order is added because of its application to the Job Corps program which, as a Federally-conducted education and training program, is covered by this part.

##### *Definitions § 38.4*

This NPRM revises the title of § 38.4 to read: “Definitions.” The proposed rule retains the majority of the definitions contained in § 38.4. Revisions in proposed § 38.4 include updating existing definitions consistent with applicable law, such as the definition of “disability” and its component definitions. This section also adds new definitions, which are discussed below. These changes also include edits to update existing definitions, based on developments in the law, as well as feedback from stakeholders and the CRC’s investigative and enforcement experiences over the past fifteen years. This NPRM retains the alphabetical order of the definitions. This ordering makes it easier to locate specific terms within the section. However, the proposed rule incorporates a letter designation before each definition to make it easier to find definitions when they are referenced. The headings that appear in this preamble to guide the reader do not appear as headings in the regulatory text. The discussion below addresses revisions to the definitions section in the part 38 rule.

##### *Aid, Benefit, Service, or Training § 38.4(b)*

In the definition for “Aid, benefit, service, or training,” the proposed rule replaces “core and intensive services” with “career services” in § 38.4(b)(1) to be consistent with the text of Title I of WIOA<sup>69</sup> and the proposed ETA regulations implementing Title I of WIOA,<sup>70</sup> which made the same replacement.

<sup>61</sup> 29 U.S.C. 1501 *et seq.*

<sup>62</sup> One-Stop Career Centers are designed to provide a full range of assistance to job seekers under one roof. The centers offer training referrals, career counseling, job listings, and similar employment-related services.

<sup>63</sup> 29 U.S.C. 3248(a)(2).

<sup>64</sup> See 20 CFR 686.985.

<sup>65</sup> 29 U.S.C. 3248(d).

<sup>66</sup> Reference Guide, Key EEO and Civil Rights Laws, Statutes, and Regulations, USDA Forest Service WO/Civil Rights Staff (April 2010).

<sup>67</sup> 41 CFR 60–741.1(c)(3); 41 CFR 60–300.1(c)(3).

<sup>68</sup> 65 FR 39775, June 27, 2000.

<sup>69</sup> 29 U.S.C. 3303(a)(1)(A).

<sup>70</sup> 80 FR 20690, April 16, 2015.

#### Auxiliary Aids or Services § 38.4(h)

This NPRM revises the definition of “Auxiliary aids or services” to include new technology alternatives that have become available since the current regulations were drafted in 1999, such as video remote interpreting services and real-time computer-aided transcription services. This provision mirrors the language in the DOJ regulations implementing Title II of the ADA, which prohibits discrimination on the basis of disability by public entities,<sup>71</sup> some of which are also recipients of WIOA Title I financial assistance.

#### Babel Notice § 38.4(i)

This NPRM adds a definition for “Babel Notice.” A Babel Notice is a short notice in multiple languages informing the reader that the document or electronic media (*e.g.*, Web site, “app,” email) contain vital information, and explaining how to access language services to have the contents of the document or electronic media provided in other languages. The Department proposes adding this definition because Babel Notices are an integral tool for ensuring that recipients meet their nondiscrimination and equal opportunity obligations under WIOA and this part regarding LEP individuals. The Department welcomes comments on this definition.

#### Direct Threat § 38.4(p)

This NPRM adds a definition for “direct threat.” This term is used in the context of determining whether the employment of or program participation by an individual with a disability poses a health or safety risk such that the employer or recipient can lawfully exclude the individual from employment or participation. A “direct threat” is “a significant risk of substantial harm to the health or safety of others that cannot be eliminated or reduced by auxiliary aids and services, reasonable accommodations, or reasonable modifications in policies, practices, or procedures.” The definition describes the four factors that a recipient must consider when making a direct threat determination: The duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. This proposed definition tracks the definition of direct threat contained in the Americans with Disabilities Act and used by DOJ<sup>72</sup> in interpreting Title II of the ADA. This

proposed definition ensures consistency with current law. To reflect the specific context of federal financially-assisted programs and activities, the proposed definition includes considering whether provision of auxiliary aids or services or reasonable modifications to policies, practices, or procedures, in addition to reasonable accommodations, will mitigate risk.

#### Disability § 38.4(q)

The rule proposes a definition of “disability” that is updated to reflect the current status of the law. As under the current part 38, the overall definition is: “with respect to an individual: (1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) A record of such an impairment; or (3) Being regarded as having such an impairment.” The proposed definition of “disability” integrates updated definitions of terms that are components of this definition, including “major life activities,” “physical or mental impairment,” “record of,” “regarded as,” and “substantially limits.” As is explained below, these revised definitions are taken directly from the ADA Amendments Act,<sup>73</sup> regulations promulgated by the EEOC to implement the ADA Amendments Act,<sup>74</sup> and the DOJ’s Notice of Proposed Rulemaking to amend Title II regulations to implement the ADA Amendments Act.<sup>75</sup> If the DOJ changes its proposal in its final rule implementing ADA Titles II and III, the Department will review those changes to determine their impact on this proposal and take appropriate action.

#### Definition of Disability, Rules of Construction § 38.4(q)(1)

Consistent with the ADAAA, the EEOC regulations implementing the ADAAA and DOJ’s NPRM to amend the ADA Title II regulations in conformance with the ADAAA,<sup>76</sup> this section sets forth rules of construction that provide the standards for application of the definition of disability.

Proposed § 38.4(q)(1)(ii) provides that an individual may establish coverage under any one or more of the prongs in

the definition of disability. To be covered under the ADA, however, an individual is only required to satisfy one prong. The term “actual disability” is used in these rules of construction as short-hand terminology to refer to an impairment that substantially limits a major life activity within the meaning of the first prong of the definition of disability. The terminology selected is for ease of reference. It is not intended to suggest that an individual with a disability who is covered under the first prong has any greater rights under the ADA than an individual who is covered under the “record of” or “regarded as” prongs, with the exception that the ADA, as amended, expressly states that an individual who meets the definition of disability solely under the “regarded as” prong is not entitled to reasonable accommodations, auxiliary aids or services, or reasonable modifications of policies, practices, or procedures.<sup>77</sup>

This section also amends the definition of “disability” to incorporate Congress’s expectation that consideration of coverage under the first and second prongs of the definition of “disability” will generally not be necessary except in cases involving requests for reasonable accommodations and reasonable modifications.<sup>78</sup> See § 38.4(q)(1)(ii)(B).

#### Physical or Mental Impairment § 38.4(q)(3)

This rule revises the definition of “physical or mental impairment,” in the definition of disability, to include “immune and circulatory illnesses” as well as “pregnancy-related medical conditions” and states that the definition of “mental and psychological disorder” includes “intellectual disability (formerly termed “mental retardation”) and specific learning disabilities (including but not limited to dyslexia).” This update to the definition conforms to the same definition proposed by the DOJ in their NPRM implementing Title II of the ADA<sup>79</sup> and in OFCCP’s final rule implementing Section 503,<sup>80</sup> apart from the inclusion of pregnancy-related medical conditions. This term is added here to

<sup>73</sup> Public Law 110–325 (2008).

<sup>74</sup> 29 CFR part 1630.

<sup>75</sup> 79 FR 4839, January 30, 2014. *See also* 28 CFR 35.104 (DOJ’s current Title II regulations).

<sup>76</sup> *See* Introduction to the Final Rule “The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the Amendment Act’s purpose of reinstating a broad scope of protection under the ADA, the definition of “disability” in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.” 29 CFR 1630.1(c) (citing 42 U.S.C. 12102(4)(A)).

<sup>77</sup> *See* 42 U.S.C. 1. *See* Introduction to the Final Rule, “The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA, Consistent with the Amendment Act’s purpose of reinstating a broad scope of protection under the ADA, the definition of “disability” in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.” 29 CFR 1630.

<sup>78</sup> 154 Cong. Rec. S8840 (daily ed. Sept. 16, 2008) (Statement of Managers).

<sup>79</sup> 79 FR 4839, 4844, January 30, 2014.

<sup>80</sup> 78 FR 58682, 58735, September 24, 2013.

<sup>71</sup> *See* 28 CFR 35.104.

<sup>72</sup> 28 CFR 35.139.

recognize that, under the ADA as amended by the ADAAA, Section 504 and this part, pregnancy itself is not a disability, but pregnancy-related medical conditions may meet the ADA definition of a physical or mental impairment; for example, preeclampsia (pregnancy-induced high blood pressure), placenta previa, and gestational diabetes, disorders of the uterus and cervix, or other medical conditions; symptoms such as back pain; complications requiring bed rest; and the after-effects of a delivery may be a disability.

#### Major Life Activities § 38.4(q)(4)

The proposed rule adds to the definition of disability a new definition for “major life activities” that is consistent with the definitions in the ADA, as amended,<sup>81</sup> and regulations promulgated by the EEOC<sup>82</sup> and the DOJ<sup>83</sup> implementing the ADA. Prior to the ADAAA, the ADA did not define “major life activities,” leaving delineation of illustrative examples to agency regulations. Subparagraph (2) of the definition of “disability” in the Department’s current part 38 rule states that “[t]he phrase major life activities means functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”<sup>84</sup> The ADAAA incorporates into the statutory language a non-exhaustive list of major life activities that includes, but is not limited to, “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”<sup>85</sup> This list reflects Congress’s concern that courts were interpreting the term “disability,” which includes “major life activities,” more narrowly than Congress intended.<sup>86</sup> For the same reason, the ADA as amended also explicitly defines “major life activities” to include the operation of “major bodily functions.” Examples in the amended statute or the EEOC’s amended regulations include functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine,

hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system. In § 38.4(q)(4), the Department proposes to revise its part 38 definitions of disability to incorporate the statutory examples as well as to provide additional examples of major life activities included in the EEOC Title I final regulation—reaching, sitting, and interacting with others, and the examples of major bodily functions.<sup>87</sup>

The Department cautions that both the lists of major life activities and major bodily functions are illustrative. The absence of a particular life activity or bodily function from the list should not create a negative implication as to whether such activity or function constitutes a major life activity or major bodily function under the statute or the implementing regulation.<sup>88</sup>

Consistent with the ADAAA, proposed § 38.4(q)(4)(iii) also states that “[i]n determining other examples of major life activities, the term ‘major’ must not be interpreted strictly to create a demanding standard for disability.”<sup>89</sup> Further, consistent with the ADAAA, the proposed regulations provide that “[w]hether an activity is a ‘major life activity’ is not determined by reference to whether the activity is of ‘central importance to daily life.’”<sup>90</sup>

#### Substantially Limits—Rules of Construction § 38.4(q)(5)

The revisions also add rules of construction to be applied when determining whether an impairment substantially limits a major life activity, including that the term “substantially limits” is not meant to be a demanding standard, and should be construed broadly in favor of expansive coverage. In addition, consistent with the ADAAA, the determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures.<sup>91</sup>

The determination of whether an impairment substantially limits a major life activity requires an individualized assessment.<sup>92</sup> Section 38.4(q)(5)(i)(D) applies the principles set forth in the rules of construction in order to provide examples of the types of impairments

that will virtually always be found to substantially limit a major life activity.

#### A Record of an Impairment § 38.4(q)(6)

This proposed rule updates the definition to state that an individual has “a record of such an impairment,” “if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.” This is the same language used by the EEOC in their implementing regulations.<sup>93</sup> The DOJ NPRM has identical language.<sup>94</sup>

In addition, the rule proposes adding a new paragraph at § 38.4(q)(6)(ii), which states that “[w]hether an individual has a record of an impairment that substantially limited a major life activity must be construed broadly to the maximum extent permitted by Federal disability nondiscrimination law and this part and should not demand extensive analysis.” An individual will be considered to fall within this definitional prong if the individual has a history of an impairment that substantially limited a major life activity, in comparison to most people in the general population, or was misclassified as having such an impairment. Moreover, an individual under this definitional prong may be entitled to a reasonable accommodation or a reasonable modification if needed, and related to the past disability. This provision is consistent with the DOJ NPRM implementing Title II of the ADA, as amended.<sup>95</sup> If the DOJ changes its proposal in its final rule implementing ADA Titles II and III, the Department will review those changes to determine their impact on this proposal and take appropriate action.

#### Is Regarded as Having Such an Impairment § 38.4(q)(7)

This rule revises the term “regarded as having an impairment” to conform to the ADAAA.<sup>96</sup> This updated language provides that an individual meets the definition if it is established that the individual is subject to an action prohibited by WIOA Section 188 and this part, because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. However, impairments that are transitory and minor cannot form

<sup>81</sup> 42 U.S.C. 12102(2).

<sup>82</sup> 29 CFR 1630.2(i).

<sup>83</sup> 79 FR 4839, 4844, January 30, 2014.

<sup>84</sup> 29 CFR 38.4(q)(4).

<sup>85</sup> 42 U.S.C. 12102(2)(a).

<sup>86</sup> See Congressional Record—Senate S8840, S8841 (September 16, 2008).

<sup>87</sup> 29 CFR 1630.2(i)(1).

<sup>88</sup> 29 CFR 1630, App., Section 1630.2(i). Major Life Activities (EEOC Title I).

<sup>89</sup> 42 U.S.C. 12101(b)(4).

<sup>90</sup> 29 CFR 1630.2(i)(2).

<sup>91</sup> 42 U.S.C. 12102(4)(E).

<sup>92</sup> 29 CFR 1630.2(j)(1)(v).

<sup>93</sup> 29 CFR 1630.2(k)(1).

<sup>94</sup> 79 FR 4839, 4848, Jan. 30, 2014.

<sup>95</sup> 70 FR 4839, 4859, Jan. 30, 2014.

<sup>96</sup> 42 U.S.C. 12102(3).

the basis of a finding that an “individual is regarded as having a disability.”

#### Employment Practices § 38.4(s)

A minor revision to the definition of “Employment practices” has been made to read: “Employment Practices of a recipient include, but are not limited to” to make it easier to read and understand. The enumerated examples in the part 38 definition have not changed.

#### Employment-Related Training § 38.4(t)

The definition of “Employment-related training” has been revised to make the definition less circular. The new definition is “training that allows or enables an individual to obtain skills, abilities and/or knowledge that are designed to lead to employment.”

#### Individual With a Disability § 38.4(ff)

The rule revises the definition of “individual with a disability” to be consistent with the ADA and implementing regulations issued by the EEOC<sup>97</sup> and proposed by the DOJ.<sup>98</sup> The majority of the text lists conditions that are not included in the definition of an individual with a disability.

The proposed rule separates “transvestism, transsexualism, and gender dysphoria not resulting from physical impairments” from “pedophilia, exhibitionism, voyeurism and other sexual behavior disorders.” Previously, these terms were listed together and are listed together in the same definition in the ADA<sup>99</sup> and in the EEOC<sup>100</sup> regulations and the DOJ<sup>101</sup> proposed regulations implementing the ADA. The terms remain but have been separated into two groups. This change is intended to highlight the distinction between the first three terms (transvestism, transsexualism, or gender dysphoria not resulting from physical impairment) from those in the second group (pedophilia, exhibitionism, voyeurism, or other sexual behavior disorders) which carry distinctly negative connotations.

In this regard, CRC notes that Section 504 specifically excludes from the definition of disability, among other conditions, gender identity disorders that are not the result of physical impairments.<sup>102</sup>

Finally, subparagraph (2)(i) of this definition has been changed so that it states that an individual who has successfully completed a supervised

drug rehabilitation program and is no longer engaging in the illegal use of drugs or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs is not excluded from the definition of an individual with a disability. By adding the characterization of “illegal drugs” to the last part of this subparagraph, it is easier to read and understand such use.

#### Limited English Proficient (LEP) Individual § 38.4(hh)

This rule proposes a new definition for “limited English proficient (LEP) individual.” The proposed definition of “limited English proficient individual” is “an individual whose primary language for communication is not English and who has a limited ability to read, speak, write and/or understand English. LEP individuals may be competent in English for certain types of communication (e.g., speaking or understanding), but still be LEP for other purposes (e.g., reading or writing).” Similarly, LEP designations are context specific. For example, an individual may possess sufficient English language skills to function in one setting (e.g., reading a recipient’s hours of operation or greeting an individual), but the individual’s skills may be insufficient in other settings (e.g., completing a legal document or discussing eligibility requirements).

This definition is added because discrimination based on limited English proficiency may be a form of unlawful national origin discrimination.<sup>103</sup> The term is used elsewhere in this proposed rule, in § 38.9 defining national origin discrimination as including discrimination based on limited English proficiency. This definition is consistent with decisions interpreting the scope of national origin discrimination under Title VI<sup>104</sup> and regulations interpreting national origin-based discrimination,<sup>105</sup> and has been adopted from those DOJ regulations implementing Title VI to ensure consistency. Finally, this term is being added to provide direction to the regulated recipient community because the population attempting to apply for,

participate in, and benefit from WIOA Title I-financially assisted programs and activities is increasingly diverse, speaking many languages in addition to and sometimes instead of English. According to a report issued by the U.S. Census Bureau in 2013, as of 2011, 21 percent of people aged 5 and over living in the U.S. spoke a language other than English at home, 22.4 percent of whom either spoke English not well or not at all.<sup>106</sup> As a result, WIOA Title I-financially assisted programs and activities have increasingly interacted with and provided services to individuals who are limited English proficient. Since fiscal year 2013, of the compliance reviews of state programs that CRC has conducted, six have revealed significant language access violations. Thus, there is a need for increased direction for recipients regarding their obligations to meet the needs of these LEP applicants, participants, and beneficiaries.

#### National Programs § 38.4(ii)

This proposed rule includes the National Dislocated Worker Grant Programs and YouthBuild programs in the definition of “National Programs.” This change reflects the language in WIOA Title I Subpart D, Section 170 and Sec. 171<sup>107</sup> and ETA’s proposed implementing regulations.<sup>108</sup>

#### Nondiscrimination Plan § 38.4(ll)

This proposed rule changes the name “Methods of Administration” for the document described in § 38.54 to “Nondiscrimination Plan,” but retains the definition of the document. This change more clearly represents the contents and purpose of this document, which is created, maintained, and implemented by the Governor to ensure compliance on the part of state programs with WIOA’s nondiscrimination and equal opportunity obligations and this part.

#### Other Power-Driven Mobility Device § 38.4(nn)

This rule adds a definition for “other power-driven mobility device.” The term is used in the proposed rule in § 38.17, setting out the programmatic and physical accessibility requirements applicable to individuals with disabilities. This definition mirrors the definition in the DOJ ADA Title II regulations.<sup>109</sup> This definition is

<sup>103</sup> *Lau v. Nichols*, 414 U.S. 563 (1974) (federal fund recipient’s denial of an education to a group of non-English speakers was national origin discrimination in violation of Title VI).

<sup>104</sup> *Sandoval v. Hagan*, 197 F.3d 484, 510–11 (11th Cir. 1999) (holding that English-only policy for driver’s license applications constituted national origin discrimination under Title VI), *rev’d* on other grounds, 532 U.S. 275 (2001); *Almendares v. Palmer*, 284 F. Supp. 2d 799, 808 (N.D. Ohio 2003) (holding that allegations of failure to ensure bilingual services in a food stamp program could constitute a violation of Title VI).

<sup>105</sup> 28 CFR 42.104.

<sup>106</sup> American Community Survey Reports, Language Use in the United States: 2011 (August 2013).

<sup>107</sup> 29 U.S.C. 3225–3226.

<sup>108</sup> 80 FR 20690, April 16, 2015.

<sup>109</sup> 28 CFR 35.104.

<sup>97</sup> 29 CFR 1630.3.

<sup>98</sup> 70 FR 4839, 4859–60, Jan. 30, 2014.

<sup>99</sup> 42 U.S.C. 12211(b).

<sup>100</sup> 29 CFR 1630.3(d).

<sup>101</sup> 70 FR 4839, 4859–60, January 30, 2014.

<sup>102</sup> 29 U.S.C. 705(20)(F)(i).

updated because, as the technology available for mobility devices advances, devices with new capabilities, such as the Segway®, are increasingly used by individuals with mobility impairments.

#### Programmatic Accessibility § 38.4(tt)

The rule adds a definition for “programmatic accessibility.” WIOA states in no fewer than ten places in Title I that recipients will comply with section 188, if applicable, and applicable provisions of the Americans with Disabilities Act of 1990, regarding the physical and programmatic accessibility of facilities, programs, services, technology, and materials, for individuals with disabilities.<sup>110</sup> However, WIOA does not define programmatic accessibility for this purpose. The Department’s proposed definition, “policies, practices, and procedures providing effective and meaningful opportunity for persons with disabilities to participate in or benefit from aid, benefit, service and training,” provides needed direction for recipients and beneficiaries. It is important to note that the term “programmatic accessibility” in this context has a different meaning than the similar term “program accessibility” that is used in Title II of the ADA.

#### Qualified Individual With a Disability § 38.4(ww)

This rule revises the title of the definition of “qualified individual with a disability” to match the definition of “qualified” in the EEOC regulations<sup>111</sup> implementing Title I of the ADAAA.

#### Qualified Interpreter § 38.4(xx)

This NPRM amends the existing definition of “qualified interpreter” to reflect the existence of new technologies used by interpreters. The revised language states that interpreting services may be provided “either in-person, through a telephone, a video remote interpreting (VRI) service or via internet, video, or other technological methods.”<sup>112</sup> This revision is also intended to delineate the skills and abilities that an individual must possess in order to provide interpretation services. This change to the definition is intended to assist recipients who are seeking to meet their nondiscrimination and equal opportunity responsibilities as defined in this part. This change is

<sup>110</sup> See, e.g., 29 U.S.C. 102(b)(2)(c)(vii); 29 U.S.C. 102(b)(2)(e)(vi).

<sup>111</sup> 29 CFR 1630.2(m).

<sup>112</sup> See 28 CFR 35.104, definition of “auxiliary aids and services” (paragraph 1) and definition of “qualified interpreter.”

also intended to benefit applicants, participants, and beneficiaries.

The rule adds two new subdefinitions to further explain the different meanings of “qualified interpreter” when working with individuals with disabilities and with individuals who are limited English proficient. The first new definition specifies that “qualified interpreter for an individual with a disability” includes sign language interpreters, oral transliterators, and cued-language transliterators, and describes the essential functions required to be performed by a qualified interpreter for a deaf or hard of hearing individual. This language is taken from the ADA Best Practices Tool Kit for State and Local Governments.<sup>113</sup>

The second subdefinition is for “qualified interpreter for an individual who is limited English proficient.” This new subdefinition is taken from the DOL LEP guidance and refers to an individual who demonstrates expertise in and ability to communicate information accurately in both English and in the other language and to identify and employ the appropriate mode of interpreting, such as consecutive, simultaneous, or sight translation.<sup>114</sup> Recipients are strongly encouraged to use certified interpreters where individual rights depend on precise, complete and accurate translations. Such situations may include, e.g., a hearing on eligibility for unemployment insurance benefits or a test for obtaining certification or credentials. A certified interpreter may be someone who has been certified by the federal courts to be a qualified interpreter for legal purposes, or someone who has been certified by a national interpreter association. Certification indicates a particular level of expertise in the specific skill of interpretation, which is distinct from being bilingual.

#### Reasonable Accommodation § 38.4(yy)

This NPRM revises the definition of “reasonable accommodation” to add a new paragraph (4), which reads as follows: “A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who has an ‘actual disability’ or ‘record of’ a disability, but is not required to provide a reasonable accommodation to an individual who is only ‘regarded as’

<sup>113</sup> ADA Best Practices Tool Kit for State and Local Governments, General Effective Communication Requirements Under Title II of the ADA, Chapter 3, available at: <http://www.ada.gov/pcaoolkit/chap3toolkit.htm> (last accessed March 19, 2015).

<sup>114</sup> DOL LEP Guidance, supra note 24 at 32296.

having a disability.” This change to the definition of reasonable accommodation makes it consistent with the ADAAA<sup>115</sup> and regulations issued by the EEOC<sup>116</sup> and proposed by the DOJ<sup>117</sup> interpreting the ADA.

#### Recipient § 38.4(zz)

This NPRM revises the definition of “recipient.” The definition retains most of the language contained in the § 38.4 definition except that the rule removes the language excluding the operators of federally-operated Job Corps Centers from the definition of recipient. As described above, WIOA Title I<sup>118</sup> and ETA’s proposed implementing regulations<sup>119</sup> set forth CRC’s jurisdiction to enforce the WIOA nondiscrimination and equal opportunity provisions as to Federally-operated Job Corps Centers. Thus, this NPRM revises the definition to include as recipients all Job Corps contractors and Center operators. This proposed addition to the existing definition is intended to provide consistency by placing all Job Corps Centers under CRC’s jurisdiction to ensure that participants in all Job Corps Centers have the identical enforcement mechanism.

#### Service Animal § 38.4(fff)

This NPRM adds a definition for “service animal.” The proposed rule refers to the term “service animal” in § 38.16; therefore, the term has been defined in this section. This provision is drawn from the DOJ ADA Title II regulations at 28 CFR 35.104 and is intended to provide uniformity.<sup>120</sup>

#### State Workforce Agency § 38.4(III)

This NPRM proposes to change the term “State Employment Service Agencies” to “State Workforce Agencies” to be consistent with the change to this term contained in WIOA Title I<sup>121</sup> and the proposed ETA regulations implementing Title I.<sup>122</sup>

#### Undue Burden or Hardship § 38.4(rrr)

This NPRM amends the definition of “undue hardship” in the context of religious accommodation to read as follows: “For the purposes of religious accommodation only, ‘undue hardship’

<sup>115</sup> 42 U.S.C. 12101 *et seq.*

<sup>116</sup> 29 CFR 1630.9(e).

<sup>117</sup> 70 FR 4839, January 30, 2014.

<sup>118</sup> 29 U.S.C. 3248(d).

<sup>119</sup> 80 FR 20690, April 16, 2015.

<sup>120</sup> The EEOC has not addressed whether or not this definition would apply to employers and employment agencies covered under Title I of the ADA or Section 501 of the Rehabilitation Act.

<sup>121</sup> 80 FR 20690, April 16, 2015.

<sup>122</sup> *Id.*

means anything more than a de minimis cost or operational burden that a particular accommodation would impose on a recipient.” This minor change to the current rule’s definition removes the reference to case law and makes it consistent with EEOC’s interpretation of Title VII.<sup>123</sup>

#### Video Remote Interpreting (VRI) Service § 38.4(sss)

This NPRM adds the definition of “video remote interpreting (VRI) service” because it is an interpreting service that is increasingly integrated into services provided to individuals with disabilities and LEP individuals. The definition of “video remote interpreting service” means an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection that delivers high-quality video images, as provided in § 38.15. This definition mirrors the term used by the DOJ regulations implementing Title II of the ADA.<sup>124</sup>

#### Vital Information § 38.4(ttt)

This NPRM adds a new definition for “vital information.” The proposed rule uses the term “vital information” in setting forth a recipient’s responsibility to meet its language access requirements. The proposed definition reads as follows: “information, whether written, oral or electronic, that is necessary for an individual to understand how to obtain any aid, benefit, service and/or training; necessary for an individual to obtain any aid, benefit, service, and/or training; or required by law. Examples of documents containing vital information include, but are not limited to, applications, consent, and complaint forms; notices of rights and responsibilities; notices advising LEP individuals of their rights under this part, including the availability of free language assistance; rulebooks; written tests that do not assess English language competency, but rather assess competency for a particular license, job, or skill for which English proficiency is not required; and letters or notices that require a response from the beneficiary or applicant, participants, or employee.

This definition is intended to provide clear direction for recipients so that they can determine what information is necessary to be translated or interpreted for limited English proficient individuals in order for recipients to meet their obligations under this part

and WIOA Section 188. The definition builds upon and is consistent with the discussion of vital written materials and documents contained in the DOL LEP Guidance.<sup>125</sup> The guidance does not define “vital documents” or “vital information” and CRC has received feedback from Equal Opportunity Officers that this omission has caused some confusion on the part of recipients. The DOL LEP Guidance uses the term “vital documents” when discussing written language services and which documents should be translated. It explains that an effective LEP plan for a particular program or activity includes the translation of vital written materials into the languages of each frequently-encountered LEP group eligible to be served and/or likely to be affected by the recipient’s program. The Guidance then provides a non-exhaustive list of examples of documents that would qualify as vital written materials, including letters containing important information regarding participation in a program or activity and notices that require a response from beneficiaries. When the LEP Guidance was issued in 2003, recipients still provided a significant percentage of aid, service, benefit, and training in person. Since then, many recipients, including unemployment insurance programs, moved to a phone-based system and then to a Web site- and Internet-based system of provision of services. Today, many WIOA Title I-financially assisted programs and activities, including unemployment insurance programs, are made available to the public largely through a Web site and the internet. While web-based services and programs offered by recipients provide beneficiaries the convenience of accessing resources remotely at almost any time, ineffectually designed or implemented Web sites may create barriers that prevent or limit access for some LEP individuals. As a result, it has become necessary to define vital information to include information delivered orally, such as in a telephone recording or phone conversation with a recipient’s staff member, as well as electronically, such as contained in a recipient’s Web page or email. The Department welcomes comments on this new definition.

#### Wheelchair § 38.4(uuu)

The proposed rule adds a definition for “wheelchair” to read as follows: “A manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for

the main purpose of indoor or of both indoor and outdoor locomotion.” This definition mirrors the definition in the DOJ ADA Title II regulations at 28 CFR 35.104. CRC has proposed a separate definition for wheelchair to distinguish it from other power driven mobility devices.

#### General Prohibitions on Discrimination § 38.5

The title of proposed § 38.5 revises the part 37 title to read as follows: “General Prohibitions on Discrimination.”

#### Specific Discriminatory Actions Prohibited on Bases Other Than Disability § 38.6

The title of proposed § 38.6 revises the part 37 title to: “Specific discriminatory actions prohibited on bases other than disability.” In addition, this section replaces the term “ground” with the term “basis.”

#### Discrimination Prohibited Based on Sex § 38.7

The proposed rule incorporates a new section, § 38.7, titled “Discrimination prohibited based on sex.” This proposed section incorporates certain obligations already set forth in the current part 37 rule. This new section in paragraph (a) states that discrimination in WIOA Title I-financially assisted programs and activities based on pregnancy, childbirth, or related medical conditions is sex discrimination. This principle has been the law since Congress enacted the Pregnancy Discrimination Act (PDA) to amend Title VII in 1978 and is now being incorporated into the WIOA regulations consistent with current law interpreting the PDA.<sup>126</sup> Pregnancy discrimination is also addressed separately in proposed § 38.8.

In addition, paragraph (a) states that discrimination based on gender identity or transgender status is also a form of unlawful sex discrimination. As described above, the Department follows the jurisprudence developed under Title VII cases brought by the EEOC and the Department of Justice. In the EEOC’s decision in *Macy v. Holder*, the EEOC concluded that discrimination because of gender identity or transgender status is sex discrimination in violation of Title VII, by definition, because the discriminatory act is “related to the sex of the victim.”<sup>127</sup> The EEOC cited both the text of Title VII and the reasoning in *Schroer v.*

<sup>126</sup> 42 U.S.C. 2000e(k).

<sup>127</sup> *Macy*, 2012 WL 1435995 at \*7. *Macy* also held that discrimination on the basis of transgender status could be unlawful under Title VII as sex stereotyping. *Id.*

<sup>123</sup> 29 CFR 1605.2(e).

<sup>124</sup> See 28 CFR 35.104.

<sup>125</sup> DOL LEP Guidance, supra note 24 at 32298.

*Billington*, supra, for its conclusion.<sup>128</sup> See also Memorandum from Attorney General Eric Holder to United States Attorneys and Heads of Department Components (Dec. 15, 2014) (citing EEOC's decision in *Macy v. Holder* as support for DOJ's position that "[t]he most straightforward reading of Title VII is that discrimination 'because of . . . sex' includes discrimination because an employee's gender identification is as a member of a particular sex, or because the employee is transitioning, or has transitioned, to another sex"). Note that discrimination on the basis of gender identity or transgender status can arise regardless of whether a transgender individual has undergone, is undergoing, or plans to undergo sex-reassignment surgery or other processes or procedures designed to facilitate the adoption of a sex or gender other than the individual's assigned sex at birth.<sup>129</sup>

Subsection (b) provides a nonexhaustive list of distinctions based on sex that are unlawful. The nonexhaustive list of examples included in this proposed section are intended to assist recipients in meeting their nondiscrimination and equal opportunity responsibilities under this section. The examples include: Making a distinction between married and unmarried persons that is not applied equally to individuals of both sexes as an example of a sex-based discriminatory practice (proposed paragraph 38.7(b)(1)); denying individuals of one sex who have children access to aid, benefit, service, or training opportunities that is available to individuals of another sex who have children is an unlawful sex-

based discriminatory practice (proposed paragraph 38.7(b)(2)); adversely treating unmarried parents of one sex, but not unmarried parents of another sex (proposed paragraph 38.7(b)(3)); distinguishing on the basis of sex in formal or informal job training and/or educational programs, or other opportunities (proposed paragraph 38.7(b)(4)); posting job announcements that recruit or advertise for individuals for certain jobs on the basis of sex, including through the use of gender-specific terms (proposed paragraph 38.7(b)(5)); treating an individual adversely because the individual identifies with a gender different from that individual's sex assigned at birth or the individual has undergone, is undergoing, or is planning to undergo, processes or procedures designed to facilitate the adoption of a sex or gender other than the individual's assigned sex at birth (proposed paragraph 38.7(b)(6)); denying individuals who are pregnant, who become pregnant, or who plan to become pregnant opportunities for or access to aid, benefit, service, or training on the basis of pregnancy (proposed paragraph 38.7(b)(7)); making any facilities associated with WIOA Title I-financially assisted program or activities available only to members of one sex, except that if the recipient provides restrooms or changing facilities, the recipient must provide separate or single-user restrooms or changing facilities to assure privacy (proposed paragraph 38.7(b)(8)); and denying employees access to the bathrooms used by the gender with which they identify (proposed paragraph 38.7(b)(9)).<sup>130</sup>

Proposed paragraph 38.7(c) provides that a recipient's policies or practices

that have an adverse impact on the basis of sex and are not program-related and consistent with program necessity, constitute sex discrimination in violation of WIOA. Traditionally, disparate impact claims have involved selection criteria that are not necessary to the performance of the job, but which instead reflect stereotypical notions about the skills required for the position in question. *Mehus v. Emporia State Univ.*, 295 F. Supp. 2d 1258, 1271 (D. Kan. 2004) ("Plaintiff is not required to allege discriminatory intent."); *Sharif by Sala-huddin v. N.Y. State Educ. Dep't.*, 709 F. Supp. 345 (S.D.N.Y. 1989) (disparate impact theory to challenge use of Scholastic Aptitude Test to allocate state merit scholarships was appropriate under Title IX). See also *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979) (striking down height requirements by the Los Angeles police department because they were not job related and had a disparate impact on women, who in general are shorter than men); *EEOC v. Dial Corp.*, 469 F.3d 735 (8th Cir. 2006) (striking down a strength test used in a sausage factory because the test was more physically demanding than the job in question and had a significant disparate impact on women). This sex discrimination analysis may also apply to policies or practices that are unrelated to selection procedures. For instance, an employer policy requiring crane operators to urinate off the back of the crane instead of using a restroom was held to be a neutral employment policy that was not job-related and that produced an adverse effect on women, who, the court found, have "obvious anatomical and biological differences" that require the use of bathrooms.

*Johnson v. AK Steel Corp.*, 1:07-cv-291, 2008 WL 2184230, \*8 (S.D. Ohio May 23, 2008).

Proposed paragraph 38.7(d) clarifies that discrimination based on sex stereotypes, such as stereotypes about how persons of a particular sex are expected to look, speak, or act, is a form of unlawful sex discrimination. The proposed rule states the well-recognized principle that employment-related decisions made on the basis of stereotypes about how males and/or females are expected to look, speak, or act are a form of sex-based employment discrimination. As the Supreme Court stated in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989), "we are beyond the day when an employer can evaluate employees by assuming or insisting that they match the stereotype associated with their . . . [sex]." In *Price Waterhouse*, the Court held that an

<sup>128</sup> Consistent with *Macy*, this NPRM defines discrimination on the basis of gender identity or transgender status as a form of sex discrimination. Gender identity is also a stand-alone protected category (as is sexual orientation) under Executive Order 13672. Executive Order 13672 amended Executive Order 11246 to add sexual orientation and gender identity as protected bases, and applies to certain government contracts entered into or modified on or after April 8, 2015, the effective date of OFCCP's implementing regulations promulgated thereunder. Section 188 of WIOA and this part apply to Federal contracts to operate Job Corps Centers (see § 38.2(b)(4)), so persons that hold such contracts may be subject to Executive Order 11246, as amended, including the obligation not to discriminate in employment based on gender identity and sexual orientation.

<sup>129</sup> See *Macy v. Holder*, 2012 WL 1435995 (discrimination against a transgender individual is discrimination related to the sex of the victim including when the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from the person's sex assigned at birth to another sex); *Shroer v. Billington*, 577 F. Supp. at 293 (discrimination against a transgender individual on the basis of an intended, ongoing, or completed gender transition is discrimination because of sex).

<sup>130</sup> Office of Personnel Management (OPM) Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace, available at <http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/> (last accessed March 20, 2015), citing DOL Occupational Safety and Health Administration (OSHA) Interpretations, Interpretation of 29 CFR 1910.141(c)(1)(i): Toilet Facilities (April 6, 1998), available at [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=22932](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22932) (last accessed March 20, 2015); Letter from Thomas Galassi to Maine Human Rights Comm'n (April 16, 2013), available at <http://www.dol.gov/oasam/programs/crc/23603JohnP.GauseLetter.pdf> (last accessed March 20, 2015); see also *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (April 1, 2015) (denying employees use of a restroom consistent with their gender identity and subjecting them to intentional use of the wrong gender pronouns constitutes discrimination because of sex, and violates Title VII); Statement of Interest of the United States in *G.G. v. Gloucester County School Board*, No. 15-2056 (4th Cir.) (arguing that the Gloucester County School Board violated Title IX when it denied a transgender male access to the restroom consistent with his gender identity).



employer's failure to promote a female senior manager to partner because of the sex-stereotyped perceptions that she was too aggressive and did not "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" was unlawful sex-based employment discrimination.<sup>131</sup> The principle that sex stereotyping is a form of sex discrimination has been applied consistently in Supreme Court and lower-court decisions. *See, e.g., Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (stereotype-based beliefs about the allocation of family duties on which state employers relied in establishing discriminatory leave policies held to be sex discrimination under the Equal Protection Clause of the Constitution); *Chadwick v. Wellpoint, Inc.*, 561 F.3d 38 (1st Cir. 2009) (making employment decision based on the belief that women with young children neglect their job responsibilities is unlawful sex discrimination under Title VII); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009) (harassment based on a man's so-called effeminacy is a form of sex discrimination under Title VII); *Terveer v. Billington*, Civil Action No. 12–1290, 2014 WL 1280301 (D.D.C. Mar. 31, 2014) (hostile work environment based on stereotyped beliefs about the appropriateness of same-sex relationships is a form of sex discrimination under Title VII).<sup>132</sup> *Cf.*

<sup>131</sup> *Price Waterhouse*, 490 U.S. at 235.

<sup>132</sup> *See also Centola*, 183 F. Supp. 2d at 410 ("Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotype about the proper roles of men and women."); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002) ("[A] jury could find that Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men."); *Videckis v. Pepperdine Univ.*, 2015 WL 8916764 (C.D. Cal. 2015) (slip op) ("The type of sexual orientation discrimination Plaintiffs allege falls under the broader umbrella of gender stereotype discrimination. Stereotypes about lesbianism, and sexuality in general, stem from a person's views about the proper roles of men and women—and the relationships between them."). The EEOC has recognized in a number of federal sector decisions that adverse actions taken on the basis of sex stereotypes related to sexual orientation, such as the stereotype that men should only date women, violate Title VII. *Castello v. U.S. Postal Service*, EEOC Request No. 0520110649, 2011 WL 6960810 (Dec. 20, 2011) (sex-stereotyping evidence entailed offensive comment by manager about female subordinate's relationships with women); *Veretto v. U.S. Postal Service*, EEOC Appeal No. 0120110873, 2011 WL 2663401 (July 1, 2011) (complainant stated plausible sex-stereotyping claim alleging harassment because he married a man); *Culp v. Dep't of Homeland Security*, EEOC Appeal 0720130012, 2013 WL 2146756 (May 7, 2013) (Title

*U.S. v. Virginia*, 518 U.S. 515, 533 (1996) (in making classifications based on sex, state governments "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females").<sup>133</sup>

As a matter of policy, we support banning discrimination on the basis of sexual orientation in the administration of, or in connection with, any programs and activities funded or otherwise financially assisted in whole or in part under Title I of WIOA. Current law is mixed on whether existing Federal nondiscrimination laws prohibit discrimination on the basis of sexual orientation as a part of their prohibitions on sex discrimination. To date, no Federal appellate court has concluded that Title VII's prohibition on discrimination "on the basis of sex"—or Federal laws prohibiting sex discrimination more generally—prohibits discrimination on the basis of sexual orientation, and some appellate courts previously reached the opposite conclusion.<sup>134</sup>

However, a recent EEOC decision concluded that Title VII's prohibition of discrimination "on the basis of sex"

VII covers discrimination based on associating with lesbian colleague); *Couch v. Dep't of Energy*, EEOC Appeal No. 0120131136, 2013 WL 4499198, at \*8 (Aug. 13, 2013) (complainant's claim of harassment based on his "perceived sexual orientation"); *Complainant v. Dep't of Homeland Security*, EEOC Appeal No. 0120110576, 2014 WL 4407422 (Aug. 20, 2014) ("While Title VII's prohibition of discrimination does not explicitly include sexual orientation as a basis, Title VII prohibits sex discrimination, including sex-stereotyping discrimination and gender discrimination" and "sex discrimination claims may intersect with claims of sexual orientation discrimination."); *Baldwin*, EEOC Appeal No. 0120133080, 2015 WL 4397641 at \*7 ("Sexual orientation discrimination is also sex discrimination because it necessarily involves discrimination based on gender stereotypes.");

<sup>133</sup> The Seventh Circuit articulated this principle as early as 1971. *Sprogs v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.") (emphasis added).

<sup>134</sup> *See, e.g., Kiley v. Am. Soc'y for Prevention of Cruelty to Animals*, 296 Fed. App'x 107, 109 (2d Cir. 2008); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 759 (6th Cir. 2006); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 260 (3d Cir. 2001); *but cf. Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) (Berzon, J., concurring) (in striking down State law prohibition on same sex marriage, observing that "the same sex marriage laws treat the subgroup of men who wish to marry men less favorably than the otherwise similarly situated subgroup of women who want to marry men" and therefore constitute sex discrimination); *see also Muhammad v. Caterpillar*, 767 F.3d 694 (7th Cir. 2014), 2014 WL 4418649 (7th Cir. Sept. 9, 2014, as Amended on Denial of Rehearing, Oct. 16, 2014) (removing statements from previously issued panel decision that relied on outdated precedents about coverage of sexual orientation discrimination under Title VII as requested in EEOC Amicus Brief).

precludes sexual orientation discrimination because discrimination on the basis of sexual orientation necessarily involves sex-based considerations. The EEOC relied on several theories to reach this conclusion: A plain interpretation of the term "sex" in the statutory language, an associational theory of discrimination based on "sex," and the gender-stereotype theory announced in *Price Waterhouse*.<sup>135</sup> The EEOC's decision cited several district court decisions that similarly concluded that sex discrimination includes sexual orientation discrimination, using these theories.<sup>136</sup> The EEOC also analyzed and called into question the appellate decisions that have concluded that sexual orientation discrimination is not covered under Title VII.<sup>137</sup> The EEOC decision applies to workplace conditions, as well as hiring, firing, and promotion decisions, and is one of several recent developments in the law that have resulted in additional protections for individuals against discrimination based on sexual orientation.<sup>138</sup> Two federal district courts have since concurred with the EEOC's legal analysis in *Baldwin*.<sup>139</sup>

The final rule should reflect the current state of nondiscrimination law, including with respect to prohibited bases of discrimination. We seek comment on the best way of ensuring

<sup>135</sup> *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, Agency No. 2012–24738–FAA–03, at 5–6 (July 15, 2015) (finding that sexual orientation is inseparable from and inescapably linked to sex and thus that an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination).

<sup>136</sup> *See id.* at \*4–\*8.

<sup>137</sup> *See id.* at \*9–\*10.

<sup>138</sup> For example, just this year, the Supreme Court ruled that States may not prohibit same-sex couples from marrying and must recognize the validity of same-sex couples' marriages. *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015).

<sup>139</sup> *Isaacs*, 2015 WL 6560655 at \*3–4 ("This court agrees instead with the view of the Equal Employment Opportunity Commission that claims of sexual orientation discrimination are cognizable under Title VII. In [*Baldwin*], the Commission explains persuasively why an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.") (internal citations and quotations omitted); *Videckis*, 2015 8916764 at \*8 ("This Court's conclusion [that sexual orientation discrimination is necessarily sex discrimination] is in line with a recent Equal Employment Opportunity Commission decision ('EEOC') holding that sexual orientation discrimination is covered under Title VII, and therefore that the EEOC will treat sexual orientation discrimination claims the same as other sex discrimination claims under Title VII."); *Cf. Roberts v. United Parcel Serv.*, 2015 WL 4509994, \*14–18 (E.D. N.Y. 2015) (referring to *Baldwin* as a "landmark ruling," noting its criticism of federal courts for citing to dated rulings without additional analysis in the sexual orientation context, and quoting favorably from the decision at length).

that this rule includes the most robust set of protections supported by the courts on an ongoing basis.

Paragraph (d) provides examples of sex stereotyping to assist recipients in preventing, identifying, and remedying such examples of sex discrimination in their programs. Examples of practices that constitute sex stereotyping include: Denying an individual access to, or otherwise subjecting an individual to adverse treatment in accessing aid, benefit, service, and training (proposed paragraph 38.7(d)(1)); harassment or adverse treatment of a male because he is considered effeminate or insufficiently masculine (proposed paragraph 38.7(d)(2)); adverse treatment of an applicant, participant, or beneficiary of a WIOA Title I-financially-assisted program or activity because of the individual's actual or perceived gender identity (proposed paragraph 38.7(d)(3)); adverse treatment of an applicant to, participant in, or beneficiary of, a WIOA Title I-financially assisted program or activity based on sex stereotypes about caregiver responsibilities such as assuming that a female applicant has (or will have) family caretaking responsibilities, and that those responsibilities will interfere with her ability to access aid, benefit, service, or training (proposed paragraph 38.7(d)(4)); adverse treatment of a male applicant to, or beneficiary of, a WIOA Title I-financially assisted program or activity because he has taken, or is planning to take care of, his newborn or recently adopted or fostered child, based on the sex-stereotyped belief that women, and not men, should care for children (proposed paragraph 38.7(d)(5)); denying a woman access to, or otherwise subjecting her to adverse treatment in accessing aid, benefit, service, or training, under a WIOA Title I-financially assisted program or activity based on the sex-stereotyped belief that women with children should not work long hours, regardless of whether the recipient is acting out of hostility or belief that it is acting in her or her children's best interest (proposed paragraph 38.7(d)(6)); denying an individual access to, or otherwise subjecting the individual to adverse treatment in accessing aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity based on sex stereotyping including the belief that a victim of domestic violence would disrupt the program or activity and/or may be unable to access aid, benefits, services, or training (proposed paragraph 38.7(d)(7)). Proposed paragraph 38.7(d)(7) is based upon the technical assistance document issued by

the EEOC interpreting Title VII's prohibition against sex discrimination in employment to include an individual's status as a victim of domestic violence.<sup>140</sup> The technical assistance publication states: "Title VII prohibits disparate treatment based on sex, which may include treatment based on sex-based stereotypes. For example: An employer terminates an employee after learning that she has been a subjected to domestic violence, saying he fears the potential drama battered women bring to the workplace." The EEOC publication refers to the DOJ definition of domestic violence, which defines the term as: "a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner. Domestic violence can be physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person. This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone."<sup>141</sup> CRC has drawn from this existing EEOC interpretation in this proposed rule.

Proposed § 38.7(d)(8) addresses stereotyping based on an applicant's, participant's, or beneficiary's nonconformity with norms about how people with the applicant's, participant's, or beneficiary's assigned sex at birth should look, speak, and act. Proposed § 38.7(d)(8) states adverse treatment of a woman applicant, participant, or beneficiary of a WIOA Title I-financially assisted program or activity because she does not dress or talk in a feminine manner is an example of discrimination based on sex.

The final example in this non-exhaustive list addresses adverse treatment that occurs because of an applicant's, participant's, or beneficiary's nonconformity with stereotypes about a certain sex not working in a particular job, sector, or industry.

#### Discrimination Prohibited Based on Pregnancy § 38.8

The rule proposes a new § 38.8 entitled, "Discrimination prohibited based on pregnancy." This section is

<sup>140</sup> "Questions and Answers," The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault or Stalking," available at: [http://www.eeoc.gov/eeoc/publications/qa\\_domestic\\_violence.cfm](http://www.eeoc.gov/eeoc/publications/qa_domestic_violence.cfm) (issued in 2013) (last accessed Feb. 2, 2015).

<sup>141</sup> See DOJ Office on Violence Against Women/ Domestic Violence available at <http://www.justice.gov/ovw/domestic-violence> (last accessed March 19, 2015).

intended to incorporate an existing obligation into the current rule, *i.e.*, that the prohibition against sex discrimination includes discrimination based on pregnancy, childbirth, and related medical conditions. This new section explains that limiting or denying access to any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity based on an individual's pregnancy, childbirth, or related medical conditions is sex discrimination and is thus prohibited.

Title IX of the Education Amendments of 1972<sup>142</sup> prohibits sex discrimination in any educational program or activity receiving federal financial assistance, including those that are financially assisted by WIOA Title I.<sup>143</sup> Specifically, Title IX provides in part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>144</sup> When it enacted Title IX, Congress was concerned with ending the "persistent, pernicious discrimination which [was] serving to perpetuate second-class citizenship for American women."<sup>145</sup> Congress wanted to provide equal opportunity in education as a way to provide greater access to jobs, employment security, financial security, and ending the far-reaching effects of educational discrimination for women.<sup>146</sup>

As far back as 1974, federal agency regulations, promulgated under Title IX, have included pregnancy as a basis of prohibited discrimination in programs and activities receiving Federal financial assistance.<sup>147</sup> The Department of Education's regulations unequivocally apply Title IX's prohibition against sex discrimination to discrimination on the basis of pregnancy and parental status, stating: "A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently

<sup>142</sup> 20 U.S.C. 1681 *et seq.*

<sup>143</sup> 20 U.S.C. 1687 (Title IX provision applicable to vocational education and training programs).

<sup>144</sup> 20 U.S.C. 1681(a).

<sup>145</sup> 118 Cong. Rec. 5804 (1972) (statement of Sen. Bayh).

<sup>146</sup> *Emily McNee, Pregnancy Discrimination in Higher Education: Accommodating Student Pregnancy*, 20 Cardozo J. L. & Gender 63 (2013).

<sup>147</sup> The Department of Health Education and Welfare's (HEW) Title IX regulations at 45 FR 24128 included pregnancy as a protected basis. HEW's regulations were adopted by the Department of Education in 1980. 34 CFR 106.40.

on the basis of sex.”<sup>148</sup> Section 106.40(b) specifically provides that a recipient must not “discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student’s pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.” The substantive provisions of DOL’s Title IX regulations at 29 CFR part 36, like those of approximately twenty other federal agencies, were modeled on and are essentially identical to the Department of Education’s regulations.<sup>149</sup> Thus, DOL’s regulations likewise prohibit discrimination based on pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

When Congress amended Title VII in 1978 by enacting the Pregnancy Discrimination Act (PDA), the protections against sex discrimination in the context of employment were expanded to include protections against discrimination based on pregnancy, childbirth, and related medical conditions. While the PDA does not directly govern the nondiscrimination obligations of a program or activity receiving Federal financial assistance, the principles underlying the PDA were built on Title IX’s prohibitions against discrimination on the basis of pregnancy and actual or potential parental status.<sup>150</sup> Section 38.8 relies on both the PDA and Title IX. It is not uncommon for courts to do so as well.<sup>151</sup> Further, because there is significantly more available jurisprudence under Title VII,<sup>152</sup> courts apply the Title VII burdens of proof to

allegations of pregnancy discrimination under Title IX.<sup>153</sup>

Proposed paragraph (a) of § 38.8 adopts the principle set forth in Title IX and the PDA<sup>154</sup> that discrimination on the basis of sex includes “because of or on the basis of pregnancy, childbirth, or related medical conditions.”<sup>155</sup> It requires that employers treat employees and job applicants of childbearing capacity and those affected by pregnancy, childbirth or related medical conditions the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work and defines the term “related medical conditions.” Proposed paragraphs 38.8(a–d) provide the following examples that may be prohibited pregnancy discrimination: Refusing to provide aid, benefit, service, training or employment under a WIOA Title I-financially assisted program or activity to a pregnant individual or an individual of childbearing capacity, or otherwise subjecting such individuals to adverse treatment on the basis of pregnancy, related medical conditions, or childbearing capacity; limiting an individual’s access to any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity based on that individual’s pregnancy, or requiring a doctor’s note in order for a pregnant individual to continue participation while pregnant; and denying accommodations or modifications to a pregnant applicant or participant who is temporarily unable to participate in a program or activity because of pregnancy, childbirth, and/or related medical conditions, when such accommodations or modifications are provided to other participants who are similarly affected.<sup>156</sup> Without such accommodations, many pregnant individuals are unable to participate in job training programs or activities. Consequently, some pregnant

individuals who need reasonable accommodations lose opportunities to receive job training and other WIOA Title I-financially assisted aid, benefits, services, or training to assist them in obtaining employment.

The range of accommodations to address the temporary limitations of a pregnant applicant, participant, or beneficiary in a WIOA Title I-financially assisted program or activity may include simple things that involve little or no cost, such as permitting more frequent bathroom breaks and allowing the pregnant individual to sit down during a training program or applications or interview process.<sup>157</sup> Other temporary limitations, however, may require a temporary light-duty assignment to accommodate lifting or bending restrictions that a pregnant participant or trainee may have.

Denying an alternative assignment, modified duties, or other accommodations to a pregnant applicant, participant, or beneficiary who is temporarily unable to perform some program or activity duties because of pregnancy, childbirth, or a related medical condition may be sex discrimination when such assignments, modifications, or other accommodations are provided, or are required to be provided, by a recipient’s policy or other relevant laws, to other individuals whose abilities to perform some of their program or activity duties are similarly affected (proposed Sec. 38.7). Thus, for example, a recipient that permits light-duty assignments for individuals who are unable to perform their regular assignments due to on-the-job injuries or disabilities may also be required to permit light-duty assignments for individuals who are unable to perform their regular assignments due to pregnancy. The approach set forth in the proposed rule with respect to pregnancy accommodation is intended to align with the U.S. Supreme Court’s decision in *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015). Thus, in analyzing pregnancy-based sex

<sup>148</sup> 34 CFR 106.40(a).

<sup>149</sup> 65 FR 52858 at 52859.

<sup>150</sup> See 123 Cong. Rec. 29662 (1977) (statement of Sen. Cranston (D—CA)), reprinted in *Legis. History of the Pregnancy Discrimination Act of 1978*, at 128 (1980).

<sup>151</sup> See *Chipman v. Grant County School Dist.*, 30 F.Supp.2d 975 (E.D. Ky. 1998) (“Although [the] language [of Title IX] is somewhat different, its purpose is generally the same as the Pregnancy Discrimination Act.”), citing *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 784 (3d Cir. 1990) (“regulations promulgated pursuant to Title IX specifically apply its prohibition against gender discrimination to discrimination on the basis of pregnancy”); *Cooper v. Rogers*, Case No. 2:11–CV–964–MEF, 2012 WL 2050577, \*8 (M.D. Ala. June 06, 2012).

<sup>152</sup> Since the passage of Title IX, there have been fewer than fifteen reported cases where a federal court has heard a claim of pregnancy discrimination under Title IX. Kendra Fershee, *An Act For All Contexts: Incorporating The Pregnancy Discrimination Act Into Title IX To Help Pregnant Students Gain And Retain Access To Education*, 39 Hofstra L. Rev. 281 (2010) citing Michelle Gough, Parenting and Pregnant Students: An Evaluation of the Implementation of the “Other” Title IX, 17 Mich. J. Gender & L. 211, 220–47 (2011).

<sup>153</sup> *Darien v. University of Massachusetts*, 980 F. Supp. 77, 92 (D. Mass. 1997), citing *Lipssett v. University of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988) (holding claims under Title IX will be analyzed using the Title VII burden shifting analysis in the employment context).

<sup>154</sup> 42 U.S.C. 2000e(k).

<sup>155</sup> The statutory term “related medical conditions” appears in the PDA only.

<sup>156</sup> This Pregnancy Discrimination Act obligation applies even though “pregnancy itself is not an impairment within the meaning of the [Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, as amended], and thus is never on its own a disability.” EEOC, *Enforcement Guidance: Pregnancy Discrimination and Related Issues*, sec. II.A (July 14, 2014) (footnote omitted), available at [http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm) (last accessed March 19, 2015). Under the ADA, accommodation is required for qualified individuals absent undue hardship when a physical or mental impairment (including one caused by pregnancy) substantially limits a major life activity.

<sup>157</sup> In addition, the Fair Labor Standards Act, 29 U.S.C. Section 207(r), requires FLSA-covered employers to provide reasonable break time for an employee to express breast milk for her nursing child for one year after the child’s birth, each time such employee has need to express the milk. Employers are also required to provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk. FLSA-covered employers with fewer than 50 employees are not subject to the FLSA break time requirement if compliance with this provision would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer’s business.

discrimination allegations that seek to show disparate treatment related to accommodation requests by using indirect evidence, CRC will apply the three-part analytical framework set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–805 (1973). Specifically with respect to demonstrating pretext, CRC will follow the analysis described in *Young*, supra at 1354–55.<sup>158</sup> CRC solicits comments from the public on how best to operationalize application of the Court's pretext analysis.

*Discrimination Prohibited Based on National Origin, Including Limited English Proficiency § 38.9*

In an effort to facilitate consistent Federal enforcement, the NPRM proposes adding a new section on national origin discrimination. Proposed paragraph (a) states the existing obligation that a recipient must not discriminate on the basis of national origin in providing any aid, benefit, service, or training under any WIOA Title I-financially assisted program or activity. It also explains that national origin discrimination includes “treating individual beneficiaries, participants, or applicants for aid, benefit, service or training adversely because they (or their ancestors) are from a particular country or part of the world, because of ethnicity or accent (including adverse treatment because they have the physical, linguistic, and cultural characteristics closely associated with a national origin group).”

Proposed paragraph (b) adopts the well-established principle under Title VI of the Civil Rights Act of 1964, as amended,<sup>159</sup> that recipients of Federal financial assistance must take reasonable steps to provide meaningful access to each LEP individual whom they serve or encounter. This same principle has been applied to recipients in their WIA Title I-financially assisted programs and activities and likewise applies to all recipients in their WIOA Title I financially-assisted programs or activities. This provision reflects the fundamental obligation of recipients to provide meaningful access to LEP individuals, e.g., to effectively understand communications and to make themselves understood. This paragraph provides examples of reasonable steps: “Reasonable steps

generally may include, but are not limited to, an assessment of an LEP individual to determine language assistance needs; providing oral interpretation and written translation of both hard-copy and electronic materials, in the appropriate non-English languages to LEP individuals; or outreach to limited English proficient communities to improve service delivery in needed languages.” The Department intends this to be a flexible standard that evaluates the level, type, and manner of language services required in light of the particular facts, such as the nature of the communication, the language of the LEP individual, and the recipient involved.<sup>160</sup> The proposed section further provides direction regarding the application of the term “reasonable steps” in the context of training programs. “Reasonable steps to provide meaningful access to training programs may include, but are not limited to providing: (1) Written training materials in appropriate non-English languages by written translation or by oral interpretation or summarization; and (2) Oral training content in appropriate non-English languages through in-person interpretation or telephone interpretation.”

The proposed language provides familiarity and consistency for recipients about the scope of their obligations. It is particularly critical that LEP individuals be provided meaningful access to information in the context of access to any aid, benefit, service, and/or training, because that information—including, for example, how to apply for unemployment insurance benefits, how to appeal a denial of benefits, how to apply for and participate in job training and employment opportunities—is often essential to ensure beneficiaries' access to necessary employment-related opportunities.

Additionally, the NPRM proposes adding paragraphs (c) through (i), which specify the actions recipients must take to ensure language access. Proposed paragraph (c) makes clear that a recipient should ensure that every program delivery avenue, including electronic, in person, and/or telephonic communication, conveys in the appropriate languages how an individual can effectively learn about, participate in, and/or access any aid, benefit service or training that the recipient provides. This provision would ensure that, as recipients convert

to on-line delivery systems, language access is not lost in the transition.

Paragraph (d) specifies that any language assistance services whether oral interpretation or written translation, must be provided free of charge and in a timely manner.<sup>161</sup> Consistent with the approach in the Department's LEP Guidance that there is no one definition for “timely” that applies to every type of interaction with every type of recipient at all times, CRC declines to define “timely” for the purposes of this section. A determination of whether language assistance services are timely will depend on the specific circumstances of each case. However, CRC echoes the LEP Guidance's recognition that language assistance is timely when it is provided at a time and place that avoids the effective denial of or imposition of an undue burden on or delay in important aid, benefits, services, or training to LEP individuals.<sup>162</sup>

Paragraph (e) states that a recipient must provide adequate notice to LEP individuals of the existence of interpretation and translation services and that they are free of charge. The provision would ensure that LEP individuals are aware that they do not have to navigate the workforce system unassisted.

Paragraph (f) identifies restrictions on the use of certain persons to provide language assistance services for an LEP individual. This paragraph applies regardless of the appropriate level, type, or manner of language assistance services a recipient is required to provide. Based upon the CRC's experience, the use of incompetent or ad hoc interpreters, such as family members, including children, and friends, is not uncommon and can have negative consequences if the interpretation is not accurate. Thus, proposed paragraph (f) prohibits a recipient from requiring an LEP individual to provide his/her own interpreter. Proposed paragraphs (f)(1)–(2), however, identify narrow and finite situations in which a recipient may rely on an adult accompanying an LEP individual to interpret. Proposed paragraph (f)(2)(i) provides that an LEP individual's minor child or adult family or friend(s) may interpret or facilitate communication in emergency situations while awaiting a qualified interpreter. Proposed paragraph (f)(2)(ii) states that an accompanying adult may interpret or

<sup>158</sup> The EEOC has issued guidance in the employment context. See *U.S. Equal Employment Opportunity Commission, Enforcement Guidance: Pregnancy Discrimination and Related Issues* (July 25, 2015), available at [http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm) (last accessed Sept. 24, 2015).

<sup>159</sup> 42 U.S.C. 2000d et seq.

<sup>160</sup> DOL LEP Guidance, 68 FR 32293–32295 (describing the factors recipients should consider, and the factors that CRC will consider, in determining the extent of recipients' obligations to LEP individuals).

<sup>161</sup> This principle is consistent with long-standing concepts reflected in the DOL LEP Guidance. See 68 FR at 32297 (with respect to privacy), 32296 (with respect to timeliness), and 32300 (with respect to services free of charge).

<sup>162</sup> *Id.* at 47316.

facilitate communication when the information conveyed is of minimal importance to the services to be provided or when the LEP individual requests that the accompanying adult provide language assistance, the adult agrees, and reliance on that adult is appropriate. If the LEP individual voluntarily chooses to provide their own interpreter, a recipient must make and retain a record of the individual's decision to use their own interpreter. This provision allows the LEP individual to rely on an adult of their own choosing, but requires that the recipient document that choice so that there can be no question regarding the voluntariness of the choice of interpreter. Proposed paragraph (f)(3) outlines that when precise, complete, and accurate interpretations or translation of information and/or testimony are critical for adjudicatory or legal reasons, or where the competency of the LEP person's interpreter is not established, a recipient may decide to provide its own, independent interpreter, even if an LEP individual wants to use their own interpreter as well.

Paragraph (g) addresses recipients' LEP requirements as to vital information. Paragraph (g)(1) provides that, for languages spoken by a significant number or portion of the population eligible to be served or likely to be encountered, recipients must translate vital information in written materials into these languages and make the translations readily available in hard copy, upon request, or electronically such as on a Web site. Written training materials offered or used within employment-related training programs as defined under § 38.4(t) are excluded from these translation requirements. The Department is cognizant of the challenge posed by translating the variety of training materials into so many languages as may be necessary in an employment-related training program. The vital information these materials contain can be provided to LEP participants by oral interpretation or summarization during the training program itself. However, recipients must still take reasonable steps to ensure meaningful access to training programs as stated in (b) of this section. Reasonable steps to ensure meaningful access for LEP individuals to employment-related training programs may include offering courses such as English as a Second Language (ESL) to the individual concurrent with the training program, or enrollment in such a program to attain a sufficient level of English proficiency to become eligible

for a specific job or training program. Importantly, whenever possible, the LEP individual's access to the training program, and thus any resulting employment opportunity, should not be delayed by enrollment in an ESL course.

Paragraph (g)(2) states: "For languages not spoken by a significant number or portion of the population eligible to be served, or likely to be encountered, a recipient must make reasonable steps to meet the particularized language needs of LEP individuals who seek to learn about, participate in, and/or access the aid, benefit, service or training that the recipient provides. Vital information may be conveyed orally if not translated." For these languages, recipients are not obligated to provide written translations of vital information in advance of a request by an LEP individual. Recipients are, however, required to take reasonable steps, including oral translation, to provide access to vital information. Paragraph (g)(3) states that recipients must include a "Babel notice" indicating that language assistance is available, in all communications of vital information, such as hard-copy letters or decisions or those communications posted on Web sites. This requirement would ensure that LEP individuals know how to obtain language assistance for vital information that has not been translated into the LEP individual's preferred, non-English language.

Paragraph (h) addresses the situation in which a recipient becomes aware of the particularized language needs of an individual. The proposed provision states: "To the extent otherwise required by this part, once a recipient becomes aware of the non-English preferred language of an LEP beneficiary, participant, or applicant for aid, benefit, service or training, the recipient must convey vital information in that language." This obligation to provide meaningful access as soon as the entity becomes aware that the individual is LEP exists regardless of whether the LEP individual's language is spoken by a significant number or portion of the population to be served.

Paragraph (i) provides that recipients should develop a written language access plan to ensure LEP individuals have meaningful access to their programs and activities and references Appendix A of this part where the Department has provided guidance to recipients on developing a language access plan.

In evaluating the scope of a recipient's obligations to provide meaningful access, recipients should, and CRC proposes to, give substantial weight to the nature and importance of the

program or activity, including the particular communication at issue, in determining the appropriate level, type and manner of language assistance services to be provided. At the same time, CRC recognizes that a recipient's operations and capacity may be relevant in evaluating the level, type, and manner of language assistance services it is required to provide. Thus, recipients may also consider the proportion of LEP individuals of a particular language group eligible to be served or likely to be encountered by the recipient; the frequency of contacts between LEP individuals who speak that language and the recipient's program or activity;<sup>163</sup> and the resources available to the recipient and the costs of language assistance services. Importantly, while these criteria may be used in an assessment of how, and at what level, language assistance services must be provided, they are not intended to relieve a recipient of its core obligation to take reasonable steps to enable LEP individuals to gain meaningful access to its programs and activities.

For instance, a recipient may choose to consider whether the preferred language of an LEP individual is one that is frequently spoken or one that the recipient only rarely encounters. In the latter circumstance, and depending on the importance of the communication at issue, the recipient might satisfy the requirements of Section 188 and this proposed part by providing an oral summary of the information rather than a written translation. Given the widespread commercial availability of relatively low-cost language assistance services such as remote oral interpretation, as well as the nature and importance of covered entities' employment-related programs or activities, CRC expects that most recipients will, at a minimum, have the capacity to provide LEP individuals with remote oral interpretation via telephone.

Recipients may not use their analysis of these various factors as a defense or excuse for providing language assistance services in an untimely manner. CRC recognizes that a recipient may wish to conduct thorough assessments of its language assistance needs and

<sup>163</sup> As described in the DOL LEP Guidance, the first and second factors evaluate the proportion of LEP individuals in the relevant area and the frequency of the recipient's contact with those individuals. Further explanatory material in the Guidance makes clear, however, that the focus of the inquiry should be on the proportion of individuals in, and frequency of contact with, speakers of a particular language group, not all LEP individuals. CRC intends for recipients to apply the criteria to this narrower group of LEP individuals.

comprehensively create the operational infrastructure to execute a variety of high quality language assistance services. CRC urges recipients to pursue such high standards and to create language access plans that will identify in advance the types and levels of services that will be provided in each of the contexts in which the recipient entity encounters LEP individuals. At the same time, the pursuit of such goals cannot come at the expense of failing to provide language assistance services at all or in an untimely manner if such services are reasonable steps to provide meaningful access. Recipients should consider how they can ensure that language assistance services are available in their programs and activities as they simultaneously conduct further language needs assessments or improve their operational capacities to provide effective language assistance services.

The Department acknowledges that its LEP guidance long has employed “four factors” when assessing a recipient’s compliance with its obligation to provide meaningful access.<sup>164</sup> This proposal does not include them in the regulatory text because the obligation of a recipient is to provide meaningful access in the form of language assistance of some type. Recipients should, and CRC will, review each situation based on the facts presented. Thus, the Department does not want to impose a formulaic analysis that would detract from the primary weight to be placed on the nature and importance of the program or activity. The Department seeks comment on this approach, particularly whether the four factors should instead be incorporated into the regulatory text, whether the weight to be accorded the “nature and importance” factor is appropriate, and whether there are additional factors that should be part of the analysis.

The DOL LEP Guidance issued in 2003 did not specifically define what constitutes a “significant number or proportion of the eligible service population.” To provide the regulated community with more direction, the Department is considering a regulatory scheme requiring recipients to provide a range of language assistance services in the non-English languages spoken by state-wide populations with limited English proficiency that meet defined thresholds. Such thresholds would address the requirements for written translation of vital documents and Web site content. For instance, CRC is considering thresholds triggering a requirement to translate standardized

vital documents based upon the number of languages (e.g., top ten languages spoken by LEP individuals); percentage of language speakers (e.g., languages spoken by at least 5% of LEP individuals); the number of language speakers (e.g., languages spoken by at least 1,000 LEP individuals); and composite thresholds combining these approaches, e.g., language spoken by at least 5% of LEP individuals or 1,000 LEP individuals, whichever is lower.

The Department seeks comment on what thresholds, if any, should be required, and to what geographic areas or service areas, State-level or lower, the threshold should apply. If thresholds should be required, CRC seeks comment on the time that should be allowed for recipients to come into compliance with the threshold, including whether this regulation should permit recipients to implement their obligations with a phased-in approach. CRC is also seeking comment on other methodologies for formulating language access thresholds regarding written materials containing vital information that would result in meaningful access for individuals regardless of national origin, while being mindful of the potential burden on recipients.

These concepts are broadly recognized as essential components of an effective language assistance plan for LEP individuals. Recipients should be familiar with these concepts, as they are contained in the DOL LEP Guidance that was issued in 2003 and various guidance documents issued by the Department of Justice.<sup>165</sup>

Although the requirement that recipients take reasonable steps to provide meaningful access for LEP individuals to access and participate in WIOA Title I-financially assisted programs and activities is not new, the CRC has received feedback from EO Officers and others that achieving compliance with these requirements has been difficult in part because of the resources necessary and the need for guidance about implementation. Thus, the Department recognizes that there is a need for additional technical assistance to assist recipients in achieving compliance with their language access requirements. The CRC, along with the Employment and Training Administration, is committed to providing the necessary technical assistance and guidance to the field in the years immediately following the effective date of the final rule containing these provisions.

#### Harassment Prohibited § 38.10

This rule proposes a new § 38.10 to provide additional direction for an

existing obligation. Harassment is a form of discrimination that currently is prohibited under WIA and Section 188. Courts have recognized for many years that harassment on the basis of race, color, religion, sex, or national origin, including the existence of a work environment that is hostile to members of one race, color, religion, sex, or national origin, may give rise to a violation of Title VII.<sup>166</sup> Despite this longstanding precedent, current part 38 does not include any references to harassment. Proposed § 38.10 remedies this omission.

Harassment on the basis of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries, applicants, and participants only, citizenship status or participation, that occurs in WIOA Title I-financially assisted programs and activities may give rise to a violation of WIOA Section 188 and this part. This new section provides recipients with direction concerning the conduct that may constitute unlawful harassment so that they may better prevent, identify, and remedy it.

Proposed paragraphs 38.10(a)(1)–(3) describe situations in which unlawful harassment may exist under WIOA and this part. Unwelcome sexual advances, requests for sexual favors, or offensive remarks may constitute unlawful harassment when: Submission to such conduct is made explicitly or implicitly a term or condition of accessing the aid, benefits, services, training or employment (proposed paragraph 38.10(a)(1)); submission to or rejection of such conduct is used as the basis for limiting that person’s access to any aid, benefits, services, training or employment (proposed paragraph 38.10(a)(2)); or such conduct has the purpose or effect of unreasonably interfering with an individual’s participation in a WIOA Title I-financially assisted program or activity, creating an intimidating, hostile or offensive program or activity environment (proposed paragraph 38.10(a)(3)). This language mirrors provisions of EEOC’s Guidelines on Discrimination Because of Sex<sup>167</sup> and

<sup>166</sup> *Harris v. Forklift Sys.*, 510 U.S. 17 (1993) (harassment based on sex); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (sex); *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1274 (7th Cir. 1991) (race); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (sex); *Rogers v. Western-Southern Life Ins. Co.*, 792 F. Supp. 628 (E.D. Wis. 1992) (race); *Moore v. Secretary of Defense, Army and Air Force Exchange, E.E.O.C. Appeal No. 01933575*, 1994 WL 1754483 at \*1 (Mar. 16 1994) (religion). See also U.S. Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 41 CFR 1604.11 (1980) (provision on harassment).

<sup>167</sup> See 29 CFR 1604.11(a).

<sup>164</sup> See 68 FR 32293–32295.

OFCCP's proposed rule addressing Discrimination Based on Sex<sup>168</sup> relating to sexual harassment, but also addresses harassment based on any of the other protected bases covered by this part. These provisions are also consistent with established case law holding that isolated or stray remarks generally cannot form the basis of a harassment claim. The harassment, to be unlawful, must create a hostile or offensive program environment.<sup>169</sup>

Proposed paragraph § 38.10(b) defines harassment because of sex under WIOA broadly to include sexual harassment (including harassment based on gender identity and failure to comport with sex stereotypes), harassment based on pregnancy, childbirth, or related medical conditions, and harassment that is not sexual in nature but is because of sex (including harassment based on gender identity or failure to comport with sex stereotypes), or where one sex is targeted for the harassment. This aligns the meaning of "because of sex" for purposes of sexual harassment with its meaning under current Title VII law.

#### Discrimination Prohibited Based on Citizenship Status § 38.11

This NPRM adds a new § 38.11 titled "Discrimination prohibited based on citizenship status" to provide additional direction to recipients regarding the protections certain noncitizens have from discrimination based on their citizenship status. Please note that other statutes and regulations may define citizenship discrimination differently than it is defined for the purposes of this NPRM.

The new language assists recipients in identifying citizenship-based discrimination as treating individual beneficiaries, applicants, and participants, adversely because of their status as U.S. citizens or nationals of the U.S., lawful permanent residents, refugees, asylees, and parolees or other immigrants authorized by the Secretary of Homeland Security or his or her designee to work in the U.S. Although Section 188(a)(5) refers to immigrants authorized "by the Attorney General" to work in the U.S., Congress transferred that authority from the Attorney General to the Secretary of Homeland Security in the Homeland Security Act of

2002.<sup>170</sup> The new text regarding Section 188(a)(5) reflects the transfer of noncitizen work authorization authority to the Secretary of Homeland Security and specifies that a recipient's maintenance or use of policies or procedures that have the effect of discriminating on the basis of citizenship status is also prohibited by Section 188 and this part.

#### Discrimination Prohibited Based on Disability § 38.12

This NPRM revises the title of § 38.7 to "Discrimination prohibited based on disability" and makes minor changes to this section. This rule retains much of the language from the current part 38 section and proposes adding paragraph § 38.12(p) to address claims of no disability. The proposed paragraph states that nothing in this part provides the basis for a claim that an individual without a disability was subject to discrimination because of a lack of disability, including a claim that an individual with a disability was granted auxiliary aids or services, reasonable modifications, or reasonable accommodations that were denied to an individual without a disability. This new subsection incorporates the ADAAA's prohibition on claims of discrimination because of an individual's lack of disability. The ADAAA expressly prohibits claims that "an individual without a disability was subject to discrimination because of the lack of disability."<sup>171</sup>

#### Accessibility Requirements § 38.13

This rule adds a new § 38.13 titled "Physical and programmatic accessibility requirements" to address the new emphasis Congress has placed on ensuring programmatic and physical accessibility to WIOA Title I-financially assisted service, program or activity. In no less than ten provisions of Title I of WIOA, Congress referred to recipients' obligation to make WIOA Title I-financially assisted programs and activities accessible.<sup>172</sup>

<sup>170</sup> See Homeland Security Act of 2002, Public Law 107-296, 8 U.S.C. 1103(a)(1). Section 1517 of the Homeland Security Act (codified at 6 U.S.C. 557) provides that a reference in any other Federal law to any function transferred by the Act "and exercised on or after the effective date of the Act" shall refer to the Secretary of Homeland Security or other official or component of DHS to whom that function is transferred. See also *Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005) (noting that, with limited exception, the immigration authorities previously exercised by the Attorney General and the former Immigration and Naturalization Service "now reside in the Secretary of Homeland Security" and the Department of Homeland Security).

<sup>171</sup> 42 U.S.C.12201(g).

<sup>172</sup> *Id.*

Proposed paragraph (a) addresses physical accessibility requirements and proposed paragraph (b) addresses programmatic accessibility requirements. Proposed paragraph (a) states the physical accessibility requirements for existing facilities, as well as those for new construction or alterations under Title II of the ADA. Recipients that receive federal financial assistance are also responsible for meeting their accessibility obligations under Section 504. Proposed paragraph (b) describes the obligations of recipients to ensure programmatic accessibility to WIOA Title I-financially assisted programs and activities for individuals with disabilities. Congress included this description of how to achieve programmatic accessibility in 2005 in the context of considering amendments to WIA in an effort to improve accessibility to the workforce development system for individuals with disabilities.<sup>173</sup> Therefore, the Department proposes to include it here. The Department welcomes comments on this section.

#### Reasonable Accommodations and Reasonable Modifications for Individuals With Disabilities § 38.14

The title of § 38.14 is revised to "Reasonable accommodations and reasonable modifications for individuals with disabilities." The section retains the existing text from § 38.8.

#### Communications With Individuals With Disabilities § 38.15

The title of proposed § 38.15 revises the § 38.9 title to read as follows, "Communications with individuals with disabilities" and proposes revised text for paragraph (a) and (b) of § 38.15 to be consistent with DOJ's ADA Title II proposed regulations, which have been updated since the current WIA regulations were promulgated in 1999. These changes provide that the communication requirements apply to beneficiaries, registrants, applicants, participants, members of the public and companions with disabilities. If the DOJ changes its proposal in its final rule implementing ADA Titles II and III, the Department will review those changes to determine their impact on this proposal and take appropriate action.

This rule proposes a new subparagraph (a)(5) addressing the obligation that recipients currently have, under § 38.9 and this proposed section, as well as the ADA, to take appropriate steps to ensure that

<sup>173</sup> Sen Rep. 109-134 109th Congress, 1st Section, Workforce Investment Act Amendments of 2005 (September 7, 2005) p. 11, 2005 WL 2250857 at \*11.

<sup>168</sup> See 80 FR 5279, January 30, 2015.

<sup>169</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277-78 (1989); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998); *Caver v. City of Trenton*, 420 F.3d 243 (3d Cir. 2005); *Jordan v. Alternative Res. Corp.*, 458 F.3d 332, 340-44 (4th Cir. 2006); *Herrera v. Lufkin Indus., Inc.*, 474 F.3d 675, 680 (10th Cir. 2007); *Morales-Cruz v. Univ. of Puerto Rico*, 676 F.3d 220, 226 (1st Cir. 2012).

communications with individuals with disabilities are as effective as communications with others. This responsibility includes, for example, the provision of auxiliary aids and services to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program or activity.<sup>174</sup> Thus, the proposed language states that when developing, procuring, maintaining, or using electronic and information technology, a recipient must utilize electronic and information technologies, applications, or adaptations which incorporate accessibility features for individuals with disabilities in order to achieve the goal of equally effective communication.

The section defines the term “companion” for the purposes of this part and provides detailed descriptions of requirements for telecommunications in subpart (b) and communications of information and signage in subpart (c). It also explains the limitations of fundamental alterations in subpart (d), *i.e.*, that a recipient is not required to take action that it can demonstrate would result in a fundamental alteration in the nature of a service, program or activity. CRC has drawn these provisions from the ADA Title II regulations to ensure that recipients’ responsibilities under this part are consistent with those under the ADA.

#### Service Animals § 38.16

This NPRM adds a new § 38.16 entitled “Service animals” to provide direction to recipients regarding their obligation to modify their policies, practices or procedures to permit the use of a service animal by an individual with a disability. This proposed section tracks the ADA Title II regulations issued by the DOJ found at 28 CFR part 35.136 because applicants, beneficiaries of and participants in WIOA Title I financially-assisted programs include individuals with disabilities with service animals. The Department’s discussions with recipients’ EO Officers demonstrate that there has been some confusion on the part of recipients as to what constitutes a service animal and what constitutes a pet. This section is intended to resolve that confusion. This provision as to service animals is also in direct response to the inclusion of disability accessibility obligations throughout Title I of WIOA.<sup>175</sup>

<sup>174</sup> 28 CFR 35.160(b)(1).

<sup>175</sup> See, *e.g.*, WIOA sections 102(b)(2)(C)(vii); 102(b)(2)(E)(vi); 107(b)(4)(iii). The EEOC has not addressed whether or not this definition would apply to employers and employment agencies covered under Title I of the ADA or Section 501 of the Rehabilitation Act.

#### Mobility Aids and Devices § 38.17

This NPRM adds a new § 38.17 entitled “Mobility aids and devices” to provide direction to recipients regarding the use of wheelchairs and manually-powered mobility aids by program participants and employees. This language is taken from the DOJ ADA Title II regulations at 28 CFR 35.137. This new section is being added in direct response to the inclusion of disability accessibility obligations throughout Title I of WIOA.<sup>176</sup>

#### Employment Practices Covered § 38.18

The NPRM proposes to change the title of § 38.10 to “Employment practices covered” and makes minor changes to section (a) that only restructures the introductory language to read “It is an unlawful employment practice to discriminate on the basis of race, color, religion, sex (including pregnancy, childbirth, and related medical conditions, transgender status, and gender identity), national origin, age, disability, or political affiliation or belief in the administration of, or in connection with. . . .” The word “basis” is included instead of “ground.” Consistent with existing law, the Department proposes to add a parenthetical to define the scope of the sex discrimination prohibition to include: Pregnancy, child birth, related medical conditions, transgender status, and gender identity.

#### Intimidation and Retaliation Prohibited § 38.19; Administration of This Part § 38.20; Interpretations of This Part § 38.21; Delegation of Administration and Interpretation This Part § 38.22

This rule proposes revising only the titles and section numbers of the following sections: § 38.11 to § 38.19, “Intimidation and retaliation prohibited;” § 38.12 to § 38.20, “Administration of this part,” § 38.21, “Interpretations of this part,” and § 38.22, Delegation of the administration and interpretation of this part.”

#### Coordination With Other Agencies § 38.23

This rule revises the title and number for § 38.15, “Coordination with other agencies.”

#### Effect on Other Laws and Policies § 38.24

The proposed rule includes a new title and section number for § 38.16, of § 38.23, “Effect on other laws and policies” and one minor change. In

<sup>176</sup> See, *e.g.*, WIOA sections 102(b)(2)(C)(vii); 102(b)(2)(E)(vi); 107(b)(4)(iii).

paragraph (a), CRC proposes to change “ground” to “basis.”

#### Subpart B—Recordkeeping and Other Affirmative Obligations of Recipients

In describing the recordkeeping and other affirmative obligations that recipients must meet in order to comply with the nondiscrimination and equal opportunity provisions of WIOA and this part, the Department proposes to set forth several changes to the role of the Equal Opportunity Officer and the responsibilities of recipients previously set forth in the counterpart provisions of WIA and current part 38.

#### A Grant Applicant’s Obligation To Provide a Written Assurance § 38.25

Proposed § 38.25 generally contains the same requirements as § 38.20 with some revisions and new requirements for grant applicants. This rule proposes revising the title for this section to, “A grant applicant’s obligation to provide a written assurance.” Proposed § 38.25(a)(1) emphasizes an existing obligation that, as a condition of an award of financial assistance under Title I of WIOA, a grant applicant assures that it “has the ability to comply with the nondiscrimination and equal opportunity provisions of the following laws and will remain in compliance for the duration of the award of federal financial assistance.” The existing part 38 rule does not explain that this requirement applies for the duration of the award. This new language makes explicit the existing continuing obligation for grant applicants and is intended to better effectuate compliance. The Department’s experience is that when a grant applicant fully understands its legal obligations at the outset of the grant application process, there is greater compliance and greater transparency between the Department and grant applicants that become recipients.

#### Duration and Scope of Assurance § 38.26 and Covenants § 38.27

Proposed § 38.26 and § 38.27 retain the exact language of § 38.21 and § 38.22, respectively, with the exception of section headings. This rule proposes as the heading for § 38.21, “Duration and scope of the assurance,” rather than the current heading of § 38.21. This rule also proposes as the heading for § 38.26, “Covenants,” rather than the heading of § 38.22.

#### Designation of Equal Opportunity Officer § 38.28

Proposed § 38.28 makes significant changes to current § 38.23. This rule proposes changing the title of § 38.23 to,



“Designation of Equal Opportunity Officer.” All states currently have at least one EO Officer who coordinates the Governor’s equal opportunity and nondiscrimination requirements, so this provision formalizes an existing practice. This change is intended to address feedback from EO Officers at the State level that they lack sufficient authority to carry out their responsibilities. The rule also proposes that the Governor is responsible for making that designation, to avoid confusion about who is authorized to designate the EO Officer for the Governor at the State level and in the Governor’s role as a recipient.

Under the current rule at § 38.27, every recipient, including Governors in their capacity as recipients, is required to designate an EO Officer. Proposed paragraph (a) requires the Governor to designate a State level EO Officer who reports directly to the Governor. Proposed § 38.27(a) would also require that the State level EO Officer have sufficient staff and resources to carry out the requirements of this section. Within each state, the Governor is a unique recipient because the State is responsible for disseminating WIOA Title I funds. As a recipient, the Governor must designate an EO Officer like all other recipients; however, the State level EO Officer has distinct responsibilities for coordinating compliance with the nondiscrimination and equal opportunity provisions in WIOA and this part, throughout the State, as described in the Nondiscrimination Plan, formerly the Methods of Administration. Requiring the Governor to designate a State level EO Officer and imbuing that Officer with the requisite authority is intended to address the concerns raised to the Department by the EO Officers.

EO Officers at the recipient level also have reported to CRC staff that they have neither the staff nor the resources to carry out their responsibilities, including investigating complaints, and conducting necessary monitoring of nondiscrimination policies as required in their Nondiscrimination Plans. Thus, proposed § 38.28(b) provides that EO Officers at the recipient level be provided with resources sufficient to carry out the requirements of this part. The changes made to this section are intended to ensure that the EO officers at all levels are able to fulfill their responsibilities.

#### Recipient Obligations Regarding Its Equal Opportunity Officer § 38.29

The NPRM proposes moving existing § 38.26 to proposed § 38.29. The rule proposes as a new title, “Recipient

obligations regarding its Equal Opportunity Officer.” This section is moved up in the subpart to elevate the importance of the recipient’s responsibilities regarding its EO Officer. This section, together with §§ 38.29 and 38.30, describes the obligations of all recipients as to their EO Officers. Thus, these provisions also apply to the EO Officers designated by the Governors in their role as recipients, as well as to the State level EO Officer that the Governor must designate to coordinate statewide compliance pursuant to proposed § 38.27(a).

In addition, proposed § 38.29 adds a new paragraph (a) retaining the existing obligation in § 38.29, consistent with the language about the EO Officer in § 38.28, that the EO Officer of recipients be a senior level employee. The rule proposes a new provision requiring the recipient’s EO Officer to report directly to the Chief Executive Officer, Chief Operating Officer, or equivalent top-level official. In response to the feedback from EO Officers described above, the rule proposes this change to ensure that EO Officers have the authority they need to complete their responsibilities. Proposed paragraph (b) of this section adds a requirement that the recipient designate an EO Officer who can fulfill the responsibilities of an EO Officer as described in § 38.29. This provision was added to ensure that recipients’ designated EO Officers have the knowledge, skills and abilities to comply with their obligations under this part.

#### Requisite Skill and Authority of Equal Opportunity Officer § 38.30

This rule proposes a new title for § 38.24 to “Requisite skill and authority of Equal Opportunity Officer” and a new paragraph section number 38.30. This proposed rule adds language to the existing provisions in this section that is consistent with the other sections in this subpart addressing the EO Officer’s skills and authority. The proposed provision explains that the EO Officer must be a senior level employee of the recipient who possesses the knowledge, skills, and abilities necessary to carry out the responsibilities of the role as described in this subpart. This provision is intended to emphasize the level of authority that recipients must give to the Equal Opportunity Officer and the importance that the recipient places on the role of the EO officer in effecting compliance with Section 188 and this part. Much (though by no means all) of the responsibility for a recipient’s nondiscrimination and equal opportunity program rests on the shoulders of the EO Officer. While the

proposed regulatory text is new, the Department recognized the importance of the EO Officer role when it issued the WIA Section 188 regulations in 1999. As stated in that preamble:

CRC’s experience has demonstrated that in order for such programs to function fairly and effectively, the EO Officer must be a senior-level employee whose responsibilities in the position present no conflicts of interest with his or her other responsibilities. In addition, the recipient must establish clear lines of authority and accountability for the program, and must provide the EO Officer with appropriate levels of support.<sup>177</sup>

#### Equal Opportunity Officer Responsibilities § 38.31

The proposed rule has a new title and section number for current § 38.25, “Equal Opportunity Officer responsibilities.” Section 38.31 proposes new language in paragraph (d) specifying that the EO Officer’s obligation to develop and publish the recipient’s procedures for processing discrimination complaints includes development of procedures for investigating, resolving, and tracking complaints filed against the public, in appropriate languages and formats, the procedures for filing a complaint. These additions are intended to provide consistency in the processing of complaints and increase efficiency through the use of standardized procedures for processing discrimination complaints. The provision also reiterates existing responsibilities of recipients, including Governors, in this part of this section.

Proposed paragraph (e) adds to the EO Officer’s responsibilities an outreach and education requirement, which recipients are already required to undertake pursuant to § 38.40. This proposal is intended to ensure that specific individuals are charged with carrying out this mandate. Further, as the recipient’s employee who is most familiar with equal opportunity and nondiscrimination requirements, the EO Officer is likely to be best suited to conduct such outreach. The required outreach and education includes activities such as community presentations to groups who may benefit from the recipient’s covered programs, and outreach to advise current and potential beneficiaries of their rights and recipient obligations under this part. CRC believes that the EO Officers, who serve in the recipient’s

<sup>177</sup> Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Investment Act of 1998 (WIA), 64 FR 61692 at 61702 (November 12, 1999), Section-by-Section Analysis, discussion of §§ 37.24–25.

communities, will be in the best position to identify and implement the most effective means of outreach and education for their community. In addition, the rule proposes deleting § 38.25(e), which addresses reporting lines of authority for the Equal Opportunity Officer, because it is addressed in § 38.29(a).

Finally, this rule proposes language in paragraph (f) clarifying that the existing training obligation for the EO Officer includes EO Officer staff training. EO Officers report that they are unable to attend trainings for budgetary reasons. This rule adds the reference to staff training to put recipients on notice that they must permit their EO Officers and staff to participate in such training.

#### Small Recipient Equal Opportunity Officer Obligations § 38.32

The NPRM proposes changing the title of § 38.27 to “Small recipient Equal Opportunity Obligations” and the section number to 38.32. It also replaces the word “developing” with “adopting” because small recipients may not be required to develop complaint procedures and process complaints. Governors have the discretion to prescribe the complaint processing procedures applicable to small recipients pursuant to § 38.73.

#### Service Provider Equal Opportunity Officer Obligations § 38.33

The NPRM changes the title of § 38.28 to “Service provider Equal Opportunity Officer obligations,” and renumbers it as § 38.33.

#### *Notice and Communication*

#### Recipients’ Obligations To Disseminate Equal Opportunity Notice § 38.34

Proposed § 38.34 retains the language from current § 38.29 and makes clear in minor revisions to subparagraphs (a)(6) and (b) that recipients have an existing obligation to take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others and that the Equal Opportunity notice is provided in appropriate languages to ensure meaningful access for LEP individuals. This proposed section contains appropriate cross-references to § 38.9, that addresses recipients’ obligation to provide translations for LEP populations.

#### Equal Opportunity Notice/Poster § 38.35

The proposed new title for § 38.30 is “Equal opportunity notice/poster” and the new section number is 38.35. The title change in this section is important because the rule adds “poster,” an explicit requirement of this section. The

rule also proposes language that “sex” as a prohibited basis for discrimination includes pregnancy, child birth, or related medical conditions, sex stereotyping, transgender status, and gender identity and “national origin” includes LEP to be consistent with current law and serves to remind beneficiaries that discrimination based on these subcategories is prohibited. The NPRM also proposes language in the poster stating that the CRC will accept complaints via U.S. Mail and email at an address provided on the CRC’s Web site.<sup>178</sup>

#### Recipients’ Obligations To Publish Equal Opportunity Notice § 38.36

The NPRM proposes revising the title of § 38.31 to “Recipients’ obligations to publish equal opportunity notice” and the section number to 38.36. The proposal retains the language in paragraph (a)(1) of this section that the Equal Opportunity Notice be posted prominently in reasonable numbers and places, and adds that the notice must also be posted in available and conspicuous physical locations as well as the recipient’s Web site pages. These additions reflect the current widespread use of Web site pages to convey program and employment information. The reference to available and conspicuous places is intended to ensure that the notice will be posted in places to which employees, beneficiaries and program participants have access and in places where the notice is easily visible. Similarly, the proposal retains language in paragraph (a)(3) stating that the notice must be included in employee and participant handbooks, and includes a new reference to electronic forms to account for their current widespread use. Proposed paragraph (a)(4) is updated so that the notice must be made a part of each participant’s and employee’s electronic and paper file, if one of each is kept.

The above-proposed changes provide that these notice obligations apply to both employees and participants because employees of recipients are also protected under this part. Previously, this section only applied the notice requirement to participants.

Similarly, proposed changes to paragraph (b) of § 38.36 require that this notice must be provided in appropriate formats for registrants, applicants, eligible applicants/registrants, applicants for employment and employees and participants with visual impairments. The prior rule at § 37.31(b), due to oversight or error, only required that notice in an

accessible format be provided to participants. This rule expands the categories of individuals for whom notice must be provided in alternate formats because each category of individuals listed above is protected under the WIOA nondiscrimination obligation.

Paragraph (c) of § 38.36 states that the notice must be provided to participants in appropriate languages other than English as required in this part. This provision was added because recipients have an existing obligation under § 38.35 to provide limited English proficient individuals with meaningful access to this notice, as set out in proposed § 38.9. As discussed in the preamble, the population served by WIOA Title I-financially assisted programs and activities has grown increasingly diverse, as the overall population in the U.S. has become more diverse, including a higher percentage of individuals who are not proficient in English. This requirement ensures that LEP individuals will receive the notice in a language they can understand.

Paragraph (d) of § 38.36 states that the notice required by §§ 38.34 and 38.35 must be initially published and provided within 90 days of the effective date of this part, or of the date this part first applies to the recipient, whichever comes later.

#### Notice Requirement for Service Providers § 38.37

Proposed § 38.37 contains the same requirements as current § 38.32. This rule proposes revising the heading to, “Notice requirement for service providers,” rather than the heading of current § 38.32.

#### Publications, Broadcasts, and Other Communications § 38.38

Proposed § 38.38 generally contains the same requirements as current § 38.34. This rule proposes revising the title to, “Publications, broadcasts, and other communications.” Proposed § 38.38(a) also provides that, where materials indicate that the recipient may be reached by voice telephone, the materials must also prominently provide the telephone number of the text telephone (TTY) or equally effective telecommunication system such as a relay service used by the recipient. This proposal updates this section to reflect current technology used by individuals with hearing impairments. Proposed paragraph (c) of this section replaces “prohibited ground” with “prohibited basis” for consistency with this part.

<sup>178</sup> <http://www.dol.gov/crc>.

### Communication of Notice in Orientations § 38.39

Proposed § 38.39 generally contains the same requirements as current § 38.36. This rule proposes a revised title, “Communication of notice in orientations.” The proposed rule adds language stating that orientations provided not just in person but also remotely over the internet or using other technology are subject to these notice requirements. Proposed § 38.39 also revises this section consistent with current law to ensure equal opportunity for individuals with disabilities and meaningful access for individuals who are LEP. This rule proposes language stating that the information contained in the notice must be communicated in appropriate languages to ensure language access as required in § 38.9 of this part and in accessible formats as required in § 38.15 of this part. These requirements are consistent with the recipient’s obligation to provide meaningful access to LEP individuals as discussed in § 38.9 of the preamble, and the recipient’s obligation to provide accessible communications to individuals with disabilities under the ADA as provided in § 38.15 of this part.

### Affirmative Outreach § 38.40

Proposed § 38.40 generally contains the same requirements as current § 38.42. The rule proposes changing the title to “Affirmative outreach” rather than the heading of current § 38.42 which is in question format and refers to a recipient’s responsibilities to provide “universal access.” The title change in this section is important because the Department removes the term “universal access” from the rule entirely. The use of “universal access” in the current rule has caused confusion because the provision was intended to require recipients to perform affirmative outreach in order to ensure broad access to WIA Title I financially assisted programs; however, “universal access” is a term of art with a different meaning in the disability context.<sup>179</sup> Moreover, “affirmative outreach” is more descriptive of the requirements contained in this section. This rule proposes some limited updates to this section to state that the required affirmative outreach steps should involve reasonable efforts to include more complete categories of the various

groups protected under this part, including persons of different sexes, to replace “both” sexes and avoid binary terminology and be inclusive of individuals who may not identify as male or female, as well as various racial and ethnic/national origin groups, various religions, individuals with limited English proficiency, individuals with disabilities and individuals in different age groups.

### Data and Information Collection and Maintenance

This rule proposes limited changes and additions to the sections covering data and information collection and maintenance to provide additional direction to recipients regarding the already existing obligations related to data and information collection, and maintenance. The Department welcomes comments on these changes.

### Collection and Maintenance of Equal Opportunity Data and Other Information § 38.41

Proposed § 38.41 generally contains the same requirements as current § 38.37. This rule proposes changing the title to, “Collection and maintenance of equal opportunity data and other information.” Proposed paragraph (a) retains the same language as the current § 38.37(a).

Proposed paragraph (b)(2) adds “limited English proficiency and preferred language” to the list of categories of information that each recipient must record about each applicant, registrant, eligible applicant/registrant, participant, and terminnee. The proposal does not apply this data collection obligation to applicants for employment and employees because the obligation as to LEP individuals does not apply to those categories of individuals. This change is intended to ensure that recipients collect information related to serving limited English proficient individuals. The Department believes that the term “preferred language” best attempts to capture this information as to LEP individuals and is also used by many states with language access laws.<sup>180</sup>

<sup>180</sup> For example, pursuant to the D.C. Language Access Act, the D.C. Office of Human Rights requires covered entities to collect data on the number of LEP individuals served in an annual report. See Final rulemaking at 55 DCR 6348 (June 8, 2008), as amended by Final Rulemaking published at 61 DCR 9836 (September 26, 2014). The question on the D.C. Office of Human Right Complaint Form for the purposes of capturing this information is “What language do you prefer to communicate in?” D.C. Government Employment Intake Questionnaire Form, Available at <http://deforms.dc.gov/webform/employment-intake-questionnaire-form> (last accessed March 19, 2015). Hawaii passed their language access law in 2006.

Limited English proficiency data is already being collected by recipients that offer core, intensive and training services and is reported to the Employment and Training Administration of the Department. Thus, use of some of the same terminology is intended to minimize any burden on recipients.<sup>181</sup> In addition, the Department proposes to delay enforcement regarding collection of these two new data points for two years from the effective date of the final rule to allow recipients adequate time to update their data collection and maintenance systems. The Department seeks comments on the use of these terms as proposed in § 38.41.

This NPRM proposes new language in paragraph (b)(3) specifically explaining a recipient’s responsibilities to keep the medical or disability-related information it collects about a particular individual on a separate form, and in separate files. The paragraph also lists the range of persons who may have access to such files. Similarly, new language in paragraph (b)(3) of this section contains information about the persons who may be informed that a particular individual is an individual with a disability, and the circumstances under which this information may be shared. These requirements have been separated to emphasize that the range of persons who may be permitted to have access to files containing medical and disability-related information about a particular individual is narrower than the range of persons who may be permitted to know generally that an individual has a disability. These changes make the regulations consistent with DOL’s regulations implementing § 504 of the Rehabilitation Act, and with the EEOC’s regulations implementing Title I of the ADA.<sup>182</sup> The change is also intended to provide recipients with information necessary to enable them to develop protocols that are consistent with these requirements.

See Hawaii Rev. Stat. §§ 371–31 to 37. In California, the Dymally-Alatorre Bilingual Services Act requires local agencies to provide language access to limited English-proficient speakers. Ca. Govt. Code § 7290–7299.8. The Bilingual Services Program at the California Department of Human Resources provides oversight, including conducting language surveys on implementation. California Department of Human Resources, Bilingual Services program, available at <http://www.calhr.ca.gov/state-hr-professionals/Pages/Bilingual-Services.aspx> (last accessed (March 19, 2015)).

<sup>181</sup> See, e.g., FY 2012 WIASRD Data Book at 23, Social Policy Research Associates for Office of Performance and Technology, Employment and Training Administration, U.S. Department of Labor at (December 2, 2013).

<sup>182</sup> See 29 CFR 1630.14(b)(1)(i)–(iii).

<sup>179</sup> “Universal access,” also known as “universal design,” is a strategy for making products, environments, operational systems, and services welcoming and usable to the most diverse range of people possible. Disability Employment Policy Resources by Topic/Universal Design <http://www.dol.gov/odep/topics/UniversalDesign.htm> (last accessed March 19, 2015).

#### Information To Be Provided to CRC by Grant Applicants and Recipients § 38.42

The NPRM proposes a new title for § 38.38, “Information to be provided to CRC by grant applicants and recipients” and the new section number is 38.42. Subsection (a) requires recipients to notify the Director when administrative enforcement actions or lawsuits are filed against them on any basis prohibited under Section 188 and this part. Proposed § 38.42(a) adds pregnancy, child birth or related medical conditions, transgender status, and gender identity in parentheses as forms of sex discrimination prohibited under this part and “limited English proficiency” in parentheses as a form of national origin discrimination prohibited by this part. Pregnancy and gender identity have been listed as bases of sex discrimination on CRC’s complaint form since 2014, and limited English proficiency has been listed on the complaint form as a form of national origin based discrimination since 2011. These additions are designed to make the information provision requirement consistent with the protected bases on the complaint form. In addition, the NPRM proposes removing the reference to grant applicants from § 38.42(b). Removal of this reference will sharpen the focus of § 38.42 on the information needed for compliance reviews and monitoring activities, as required under §§ 38.63 and 38.65.

Finally, the proposed rule includes the phrase “that the Director considers” in front of the word “necessary” in paragraph (c) and (e) of this section to inform recipients that the Director of CRC determines the information that is necessary for CRC to investigate complaints and conduct compliance reviews as well as to determine whether the grant applicant would be able to comply with the nondiscrimination and equal opportunity provisions of WIOA or this part. Proposed § 38.42(e) confirms the CRC’s ability to engage in pre-award reviews of grant applicants but does not contemplate the delay or denial of an award. Processes that may result in the delay or denial of an award to a grant applicant are addressed in § 38.62.

#### Required Maintenance of Records by Recipients § 38.43

The NPRM proposes a new title for current § 38.39, “Required maintenance of records by recipients,” and a new section number 38.43. Grant applicants and recipients are already required to maintain records under current § 38.39. Proposed § 38.43 adds the preservation of “electronic records” to this existing

requirement. The rule proposes that recipients that maintain electronic records, in addition to hard copies, keep the electronic records for the same three-year period. Finally, the NPRM proposes revisions to paragraph (b) of this section to require preservation of records once a discrimination complaint or compliance review is initiated.

In this regard, CRC interprets “relevant” or “relevance” broadly and expects recipients to similarly interpret relevance broadly when determining the documents that must be preserved. The Department has heard from recipients that their obligations to retain compliance review records were uncertain. The Department proposes including compliance reviews in this retention section because the same preservation of records is necessary for the duration of a compliance review as for a complaint investigation—to provide CRC with access to all records relevant to compliance and to ensure that recipients do not dispose of records to avoid a finding of noncompliance. CRC believes this may have been an oversight in the part 37 regulations. The Department welcomes comments on these proposed changes.

#### CRC Access to Information and Information Sources § 38.44

Proposed § 38.44 generally contains the same requirements as current § 38.40. The NPRM proposes revising the title to “CRC access to information and information sources.” In addition, it proposes revising paragraph (a) to require that each grant applicant and recipient must permit access by the Director “or the Director’s designee” to premises, employees, and participants for the purpose of conducting investigations, compliance review, monitoring activities, or other similar activities outlined in this section. This change acknowledges that it is the Director’s staff who ordinarily conducts these procedures on behalf of the Director.

#### Confidentiality Responsibilities of Grant Applicants, Recipients, and the Department § 38.45

Proposed § 38.45 generally contains the same requirements as current § 38.41. This rule proposes revising the title of this section to, “Confidentiality responsibilities of grant applicants, recipients, and the Department.” In addition, this section begins: “Grant applicants, recipients, and the Department must keep confidential to the extent possible . . . consistent with a fair determination of the issues.” This small reorganization is intended to make this easier to read and incorporate

the language at the beginning of this section.

#### Subpart C—Governor’s Responsibilities To Implement the Nondiscrimination and Equal Opportunity Requirements of WIOA

##### Subpart Application to State Programs § 38.50

The NPRM proposes a new title for § 38.50, “Subpart application to State Programs.” This NPRM also updates the term “State Employment Security Agencies” to “State Workforce Agencies” which is used in WIOA and the proposed ETA regulations implementing Title I of WIOA.<sup>183</sup>

##### Governor’s Oversight and Monitoring Responsibilities for State Programs § 38.51

The NPRM proposes a new title for § 38.51, “Governor’s oversight and monitoring responsibilities for State Programs.” Proposed § 38.51 generally retains the requirements of current § 38.51 but incorporates several subparagraphs found at current § 38.54(d)(2)(ii)(A–C) and thus does not impose altogether new responsibilities.

Proposed § 38.51(a) incorporates the Governor’s oversight responsibilities set out in current § 38.51, which include ensuring compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part, and negotiating, where appropriate, with a recipient to secure voluntary compliance when noncompliance is found under § 38.94(b).

Proposed § 38.51(b) requires the Governor to monitor on an annual basis the compliance of State Programs with WIOA Section 188 and this part. Under current § 38.54(d)(2)(ii), the requirement to “periodically” monitor was ambiguous and led to infrequent monitoring. The Department’s experience with State-conducted monitoring reveals inconsistent and infrequent monitoring—some States monitor the compliance of State Programs as infrequently as every five years. The proposed annual monitoring requirement is intended to: (1) Enable the timely identification and elimination of discriminatory policies and practices, thereby reducing the number of individuals impacted by discrimination; (2) be consistent with ETA proposed regulations requiring annual oversight of One-Stop Career Centers;<sup>184</sup> and (3) establish a

<sup>183</sup> See 80 FR 20690 (April 16, 2015).

<sup>184</sup> *Id.* at 20752.

consistent State-level practice nationwide.

Proposed § 38.51(b) incorporates the Governor's monitoring responsibilities currently required by § 38.54(d)(2). Moving the monitoring obligations from the Methods of Administration section at § 38.54(d)(2) to this section does not change the Governor's oversight responsibilities but underscores the importance of the Governor's monitoring responsibilities and highlights that monitoring is more than just a paper responsibility. By this minor reorganization, the Department intends to distinguish the required components of a Nondiscrimination Plan from the Governor's requirements for implementing the Nondiscrimination Plan. Section 38.51 is now the section that sets forth all of the Governor's monitoring and oversight responsibilities, which include implementation of the Nondiscrimination Plan. As discussed below, § 38.54 sets forth all the required components of the Nondiscrimination Plan.

Proposed § 38.51(b) brings in three requirements that were previously incorporated into the Governor's Method of Administration required by § 38.54. First, at a minimum, each monitoring review must include a statistical or other quantifiable analysis of records and data kept by the recipient under § 38.41, including analysis by race/ethnicity, sex, limited English proficiency, age, and disability status. Governors are already required under § 38.54(d)(2)(ii)(A) (Methods of Administration) to conduct this analysis during their monitoring reviews. Second, monitoring must also include an investigation of any significant differences identified in paragraph (b)(1) of this section in participation in the programs, activities, or employment provided by the recipient to determine whether these differences may be caused by discrimination prohibited by this part. This investigation must be conducted through review of the recipient's records and any other appropriate means, which may include interviewing staff, participants and beneficiaries, reviewing documents, and on-site review of the facility and other investigative methods. Again, this requirement is not new; it is set out in § 38.54(d)(2)(ii)(B). Third, the monitoring review must include an assessment to determine whether the recipient has fulfilled its administrative obligations under Section 188 of WIOA or this part (for example, recordkeeping, notice and communication) and any duties assigned to it under the Nondiscrimination Plan. This

requirement is set out in § 38.54(d)(2)(ii)(C).

Proposed § 38.51(b)(1) adds "limited English proficiency" to the list of categories of records and data that must be analyzed. This addition is consistent with the recipients' need to collect data to enable them to serve limited English proficient individuals in accordance with the nondiscrimination and equal opportunity provisions of WIOA and this part. CRC invites comment on the addition of "primary language" to the list of categories of records and data that must be analyzed, including whether there is a more effective method or term to use to determine or measure the relevant population of limited English proficient individuals and the language services to be provided.

**Governor's Liability for Actions of Recipients the Governor Has Financially Assisted Under Title I of WIOA § 38.52**

The NPRM proposes a new title for § 38.52, "Governor's liability for actions of recipients the Governor has financially assisted under Title I of WIOA." This section changes the word "adhered to" to "implemented" in paragraph (a)(1) because it more accurately describes the responsibility of the Governor. In addition, proposed § 38.52 (a)(1) changes, in title only, the term "Methods of Administration" to "Nondiscrimination Plan." The new title for this document is more descriptive of its purpose.

**Governor's Oversight Responsibility Regarding Recipients' Recordkeeping § 38.53**

Proposed § 38.53 generally retains the language of current § 38.53. The NPRM proposes a new title for § 38.53, "Governor's oversight responsibility regarding recipients' recordkeeping."

**Governor's Obligations To Develop and Implement a Nondiscrimination Plan § 38.54**

Proposed § 38.54 generally retains the language of current § 38.54 other than the sections moved to § 38.51, already discussed. The NPRM proposes a new title for § 38.54, "Governor's obligations to develop and implement a Nondiscrimination Plan." Proposed § 38.54(a) requires Governors to "establish and implement," rather than "establish and adhere to" a Nondiscrimination Plan for State programs. This section proposes to replace "should" with "must" in the second sentence in paragraph (a)(1) to require that, in states in which one agency contains both a State Workforce Agency (formerly a SESA) or unemployment insurance and WIOA

Title I-financially assisted programs, the Governor must develop a combined Nondiscrimination Plan. The Governor is responsible for completion of the Nondiscrimination Plan in both instances. This change formalizes current practice in that every state submits one WIA Methods of Administration. This proposal would also eliminate unnecessary duplication in that most components of the Plan would be the same for both types of entities, and both plans would be overseen by the State Level EO Officer.

The proposed rule has one minor change to paragraph (c)(1)(v) of this section: Changing reference to an existing section of 29 CFR part 38 titled "Universal Access" to reflect its new title in this rule, "Affirmative Outreach." The NPRM adds a new paragraph (c)(2)(iv) to include procedures for compliance in the Nondiscrimination Plan for protected categories other than disability, which is addressed in § 38.54(c)(2)(iv), and was addressed in current § 37.54(d)(2)(v). The part 38 rule did not require the Governor to include procedures to ensure compliance as to these protected categories. This proposal corrects that oversight. Proposed § 38.54(c)(2)(v) adds a provision requiring the procedures discussed in this subsection to ensure that recipients comply not just with Section 504 and WIOA Section 188 and this part, but also with Title II of the ADA, as amended, if applicable to that recipient. Title II of the ADA applies only to "public entities," which include State or local governments and any of their departments, agencies, or other instrumentalities.<sup>185</sup>

**Schedule of the Governor's Obligations Regarding the Nondiscrimination Plan § 38.55**

The NPRM proposes a new title to § 38.55, "Schedule of the Governor's obligations regarding the Nondiscrimination Plan." Proposed § 38.55 generally retains the existing schedule that Governors follow for their WIA Methods of Administration in current § 38.55. This section is intended to minimize the Governor's burden by allowing sufficient time to update the existing WIA Methods of Administration to comply with requirements for the WIOA Nondiscrimination Plan under this part. Therefore, proposed § 38.55 changes paragraph (a) to require Governors to develop and implement a Nondiscrimination Plan consistent with the requirements of this part either within 180 days of the date on which

<sup>185</sup> 42 U.S.C. 12131.

this final rule is effective or by the date determined by current § 38.55, whichever is later.

As in current § 38.55(b), proposed § 38.55(b) requires the Governor to promptly update the Nondiscrimination Plan whenever necessary and submit the changes made to the Director in writing at the time the updates are made. This requirement ensures that the Director will continue to have current versions of each Governor's Plan, rather than notification of changes without the actual revisions, as is permitted under current part 38. Under both the current part 38 rule and proposed § 38.55(a)(2), the Governor is required to submit the initial plan to the Director. Pursuant to proposed § 38.55(c) and current § 38.55(c), the Governor must review its plan every two years, determine whether changes are necessary, and, if so, make the changes and submit them to the Director.

#### *Subpart D—Compliance Procedures*

##### *Evaluation of Compliance § 38.60*

Proposed § 38.60 retains the same language of current § 38.60, with the exception of the title and a minor technical edit. The NPRM proposes to change the title of § 38.60 to "Evaluation of compliance." The rule also proposes to add "the ability to comply or," in the first sentence to explain that the goal of the pre-approval compliance reviews of grant applicants for, and post-approval compliance reviews of recipients of WIOA Title I financial assistance is to determine ability to comply, for applicants, or compliance with, for recipients, with the nondiscrimination and equal opportunity provisions of WIOA and this part. This language is parallel to the language proposed in § 38.25.

##### *Authority To Issue Subpoenas § 38.61*

The NPRM proposes changing the title of § 38.61 to "Authority to issue subpoenas," rather than the title of § 37.61. The paragraph also cites to Section 183(c), the WIOA provision that authorizes the issuance of subpoenas, 29 U.S.C. 3243(c).

#### *Compliance Reviews*

##### *Authority and Procedures for Pre-Approval Compliance Reviews § 38.62*

The NPRM makes several changes to the existing language of current § 38.62 in proposed § 38.62. First, the NPRM revises the title of § 38.62 to "Authority and procedures for pre-approval compliance reviews."

Second, the NPRM adds a new provision as paragraph (b) requiring that Departmental grantmaking agencies

consult with the Director to review whether the CRC has issued a Notice to Show Cause under § 38.66(b) or a Final Determination for violating the nondiscrimination and equal opportunity provisions of WIOA and this part against an applicant that has been identified as a probable awardee. The provision requires that this consultation include the grantmaker's consideration of the current compliance status of the grant applicant if such applicant was already subject to the laws enforced by CRC through existing financial assistance. The Department has selected the Notice to Show Cause and Final Determination because those documents represent steps in the enforcement process after CRC has issued findings based on its investigation, the recipient has had the opportunity to submit information to rebut the adverse findings, and CRC has concluded after review of the recipient's submission that a violation exists. This consultation and review of compliance status is necessary for effective enforcement because it ensures that Department financial assistance will not go to grant applicants that are not in compliance, and have made insufficient attempts to come into compliance, with the laws that DOL enforces.

Third, the NPRM adds a new paragraph (c) to § 38.62 providing that the grantmaking agency will consider, in consultation with the Director, the information obtained through the consultation described in subsection (b), as well as any other information provided by the Director in determining whether to award a grant or grants. Departmental grantmaking agencies must consider refraining from awarding new grants to applicants or must consider including special terms in the grant agreement for entities named by the Director as described in subsection (b). Special terms will not be lifted until a compliance review has been conducted by the Director, and the Director has approved a determination that the applicant is likely to comply with the nondiscrimination and equal opportunity requirements of WIOA and this part.

CRC has received feedback from recipients and advocacy organizations asking for clarity regarding the possible ramifications of the preaward review. This addition provides transparency about the possible consequences if an applicant or recipient is found to be unlikely to comply with the nondiscrimination and equal opportunity requirements of this part and Section 188 of WIOA.

##### *Authority and Procedures for Conducting Post-Approval Compliance Reviews § 38.63 and Procedures for Concluding Post-Approval Compliance Reviews § 38.64*

Proposed § 38.63 and § 38.64 retain the exact same language of current § 38.60 and § 38.61, with the exception of the titles. The NPRM proposes a new title for § 38.63 of "Authority and procedures for conducting post-approval compliance reviews." The NPRM proposes as a new title for § 38.64, "Procedures for concluding post-approval compliance reviews."

##### *Authority To Monitor the Activities of a Governor § 38.65*

The NPRM retains the language in paragraphs (a) and (b) of current § 38.65. The NPRM proposes a new paragraph (c) for § 38.65 that specifies the ways in which the Director may enforce the nondiscrimination and equal opportunity provisions of WIOA and this part regarding Governors' obligations for monitoring and oversight. Specifically, if the Director determines that the Governor has not complied with this part and Section 188 of WIOA, the Director may issue a Letter of Findings. The Letter must advise the Governor of the preliminary findings, the proposed remedial or corrective action and the timeframe for that action, whether it will be necessary for the Governor to enter into a conciliation agreement, and the opportunity to conciliate. If the Governor fails to take remedial or corrective actions or to enter into a conciliation agreement, the Director may follow the procedures in §§ 38.95 and 38.96. These additional provisions are intended to respond to questions that the Department has received from stakeholders (EO Officers and other State officials) regarding the possible ramifications if the Governor refuses to participate in efforts to come into voluntary compliance or if the Governor fails to enter into a conciliation agreement.

These provisions are also intended to address a gap in the existing regulations which did not establish enforcement procedures related to the Governors' monitoring obligations under the Nondiscrimination Plan, thus leading to the Department's inability to enforce these provisions when Governors do not come into compliance voluntarily. This additional language allows the Department to hold the Governors accountable if they fail to comply with their monitoring obligations. Since 2010, CRC has found during compliance reviews that no State has complied fully with its monitoring and oversight

responsibilities. For example, States have not conducted the data analysis, set forth in existing § 38.54(d)(2)(ii)(A)(C), to determine if there is systemic discrimination. The new provisions of this section provide the Department with the enforcement tools to secure the Governors' compliance with these and similar monitoring obligations. We welcome comments on these proposed changes.

#### Notice To Show Cause Issued to a Recipient § 38.66

The NPRM proposes a new title for § 38.66, "Notice to show cause issued to a recipient." It also proposes merging existing § 38.66 and § 38.67, the latter of which previously outlined the contents of a notice to show cause. Although the two sections were previously adjacent, by combining in one section when a notice to show cause may be issued by the Director to a recipient with the required contents of such a notice, the Department intends to make the show cause provision more comprehensive.

The NPRM retains in proposed § 38.66 most of the language in current § 38.66 and all of the language in current § 38.67. Paragraph (a), consistent with current § 38.66, provides that the Director may issue a Notice to Show Cause when a recipient's failure to comply with the requirements of this part results in the inability of the Director to make a finding. This paragraph retains the three examples from current § 38.66(a)–(c). The proposal revises the example in current § 38.66(a), now proposed 38.66(a)(1) to state, "Submit requested information, records, and/or data within the timeframe specified in a Notification Letter issued pursuant to § 38.63," rather than "within 30 days of receiving a Notification Letter." CRC has proposed this change because the Notification Letter contains a timeframe for response. Thus, setting out the timeframe in the regulations is redundant. This revision is also consistent with § 38.63(b)(3) which permits the Director to modify the timeframe for response in the notification letter.

The new language in § 38.66(b) states that the Director may issue a Notice to Show Cause to a recipient when the Director has reasonable cause to believe that a recipient is failing to comply with the requirements of this part, after the Director has issued a Letter of Findings and/or an Initial Determination, and after a reasonable period of time has passed within which the recipient refuses to enter into a conciliation agreement to resolve the identified violations. The Department proposes

this change to expand the circumstances in which the Director may issue a Notice to Show Cause. Under the existing regulations in § 38.66(a), the Director could only issue a Notice to Show Cause when the Director had insufficient information to make a determination on a recipient's compliance because the recipient failed or refused to submit information, records and/or data in response to a Notification letter or during a compliance review or complaint investigation. This limitation meant that the Director could not use this tool effectively at other points in the process, after finding reasonable cause to believe that a violation occurred. The proposal seeks to use the Notice to Show Cause at this later stage because it has been the Department's experience that, after issuing a letter of findings, the Governor or other recipients agree in principle to enter into a conciliation agreement that resolves the identified violations, but then frequently fail to respond to correspondence from the CRC regarding finalizing and signing the agreement. With proposed § 38.66(b), the Director could issue a Notice to Show Cause prior to issuing a Final Determination, providing Governors and other recipients another opportunity to take the corrective or remedial actions required by the Director to bring the recipient into compliance before enforcement proceedings are initiated. In this way, § 38.66 provides the States with another notice and opportunity to resolve violations and avoid the issuance of a Final Determination.

#### Methods by Which a Recipient May Show Cause Why Enforcement Proceedings Should Not Be Instituted § 38.67

The NPRM retains all of the existing language of current § 38.68 in § 38.67 except that it proposes changing the title to "Methods by which a recipient may show cause why enforcement proceedings should not be instituted" and removes reference to the letter of assurance since the Department has proposed to discontinue its use of this letter. See discussion below regarding the proposed revision of § 38.96, which addresses letters of assurance.

#### Failing To Show Cause § 38.68

The NPRM retains almost all the language of current § 38.69 in proposed § 38.68 except that it proposes changing the title to "Failing to show cause." The NPRM also proposes to change the provision to state that the Director "may," not "must," follow the enforcement procedures contained in §§ 38.94 and 38.95 if a recipient fails to

show cause why enforcement proceedings should not be initiated. This revision is intended to more accurately reflect the Director's prosecutorial discretion in bringing matters to enforcement. Nothing in Section 188 compels the Director to refer for enforcement every violation of Section 188 or this part.

#### Complaint Processing Procedures

##### Complaint Filing § 38.69

The NPRM combines existing §§ 38.70, 38.71 and 38.72 into proposed § 38.69 titled "Complaint filing," with revisions to the text. The Department proposes merging these sections to improve readability.

Proposed § 38.69(a) retains the language from current § 38.70 which explains that a complaint may be filed by any person or the person's representative, if that person believes that the complainant or class of persons has been discriminated against as prohibited by this part. Proposed subparagraph (a)(1) adds a list of the bases upon which a complaint may be filed—race, color, religion, sex (including pregnancy, child birth or related medical conditions, gender identity and transgender status), national origin (including limited English proficiency), age, disability, political affiliation or belief, citizenship status, or participation in any WIOA Title I-financially assisted program or activity. Proposed subparagraph (a)(2) adds retaliation as a basis for filing a complaint, consistent with the existing non-retaliation provision at current § 38.11 and proposed § 38.11. Proposed subparagraph (b) also includes the option of filing a complaint electronically in addition to U.S. Mail. Proposed subparagraph (c) removes reference to the Director and states that a complaint must be filed within 180 days. This language was removed because subparagraph (b) already states with whom the complaint must be filed.

##### Required Contents of Complaint § 38.70

The NPRM proposes merging current §§ 38.73 and 38.74 into § 38.70 titled "Required contents of complaint" and retains almost all of the language in these existing sections. The proposed changes in this section provide complainants the choice between filing complaints electronically or by hard copy, request that complainants provide in the complaint their email address, where available, in addition to their mailing address, and state that complaint forms are available on the Department's Web site at <http://>

[www.dol.gov/oasam/programs/crc/external-enforc-complaints.htm](http://www.dol.gov/oasam/programs/crc/external-enforc-complaints.htm).

#### Right to Representation § 38.71

The NPRM proposes to change the title of § 38.75 to “Right to Representation” and renumber it as § 38.71. Otherwise, it retains the existing language of this section.

#### Required Elements of a Recipient’s Complaint Processing Procedures § 38.72

The NPRM proposes minimal additions to the language of current § 38.76, including renumbering it as § 38.72 and changing the title to “Required elements of a recipient’s complaint processing procedures.” The proposed language retains the requirement in current § 38.76 that recipients adopt procedures specifically to process complaints. The NPRM proposes adding to the procedures that the recipient must adopt and publish the requirement that recipients provide complainants a copy of the notice of rights contained in § 38.35, along with the already-required initial written acknowledgement of receipt of the complaint and notice of the complainant’s right to representation. This requirement is designed to ensure that complainants are aware of their rights, including that they have the option of filing with the recipient or with CRC, and that they are aware of the deadlines applicable to filing a subsequent complaint with CRC once they file initially with the recipient. This notice is the same notice that the recipient is already required to post and disseminate pursuant to § 38.35, and this change ensures that the notice is included in the documents provided to the complainant at this critical juncture. The NPRM also proposes requiring inclusion of notice that the complainant has the right to request and receive, at no cost, auxiliary aids and services, language assistance services, and that this notice will be translated into the non-English languages of the recipient’s service area; this is similar to the accessibility requirements found at § 38.34 and § 38.36.

The NPRM proposes to remove reference to “he or she” in this section as is consistent throughout the part and replace them with “complainant.” The NPRM also proposes adding a new subparagraph (c)(1), affirmatively stating that ADR may be attempted any time after a written complaint has been filed with the recipient. This language advises complainants and recipients that ADR may be initiated very early on to resolve the complaint. This requirement is intended to encourage

prompt resolution of complaints at the earliest possible stage of the process.

This rule proposes changing the language in the last sentence in subparagraph (c)(3)(ii) to state, “If the Director determines that the agreement has been breached, the complaint will be reinstated and processed in accordance with the recipient’s procedures.” This change from the language in current § 38.76(c)(3)(ii) which stated: “If he or she determines that the agreement has been breached, the complainant may file a complaint with the CRC based upon his/her original allegation(s), and the Director will waive the time deadline for filing such a complaint.” This language change is proposed because the proper procedure, if the agreement reached under ADR is breached, is for the recipient and the complainant to return to the original complaint processing procedures.

#### Responsibility for Developing and Publishing Complaint Processing Procedures for Service Providers § 38.73

The NPRM proposes to retain the language from current § 38.77, changing the title to “Responsibility for developing and publishing complaint processing procedures for service providers” for proposed § 38.73.

#### Recipient’s Obligations When It Determines That It Has No Jurisdiction Over a Complaint § 38.74

The NPRM essentially retains the language of existing § 38.79 in § 38.74, but changes the title to “Recipient’s obligations when it determines that it has no jurisdiction over a complaint” and replaces the term “immediate” with “within five business days of making such determination” as the time frame in which a recipient must notify the complainant in writing that it does not have jurisdiction. This change reduces ambiguity by providing a defined timeframe within which the recipient must notify a complainant about the recipient’s lack of jurisdiction so that the complainant may timely pursue the allegations in an appropriate forum.

#### If the Complainant Is Dissatisfied After Receiving a Notice of Final Action § 38.75

Proposed § 38.75 retains the language of existing § 38.79, with the exception of the title and two minor revisions. The NPRM changes the title of current § 38.79 to “If the complainant is dissatisfied after receiving a Notice of Final Action.” In addition, the Department proposes changing the first sentence from “If, during the 90-day period” to “If the recipient issues its

Notice of Final Action before the end of the 90-day period.” This change states more clearly that this section addresses the situation where the recipient issues its Notice before the 90-day period ends. The Department also proposes changing “his or her” to “the complainant’s” representative consistent with the changes to this part.

#### If a Recipient Fails To Issue a Notice of Final Action Within 90 Days After the Complaint Was Filed § 38.76

Proposed § 38.76 retains all of the language in existing § 38.80, with the exception of the title that states “If a recipient fails to issue a Notice of Final Action within 90 days after the complaint was filed.”

#### Extension of Deadline To File Complaint § 38.77

The NPRM retains current § 37.81 in its entirety in proposed § 38.77, and changes the title to “Extension of deadline to file complaint.”

#### Determinations Regarding Acceptance of Complaints § 38.78

The NPRM retains all of the language in existing § 38.82, except the title and two words. The proposed title of § 38.78 is “Determinations regarding acceptance of complaints.” The Department proposes to delete “No” at the beginning of the section in response to the question in the heading, because the new heading is no longer in question format. The Department proposes changing the word “determine” to “decide” to distinguish the Director’s decision whether to accept a complaint from the Director’s Initial and Final Determinations.

#### When a Complaint Contains Insufficient Information § 38.79

The NPRM retains all of the language in existing § 38.83, except for removing and replacing gender-specific pronouns and the title of § 38.79 to “When a complaint contains insufficient information.” It also proposes adding a provision to subparagraph (a) stating that, if the complaint does not contain enough information “to identify the respondent or the basis of the alleged discrimination, the timeliness of the complaint, or the apparent merit of the complaint,” the Director must try to get the needed information from the complainant. This proposed new language specifies the circumstances under which the Director must try to get information from the complainant. In subparagraph (c) the NPRM proposes that, when the Director closes the complainant’s file, the Director must send a written notice to the



complainant's last known address, "email address (or other known method of contacting the complainant in writing." This change recognizes that there are more methods of written communication than mail now available.

The NPRM makes no changes to the language of existing §§ 38.84–38.88 besides revising the titles and section numbers to §§ 38.80–38.84. The new headings are, respectively, "Lack of jurisdiction," "Complaint referral," "Notice that complaint will not be accepted," "Notice of complaint acceptance," and "Contacting CRC about a complaint."

#### Alternative Dispute Resolution § 38.85

The NPRM makes some changes to existing § 38.89, including changing it to § 38.85 with the title "Alternative dispute resolution." The Department proposes replacing reference to mediation with alternative dispute resolution (ADR) to encompass a broader array of procedures that may be used. "The term ADR means any procedure, agreed to by the parties of a dispute, in which they use the services of a neutral party to assist them in reaching agreement and avoiding litigation. Types of ADR include arbitration, mediation, negotiated rulemaking, neutral fact-finding, and mini-trials. With the exception of binding arbitration, the goal of ADR is to provide a forum for the parties to work toward a voluntary, consensual agreement, as opposed to having a judge, or other authority, decide the case."<sup>186</sup> CRC also notes that current § 38.76, which sets out the required elements of a recipient's discrimination complaint processing procedures, already refers to ADR, not mediation, at § 38.76(c).

In addition, the NPRM proposes removing the references to "the parties" in this section, and replacing them with references to "the complainant and the respondent." This change has been made for legal accuracy: the real parties in interest to a complaint alleging violations of WIOA Section 188 or this part by a recipient are the recipient/respondent alleged to have committed the violation and CRC. There is no private right of action under WIOA Section 188; the complainant stands in the position of a witness who has notified CRC of the existence of a potential violation.

Proposed paragraph (b) removes the word "issued" from the sentence in

current § 38.89(b), "The mediation will be conducted under guidance issued by the Director" because the guidance from the Director on ADR may be provided informally. In addition, the NPRM revises paragraph (c) to state that ADR may take place at any time after a complaint has been filed to maximize the opportunity for resolution of complaints through the ADR process. Finally, the NPRM proposes revising paragraph (d) to state that ADR does not suspend investigation and complaint processes so that it is clear, that while ADR is taking place, CRC will continue complaint processing and investigation so that the complaint and evidence will not become stale while the complainant and recipient attempt informal resolution. CRC's continuing investigative activity will preclude recipients from using ADR as a vehicle to preclude CRC from reaching timely findings.

#### Complaint Determinations

##### Notice at Conclusion of Complaint Investigation § 38.86

The NPRM changes the title to "Notice of conclusion of complaint investigation" and the section number to 38.86. The NPRM adds a reference at the end of paragraph (b) to the sections of this part that describe the notification process described in §§ 38.34 and 38.36, so that the recipient, complainant and grantmaking agency are aware of the procedural steps that CRC will follow.

##### Director's Initial Determination That Reasonable Cause Exists To Believe That a Violation Has Taken Place § 38.87

The NPRM proposes to retain all of the existing language in § 38.91, and changes the title of § 38.87 to "Director's Initial Determination that reasonable cause to believe that a violation has taken place."

##### Director's Final Determination Finding That No Reasonable Cause Exists To Believe That a Violation Has Taken Place § 38.88

The NPRM proposes to retain all of the existing language in § 38.92, changing the title of § 38.88 to "Director's Final Determination that no reasonable cause exists to believe that a violation has taken place."

##### When the Recipient Fails or Refuses To Take Corrective Action Listed in the Initial Determination § 38.89

The NPRM proposes retaining the language from current § 38.93 for § 38.89, changing the title to "When the recipient fails or refuses to take corrective action listed in the Initial

Determination." Section 38.93 states that if the recipient failed or refused to take the corrective action listed in the Initial Determination, the Department must take corrective action, which included referring the matter to the Attorney General, or taking such other action as provided by law. This proposal has been made because the Department has prosecutorial discretion to pursue or not pursue further enforcement action after issuing an Initial Determination.<sup>187</sup>

##### Corrective or Remedial Action That May Be Imposed When the Director Finds a Violation § 38.90

The NPRM proposes retaining the language from current § 38.94 for § 38.90, changing the title to "Corrective or remedial action that may be imposed when the Director finds a violation."

##### Post-Violation Procedures § 38.91

The NPRM proposes retaining all of the existing language in the § 38.95, but changes the title. The Department proposes, "Post violation procedures" as the title for § 38.91. Because the circumstances under which a written assurance will be used has been revised, as discussed in § 38.92, this section deletes paragraphs (b)(1)(iii)(C) and paragraph (b)(3)(iii), which referred to using "both" a written assurance and a conciliation agreement as closing documents for the same set of violations. The Department proposes to remove the inadvertent reference to a nonexistent paragraph (d) at the end of paragraph (a).

##### Written Assurance § 38.92

The NPRM proposes revising current § 38.96 to explain the circumstances in which a written assurance will be used as a resolution document. The Department proposes retaining the title from current § 38.96 for § 38.92. Current Section 38.96 required that "a written assurance must provide documentation that violations listed in the Letter of Findings, Notice to Show Cause or Initial Determination, as applicable, have been corrected." That provision did not adequately explain when a written assurance rather than a conciliation agreement would be the appropriate resolution document and this confusion has caused delay in bringing recipients into compliance. The proposed rule states, "A written assurance is the resolution document used when the Director determines that a recipient has taken all corrective actions to remedy the violations specified in the Letter of Findings or

<sup>186</sup> Department of Labor/Labor Relations/Alternative Dispute Resolution, available at <http://www.dol.gov/dol/topic/labor-relations/adr.htm> (accessed March 19, 2015).

<sup>187</sup> 29 U.S.C. 3248(b)(1).

Initial Determination identifying the violations within fifteen business days after receipt of the Letter or Determination.” This proposed revision is intended to reduce the protracted negotiations over the form of the final resolution document that have become commonplace over recent years.

#### Required Elements of a Conciliation Agreement § 38.93

The NPRM proposes to retain the language in current § 38.97 for proposed § 38.93 titled “Required elements of a conciliation agreement.” It retains current paragraph (a) and adds a new paragraph (b) “Address the legal and contractual obligations of the recipient.” It re-numbers current paragraph (b) as new paragraph (c), current paragraph (c) as paragraph (d), current paragraph (d) as paragraph (e) and current paragraph (f) as new paragraph (i). The NPRM proposes a new paragraph (g) to require that a conciliation agreement provide that nothing in the agreement prohibits CRC from sending it to the complainant, making it available to the public, or posting it on the CRC or the recipient’s Web site. The NPRM also proposes a new paragraph (h) to require that a conciliation agreement provide that in any proceeding involving an alleged violation of the conciliation agreement, CRC may seek enforcement of the agreement itself and shall not be required to present proof of the underlying violations resolved by the agreement. This change brings the regulations in line with current practice and with other nondiscrimination enforcement agencies in DOL. For example, OFCCP has incorporated similar language into their conciliation agreements pursuant to their regulations at 41 CFR 60–1.34(d).

The proposal is consistent with the well-settled principle under Title VII case law that a conciliation agreement entered to resolve discrimination claims is specifically enforceable independent of a finding that the employer did, in fact, engage in discriminatory practices, so long as regular contract rules are satisfied and enforcement does not conflict with the purposes of Title VII.<sup>188</sup> The courts have concluded that conciliation agreements would be rendered worthless as a means of securing voluntary compliance with Title VII, if a finding on the merits were required before any voluntary agreement to resolve discrimination claims could be enforced.<sup>189</sup> Likewise, respondents

that enter into conciliation agreements to resolve findings of discrimination or other substantive violations do so voluntarily and knowingly.

Respondents are under no compulsion to execute conciliation agreements; they are free to reject the terms of settlement and have the matter resolved through the contested litigation. However, if a respondent voluntarily and knowingly accepts an offer to conciliate a matter, both parties, including the Government, are entitled to rely on the representations contained in the conciliation agreement. The conciliation agreement, as a contract, binds both parties and thus inequities would result if one or the other party was allowed to ignore its agreement and return to “square one.”<sup>190</sup>

#### When Voluntary Compliance Cannot Be Secured § 38.94

The NPRM proposes retaining the language in current § 38.98 in proposed § 38.94 titled “When voluntary compliance cannot be secured” and adds “the Governor” in paragraphs (a) and (b)(1) to the list of other entities—grant applicants and recipients—to which these provisions apply. Although the Governor is also a recipient in certain circumstances, these provisions add the Governor as a separate entity to address violations that are not based on the Governor’s status as a recipient. As set forth in Subpart C, the Governor has additional obligations to conduct oversight and monitoring of WIOA Title I-financially assisted State programs and to develop a Nondiscrimination Plan that are not based on the Governor’s role as a recipient. The Governor can be found in violation of this part for failure to comply with those obligations.

#### Enforcement When Voluntary Compliance Cannot Be Secured § 38.95

The NPRM retains the language of current § 38.99 in proposed § 38.95 titled “Enforcement when voluntary compliance cannot be secured.”

#### Contents of a Final Determination of a Violation § 38.96

The NPRM retains the language in current § 38.100 in proposed § 38.96 titled “Contents of a final determination of a violation.”

#### Notification of Finding of Noncompliance § 38.97

The NPRM proposes to retain the language in current § 38.101 in new § 38.97 titled “Notification of finding of noncompliance.”

<sup>188</sup> See, e.g., *EEOC v. Safeway Stores, Inc.*, 714 F.2d 567 (5th Cir. 1983), cert. denied, 467 U.S. 1204 (1984).

<sup>189</sup> *Eaton v. Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503, 1509 (11th Cir. 1985); *EEOC v. Henry*

<sup>190</sup> 62 FR 44186, Aug. 19, 1997.

#### Breaches of Conciliation Agreements

##### Notice of Breach of Conciliation Agreement § 38.98

The NPRM proposes merging and retaining the language in current § 38.102 and § 38.103 in new § 38.98 titled “Notice of breach of conciliation agreement.”

##### Contents of Notice of Breach of Conciliation Agreement § 38.99

The NPRM proposes retaining the language in current § 38.104 in § 38.99 titled “Contents of notice of breach of conciliation agreement.”

##### Notification of an Enforcement Action Based on Breach of Conciliation Agreement § 38.100

The NPRM proposes retaining the language in current § 38.105 in § 38.100 titled “Notification of an enforcement action based on breach of conciliation agreement.”

#### Subpart E—Federal Procedures for Effecting Compliance

In describing the procedures the Department will follow in effecting compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part, the Department proposes a few minor changes to the process it had followed in effecting compliance with the counterpart provisions of WIA and part 37.

##### Enforcement Procedures § 38.110

Proposed § 38.110 generally contains the same requirements of current § 38.110. The Department proposes as the title for this section, “Enforcement Procedures,” rather than the current heading of § 38.110, which is in question format. The proposed rule adds language at the end of subsection (a)(3) stating that the Secretary may take such action as may be provided by law “which may include seeking injunctive relief.” This additional language is intended to provide transparency by advising recipients that the Secretary may seek corrective actions that go beyond make-whole relief, and provides an example of such other actions.

##### Hearing Procedures § 38.111

Proposed § 38.111 contains the same requirements of current § 38.111. The Department proposes as the title for this section, “Hearing Procedures,” rather than using the current heading of § 38.111, which is in question format. Proposed § 38.111(b)(3) specifies where a grant applicant or recipient must serve a copy of their filings under this section and substitutes “Civil Rights and Labor-Management Division, Room N–2474”

for “Civil Rights Division, Room N–2464” to capture the current title and location of the Office of the Solicitor Division to which filings must be sent. Proposed § 38.111(d)(2) deletes the word “Uniform” as used in current § 38.111 (d)(2), “Uniform Rules of Evidence issued by the Department of Labor’s Office of Administrative Law Judges” to reflect the current title of that rule at 29 CFR part 18.

#### Initial and Final Decision Procedures § 38.112

Proposed § 38.112 generally contains the same requirements of current § 38.112. The Department proposes as the title for this section, “Initial and final decision procedures,” rather than the heading of current § 38.112, which is in question format. Proposed Section 38.112 is composed of one paragraph that describes Initial Decisions by an Administrative Law Judge and multiple paragraphs concerning Final Decisions and Orders by the Secretary. Proposed § 38.112 substitutes “Administrative Review Board” for the word “Secretary” where it appears in current § 38.112 paragraphs (b)(1), (b)(1)(i), (b)(1)(ii), (b)(1)(v), (b)(1)(vi), (b)(1)(vii)(A), (b)(1)(vii)(B), (b)(1)(viii), and (b)(2)(ii). The NPRM substitutes “Administrative Review Board” (ARB) for the Secretary so that the part 38 rule accurately reflects the ARB’s role in issuing final agency decisions in cases brought to enforce WIOA Section 188. In 1996, the Secretary issued Secretary’s Order 2–96 creating the ARB and delegating to the ARB the Secretary’s authority to issue final agency decisions under 38 enumerated statutes, among them the Comprehensive Employment and Training Act, 29 U.S.C. 801 *et seq.*, and the Job Training Partnership Act, 20 U.S.C. 1576, predecessor statutes to WIA and WIOA. Secretary’s Order 1–2002 included a delegation to the ARB for matters arising under Section 188 of the Workforce Investment Act. 67 FR 64272 (October 17, 2002), as did Secretary’s Order 02–2012, 77 FR 69376 (November 16, 2012). These delegation orders also contain a catch-all provision to extend the delegation to subsequently enacted statutes or rules, including: “Any laws or regulation subsequently enacted or promulgated that provide for final decisions by the Secretary of Labor upon appeal or review of decisions, or recommended Decisions, issued by ALJs, and any Federal law that extends or supplements unemployment compensation and Provides for final decisions by the Secretary of Labor.”<sup>191</sup> Thus, even absent a new delegation

order, the ARB would issue final agency decisions under Section 188 of WIOA.

The subparagraphs of proposed § 38.112(b) set forth procedures for filing exceptions to the Administrative Law Judge’s initial decision and order and issuance of a Final Decision and Order by the Department. Proposed § 38.112(b)(1)(iii) deletes the sentence “[a]ny exception not specifically urged is waived” from this subparagraph. The Department no longer believes that this is an accurate statement of the ARB’s scope of review of initial decisions. The Administrative Procedure Act provides that, on appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.<sup>192</sup> Where, as here, the applicable rule does not specify the standard of review, “the Board is not bound by either the ALJ’s findings of fact or conclusions of law, but reviews both *de novo*.”<sup>193</sup>

Finally, proposed § 38.112(b)(2)(ii) adds language providing that, when a Final Determination or Notification of a Breach of Conciliation Agreement becomes the Final Decision, the ARB may, within 45 days, issue an order terminating or denying the grant or continuation of assistance or imposing appropriate sanctions not just for failure of the grant recipient or recipient to comply with the required corrective and/or remedial actions, but also for the Governor’s failure to comply. The NPRM inserts “the Governor” because the Governor would have obligations under this part that are independent of his or her role as a recipient. For example, Sections 38.50–55 impose on the Governor the obligation to conduct oversight, and monitor the compliance, of WIOA title I financially assisted State programs, and to develop and maintain a Nondiscrimination Plan for State programs as defined in § 38.4. Proposed § 38.112(b)(2)(ii) retains the language in current § 38.112(b)(2)(ii) that the Secretary may refer the matter to the Attorney General for further enforcement action. The NPRM retains the reference to the Secretary’s role here

because this referral function has not been delegated to the ARB.

#### Suspension, Termination, Withholding, Denial, or Discontinuation of Financial Assistance § 38.113

Proposed § 38.113 contains the same requirements of current § 38.113. The Department proposes as the title for this section, “Suspension, termination, withholding, denial or discontinuation of financial assistance,” rather than the heading of current § 38.113, which is in question format. Consistent with the analysis set forth in the proposed § 38.112, the Department proposes in § 38.113(c) to substitute “Administrative Review Board” for “Secretary.”

#### Distribution of WIOA Title I Financial Assistance to an Alternate Recipient § 38.114

Proposed § 38.114 contains the same requirements of current § 38.114. The Department proposes as the title for this section, “Distribution of WIOA Title I financial assistance to an alternate recipient,” rather than the heading of current § 38.114, which is in question format.

#### Post-Termination Proceedings § 38.115

Proposed § 38.115 contains the same requirements of current § 38.115. The Department proposes as the heading for this section, “Post-termination proceedings,” rather than the heading of current § 38.115, which is in question format. Consistent with the reasoning provided in proposed § 38.112, and § 38.113, the Department proposes in § 38.115 substituting “Administrative Review Board” for “Secretary” throughout this section. This change has been made in paragraphs (c)(2) and (c)(5) of this section. Consistent with the reasoning provided in proposed § 38.111, the Department proposes in § 38.115 substituting “Civil Rights and Labor-Management Division” for “Civil Rights Division” in paragraph (c)(3) of this section.

#### Appendix to § 38.9

##### Recipient Language Assistance Plan (LEP Plan): Promising Practices

The proposed rule contains an Appendix that is intended to provide further direction as to the obligations of recipients to take reasonable steps to provide meaningful language access to LEP individuals. The proposed Appendix provides a clear framework for recipients that choose to develop a written LEP plan. The Appendix states that, while written LEP plans are not required under Section 188 or this proposed part, development and implementation of such a plan has the

<sup>192</sup> 5 U.S.C. 557(b).

<sup>193</sup> *Masek v. The Cadle Co.*, ARB No. 97–069, ALJ No. 1995–WPC–1 (ARB Apr. 25, 2000) at 7 (citations omitted). See also *Jones v. U.S. Dep’t of Labor*, 148 F.App’x 490, 2005 WL 2173769 (6th Cir. Sept. 8, 2005) (ARB acted within its authority in drawing its own conclusions based on its independent review of the evidence); *Phillips v. Stanley Smith Security, Inc.*, ARB No. 98–020, ALJ No. 1996–ERA–30 (ARB Jan. 31, 2001 (ARB reviews ALJ decisions under the ERA *de novo*, but accords special weight to an ALJ’s demeanor-based credibility determinations.); *Berkman v. U.S. Coast Guard Academy*, ARB No. 98–056, ALJ No. 1997–CAA–2 and 9 (ARB Feb. 29, 2000).

<sup>191</sup> 77 FR at 63279.

benefit of providing the recipient with a roadmap for establishing and documenting compliance with its LEP obligations.

As the proposed Appendix explains, the elements of an effective written plan are not fixed, nor will they be the same for all recipients. Rather, each recipient must tailor the plan to its specific programs and activities, and should revise the plan, as appropriate, to reflect updated government guidance, the recipients' experiences, changes in the recipient's operations, changing demographics, and stakeholder feedback. Based on its recent experiences in addressing issues related to recipient compliance with LEP obligations, the Department has set forth 14 suggested elements of a successful recipient LEP plan.

#### Illustrative Applications in Recipient Programs and Activities

The proposed Appendix also contains several examples that illustrate the types of reasonable steps that recipients may be required to take to provide meaningful access to LEP individuals. In the first example, an LEP individual who speaks Urdu seeks information about unemployment insurance from a State's telephone call center. Because of the nature and importance of unemployment insurance, the resources of the State, and the wide availability of low-cost commercial language services, such as telephonic oral interpretation services, the State must, at a minimum, provide the LEP individual with telephonic interpretation services to ensure meaningful access to the unemployment insurance program even if Urdu is a non-frequently encountered non-English language.

The second example illustrates that a recipient has some flexibility as to reasonable steps that it may be required to take to provide language assistance to LEP individuals. If an LEP individual who speaks Tagalog requests a recipient that provides career services to translate a brochure about an upcoming job fair, the reasonable steps that the recipient must take will vary depending on whether Tagalog is spoken by a significant number or proportion of the population eligible to be served and is a language frequently encountered in the career services program. The recipient would be required to provide a written translation of vital information in the brochure if the above factors were answered in the affirmative, but it would satisfy the obligation to take reasonable steps for the recipient to provide an oral summary of the brochure's contents if Tagalog were not

as commonly spoken in that service area.

The proposed Appendix also provides direction to recipients regarding the provision of English language learning opportunities as one of the possible reasonable steps a recipient may take to provide an LEP individual meaningful access to its program or activity. The Appendix also clarifies that taking reasonable steps may be a collaborative process, although each recipient remains independently obligated to take reasonable steps. The Appendix uses the example of an LEP individual who learns through a One Stop Center of welding training offered in English that is being provided by an eligible training provider. In such a situation, the One Stop Center and eligible training provider may work together to provide meaningful access. This coordination may involve ensuring that the LEP individual receives appropriate English learning from the One Stop or from another organization that provides English language training at no cost to the individual. Depending on the circumstances, the English language training may be offered before or concurrently with enrollment in the welding class.

### III. Rulemaking Analyses and Notices

#### A. Executive Orders 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

Executive Order (E.O.) 12866 directs agencies, in deciding whether and how to regulate, to assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. E.O. 13563 is supplemental to and reaffirms E.O. 12866. It emphasizes the importance of quantifying present and future benefits and costs; directs that regulations be adopted with public participation; and, where relevant and feasible, directs that regulatory approaches be considered that reduce burdens, harmonize rules across agencies, and maintain flexibility and freedom of choice for the public. Costs and benefits shall be understood to include both quantifiable measures and qualitative assessments of possible impacts that are difficult to quantify. If regulation is necessary, agencies should select regulatory approaches that maximize net benefits. The Office of Management and Budget (OMB) determines whether a regulatory action is significant and, therefore, subject to review.

Section 3(f) of E.O. 12866 defines a "significant regulatory action" as any

action that is likely to result in a rule that may:

- (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; or
- (4) Raise novel legal or policy issues arising from legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

*Summary of the analysis.* The Department provides the following summary of the regulatory impact analysis:

(1) The proposed rule is a "significant regulatory action" under Section 3(f)(4) of E.O. 12866; therefore, OMB has reviewed the proposed rule.

(2) The proposed rule would have a negligible net direct cost impact on small entities beyond the baseline of the current costs required by the Workforce Innovation and Opportunity Act (WIOA) program as it is currently implemented in regulation.

(3) The proposed rule would not impose an unfunded mandate on Federal, State, local, or tribal governments as defined by the Unfunded Mandates Reform Act.

In total, the Department estimates that this NPRM would have a first year cost of \$28,250,547 and second and future-year cost of \$ 9,487,711 as detailed in Table 3 and Table 4. The proposals in the NPRM would not create significant new costs or burdens for Governors, recipients, or beneficiaries. The primary administrative burden created for recipients in the first year would be the cost of regulatory familiarization, which the Department calculates to be just over \$12 million. The primary administrative burden created for Governors in the first year would be the cost of conducting monitoring of recipients for compliance with the nondiscrimination and equal opportunity provisions, which the Department calculates to be approximately \$6.55 million. The other new cost burdens created for recipients in the first year would be: (1) The cost of pregnancy accommodations, which the Department calculates to be just over \$100,000; (2) the cost of compliance with record keeping, translation, and interpretation obligations related to limited English proficient beneficiaries,

which the Department is currently unable to calculate, and about which the Department seeks comment; (3) the cost of updating and disseminating equal opportunity notices and posters, which the Department calculates to be approximately \$4 million; (4) the cost of incorporating two new categories of demographic data collection on limited English proficiency and preferred language, which the Department calculates to be approximately \$3.75 million; and (5) the cost of updating complaint processing procedures, which the Department calculates to be approximately \$1.5 million.

The Department was unable to quantify estimates of several important benefits to society due to data limitations or lack of existing data or evaluation findings on particular items. However, overall many of the proposed revisions to 29 CFR part 38 contained in the NPRM will improve readability and provide additional guidance to Governors and recipients, in several instances in response to feedback from stakeholders, to their benefit. For example, additional language in §§ 38.28–38.31 regarding the obligations of Equal Opportunity Officers (EO Officers) and recipients' obligations regarding their EO Officers provides detailed direction that benefits recipients. Similarly, language in § 38.92 provides additional detail regarding the use of written assurances in the enforcement of nondiscrimination and equal opportunity requirements that resolves confusion that recipients raised about its use. In addition, by including updates to the nondiscrimination provisions in §§ 38.7–38.17, the NPRM makes it easier for Governors and recipients to meet their equal opportunity and nondiscrimination obligations under Section 188 of WIOA because the implementing regulations contain provisions consistent with requirements with which they are already required to comply under Federal laws such as Title VI and Title VII of the Civil Rights Act of 1964, as amended; Title IX of the Education Amendments of 1972; Americans with Disabilities Act of 1990, as amended; and Section 504 of the Rehabilitation Act.

The Department requests comment on the costs and benefits of this NPRM with the goal of ensuring a thorough consideration and discussion at the Final Rule stage.

### 1. The Need for the Regulation

Signed by President Obama on July 22, 2014, the Workforce Investment and Opportunity Act (WIOA) supersedes the Workforce Investment Act of 1998

(WIA) as the Department's primary mechanism for providing financial assistance for a comprehensive system of job training and placement services for adults and eligible youth. Section 188 of WIOA contains the identical provisions of Section 188 as appeared in WIA and prohibits the exclusion of an individual from participation in, denial of the benefits of, discrimination in, or denial of employment in the administration of or in connection with, any programs and activities funded or otherwise financially assisted in whole or in part under Title I of WIOA because of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries only, citizenship status, or participation in a program or activity that receives financial assistance under Title I of WIOA. Section 188(e) of WIOA requires that the Department issue regulations implementing Section 188.

### 2. Technical Update of Section 188 versus publication of a simultaneous NPRM

The Department considered two possible alternatives:

(1) To publish a Final Rule as 29 CFR part 38 implementing Section 188 of WIOA with only technical updates to the regulations at 29 CFR part 37 which implements Section 188 of WIA; or

(2) To publish the above mentioned Final Rule followed by an NPRM. The above mentioned Final Rule would apply until issuance of a Final Rule based on the NPRM. The NPRM would update part 38 consistent with current law and address its application to current workforce development and workplace practices and issues.

The Department has considered these options in accordance with the provisions of E.O. 12866 and has chosen to publish this NPRM soon after a technically updated Final Rule implementing Section 188 of WIOA (*i.e.*, alternative 2). The Department believes that the current rule does not reflect recent developments in equal opportunity and nondiscrimination jurisprudence. Moreover, procedures and processes for enforcement of the nondiscrimination and equal opportunity provisions of Section 188 have not been revised to reflect changes in the practices of recipients since 1999, including the use of computer-based and internet-based systems to provide aid, benefits, services, and training through WIOA Title I-financially assisted programs and activities. Thus, only reissuing the existing regulations with technical updates (*i.e.*, alternative 1) would have the negative effect of

continuing to impose ongoing compliance costs on recipients.

### 3. Analysis Considerations

The Department derives its estimates by comparing the existing program baseline, that is, the program benefits and costs estimated as a part of the regulations implementing Section 188 of WIA, found at 29 CFR part 37.

For a proper evaluation of the benefits and costs of the NPRM, the Department explains how the newly required actions by States and recipients under the proposed regulations at part 38 are linked to the expected benefits and estimated costs. The Department also considered, when appropriate, the unintended consequences of the proposed regulations introduced by the NPRM. The Department makes every effort, when feasible, to quantify and monetize the benefits and costs of the NPRM. When the Department is unable to quantify them—for example, due to data limitations—the Department describes the benefits and costs qualitatively.

In accordance with the regulatory analysis guidance contained in OMB Circular A–4 and consistent with the Department's practices in previous rulemakings, this regulatory analysis focuses on the likely consequences (benefits and costs that accrue to citizens and residents of the United States) of the WIOA-required NPRM.

Table 1 presents the estimated annual number of recipients expected to experience an increase in level of effort (workload) due to the proposed language in this NPRM. These estimates are used extensively throughout this document to calculate the estimated costs for each provision. Note that several recipients are likely counted more than once under different categories because they receive more than one source of WIOA Title I financial assistance. For example, the Texas Workforce Commission is both a recipient of a Senior Community Service Employment Program Grant as well as an Adult WIOA Title I grantee. However, the Department decided to include them in both the "States" category of recipient and under a "National Programs" category to avoid the risk of being under-inclusive in the calculations. At the same time, there are entities that local workforce boards may include in the One-Stop delivery system, and thus, may be recipients if they become partners. These optional partners include the Supplemental Nutritional Assistance Program employment and training program, Ticket-to-Work and the Self-Sufficiency Program of the Social Security

Administration. Similarly, the beneficiary estimate may be over-inclusive because several beneficiaries are likely counted more than once under different categories because they receive

aid, service, training or benefit from more than one recipient. However, the Department decided to include them in both the State Workforce Agencies category of recipient and National

Programs category in an effort to be over-inclusive, rather than risking being under-inclusive in our calculations.

TABLE 1—ESTIMATED ANNUAL NUMBER OF RECIPIENTS, BENEFICIARIES, AND NON-FEDERAL FULL-TIME EMPLOYEES OF RECIPIENTS

Recipients	Estimated annual number of recipients	Estimated annual number of beneficiaries	Estimated annual number of non-federal full-time employees of recipients
States <sup>194</sup>	195 56		
Adult Program (Title I of WIOA)	(195)		196 65,655
Dislocated Worker Program (Title I of WIOA)	(195)		(196)
Youth Program (Title I of WIOA)	(195)	197 197,045	(196)
Wagner-Peyser Act Program (Wagner-Peyser Act, as amended by Title III of WIOA)	(195)	198 16,619,943	(196)
Adult Education and Literacy Program (Title II of WIOA)	(195)	199 2,012,163	200 67,293
Vocational Rehabilitation Program	(195)	201 573,086	202 68,000
Trade Adjustment Assistance Program	(195)	203 62,706	(196)
Unemployment Compensation Program	(195)	204 2,451,464	205 62,138
Local Veterans' Employment Representatives and Disabled Veterans' Outreach Program	(195)	206 450,843	207 2,700
Career and Technical Education (Perkins)	(195)	208 12,052,217	(196)
Community Service Block Grants	(195)	209 16,000,000	(196)
Temporary Assistance for Needy Families (TANF)	(195)	210 4,417,000	(196)
State and Local Workforce Investment Boards	211 580		212 9,280
Job Corps Operators (i.e. national contractors)	213 18	214 215 109,627	216 217 3,050
Job Corps Outreach and Admissions Operators	218 24	(215)	(217)
Job Corps national training contractors/Career Transition Services Operators	219 21	(215)	(217)
Service providers, including eligible training providers and on-the-job training employers <sup>220</sup>	221 11,400	222 122,693	223 439,936
One Stop Career Centers <sup>224</sup>	225 2,481	226 864,936	227 2,481
<i>National Programs Include:</i>			
Senior Community Service Employment Grants	228 71	229 67,814	(196)
National Emergency Grants <sup>230</sup>	231 125	232 26,221	233 9,280
Reintegration of Ex-Offenders—Adult Grants <sup>234</sup>	235 28	236 6,800	237 555
H-1B Technical Skills Training Grants <sup>238</sup>	239 36	240 22,543	241 774
H-1B Jobs and Innovation Accelerator Challenge Grants <sup>242</sup>	243 30	244 11,200	245 183
Indian and Native American Programs	246 178	247 40,102	248 994
National Farmworker Jobs Program	249 69	250 35,192	251 60,965
YouthBuild	252 82	253 7,604	254 2,408
Registered Apprenticeship Program	255 19,259	256 170,500	257 85,317
<b>Total</b>	<b>34,458</b>	<b>56,321,699</b>	<b>881,009</b>

<sup>194</sup> The 56 State entities are the recipients for the twelve programs below.

<sup>195</sup> This number includes the 50 states as well as the District of Columbia, American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and U.S. Virgin Islands. These 56 entities are the recipients for the following programs and are thus counted only once: Adult Program (Title I of WIOA), Dislocated Worker Program (Title I of WIOA), Youth Program (Title I of WIOA), Wagner-Peyser Act Program (Wagner-Peyser Act, as amended by Title III of WIOA), Adult Education and Literacy Program (Title II of WIOA), Vocational Rehabilitation Program, Trade Adjustment Program, Unemployment Compensation Program, Local Veterans' Employment Representatives and Disabled Veterans' Outreach Program, Career and Technical Education (Perkins), Community Service Block Grants, and Temporary Assistance for Needy Families (TANF).

<sup>196</sup> This number is an estimate based on the average number of employees at state-level Department of Labor equivalents. These same 65,655 employees account for the non-federal full-time employees in the following programs and are thus counted only once: Adult Program (Title I of WIOA), Dislocated Worker Program (Title I of WIOA), Wagner-Peyser Act Program (Wagner-Peyser Act, as amended by Title III of WIOA), Trade Adjustment Assistance Program, Career and

Technical Education (Perkins), Community Service Block Grants, Temporary Assistance for Needy Families (TANF), and Senior Community Service Employment Grants.

<sup>197</sup> Employment and Training Administration, *Workforce System Results: For the Quarter ending June 03, 2014*, U.S. Department of Labor 2, <http://www.doleta.gov/performance/results/pdf/workforceSystemResultsJune2014.pdf> [hereinafter *Workforce System Results*] (last visited June 24, 2015).

<sup>198</sup> *National—Wagner-Peyser: Program Year 2013*, U.S. Department of Labor Employment and Training Administration 1, <http://www.doleta.gov/performance/results/pdf/WagnerPeyserPY2013.pdf> (last visited June 25, 2015).

<sup>199</sup> Office of Vocational and Adult Education, *Adult Education and Family Literacy Act of 1998: Annual Report to Congress Program Year 2010–2011*, U.S. Department of Education xii, <http://www2.ed.gov/about/offices/list/ovae/resource/aefla-report-to-congress-2010.pdf> (last visited June 24, 2015).

<sup>200</sup> *Adult Education Personnel, National Reporting System 1*, [http://www.nrsweb.org/docs/NRS\\_Fast\\_Facts\\_508\\_rev.pdf](http://www.nrsweb.org/docs/NRS_Fast_Facts_508_rev.pdf) (last visited June 24, 2015).

<sup>201</sup> Office of Special Education and Rehabilitative Services, *Annual Report Fiscal Year 2012*, U.S. Department of Education 21, <http://www2.ed.gov/about/reports/annual/rfa/2012/rfa-2012-annual-report.pdf> (last visited June 24, 2015).

<sup>202</sup> This is an estimate based on the average number of employees at state-level Department of Labor equivalents.

<sup>203</sup> *Workforce System Results*, *supra* note 188, at 2.

<sup>204</sup> *Id.*

<sup>205</sup> This is an estimate based on the average number of employees at state-level Department of Labor equivalents.

<sup>206</sup> Veterans' Employment & Training Service, *Annual Report to Congress: Fiscal Year 2013*, U.S. Department of Labor 9, [http://www.dol.gov/vets/media/DOL-VETS-FY2013\\_ANNUAL\\_REPORT-OMB-CLEARED\\_10-16-14.pdf](http://www.dol.gov/vets/media/DOL-VETS-FY2013_ANNUAL_REPORT-OMB-CLEARED_10-16-14.pdf) (last visited June 24, 2015). This number is for PY 2012. *Id.*

<sup>207</sup> *LVER and DVOP Fact Sheet*, U.S. Department of Veterans Affairs 1–2, [http://www.benefits.va.gov/VOW/docs/LVER\\_DVOP\\_Factsheet.pdf](http://www.benefits.va.gov/VOW/docs/LVER_DVOP_Factsheet.pdf) (last visited June 24, 2015).

<sup>208</sup> *Carl D. Perkins Career and Technical Education Act of 2006: Report to Congress on State Performance Program Year 2010–2011*, U.S. Department of Education 12, [https://s3.amazonaws.com/PCRN/docs/Rpt\\_to\\_Congress/Perkins\\_RTC\\_2010-11.pdf](https://s3.amazonaws.com/PCRN/docs/Rpt_to_Congress/Perkins_RTC_2010-11.pdf) (last visited June 24, 2015).

<sup>209</sup> *Fiscal Year 2015: Justification of Estimates for Appropriations Committees*, Administration for Children & Families 171, [https://www.acf.hhs.gov/sites/default/files/olab/fy\\_2015\\_congressional\\_](https://www.acf.hhs.gov/sites/default/files/olab/fy_2015_congressional_)

*budget\_justification.pdf* (last accessed June 25, 2015).

<sup>210</sup> *Welfare Indicators and Risk Factors: Thirteenth Report to Congress*, U.S. Department of Health and Human Services A–8, [http://aspe.hhs.gov/hsp/14/indicators/rpt\\_indicators.pdf](http://aspe.hhs.gov/hsp/14/indicators/rpt_indicators.pdf) (last visited June 24, 2015).

<sup>211</sup> Provided by the Employment and Training Administration (ETA), U.S. Department of Labor, from the burden analysis contained in WIOA NPRM implementing Titles I and III available at <https://www.federalregister.gov/articles/2015/04/16/2015-05530/workforce-innovation-and-opportunity-act> [hereinafter ETA NPRM] (last visited June 24, 2015).

<sup>212</sup> This number is an estimate based on the average number of full-time employees from fourteen boards multiplied by the number of recipients. The fourteen boards include three from North Carolina, three from West Virginia, one from Virginia, three from Washington, three from Wisconsin, and one from Illinois.

<sup>213</sup> *PY 08: U.S. Department of Labor Job Corps Annual Report*, U.S. Department of Labor 13, <http://www.jobcorps.gov/Libraries/pdf/py08report.sflb> [hereinafter *PY 08*] (last visited June 24, 2015).

<sup>214</sup> *Workforce System Results*, *supra* note 188 at 2.

<sup>215</sup> Job Corps Operators, Job Corps Outreach and Admissions Operators, and Job Corps national training contractors/Career Transition Services Operators serve the same beneficiaries, so they are only counted once.

<sup>216</sup> This number is an estimate based on the assumption that there twenty-five employees at each of the Job Corps centers.

<sup>217</sup> Job Corps Operators, Job Corps Outreach and Admissions Operators, and Job Corps national training contractors/Career Transition Services Operators utilize the same employees, so they are only counted once.

<sup>218</sup> *PY 08*, *supra* note 204, at 13.

<sup>219</sup> *PY 08*, *supra* note 204, at 13.

<sup>220</sup> *PY 2012* estimated, see <http://www.doleta.gov/performance/results/pdf/PY2012WIATrends.pdf>.

<sup>221</sup> ETA NPRM, *supra* note 202.

<sup>222</sup> Senior Policy Research Associates, *PY 2012 WIA Trends Over Time*, U.S. Department of Labor Employment and Training Administration 26, <http://www.doleta.gov/performance/results/pdf/PY2012WIATrends.pdf> [hereinafter *WIA Trends Over Time*] (last visited June 24, 2015).

<sup>223</sup> This number is an estimate based on the average number of employees at five different community colleges multiplied by 56 (the 50 states, the District of Columbia, and American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and U.S. Virgin Islands). One college each came from the following states: Alabama, North Carolina, Virginia, Kentucky, and Colorado.

<sup>224</sup> *PY 2012* see <http://www.doleta.gov/performance/results/pdf/PY2012WIATrends.pdf>.

<sup>225</sup> ETA NPRM, *supra* note 202.

<sup>226</sup> *WIA Trends Over Time*, *supra* note 213, at 26.

<sup>227</sup> This is an estimate based on the assumption that there is usually one point of contact per One-Stop. See *Regional, State, and Local Contacts*, U.S. Department of Labor Employment and Training Administration, <http://wdr.doleta.gov/contacts/> (last visited June 24, 2015).

<sup>228</sup> *Senior Community Service Employment Program*, U.S. Department of Labor Employment and Training Administration, <http://www.doleta.gov/seniors/> (last updated Apr. 18, 2014).

<sup>229</sup> *Workforce System Results*, *supra* note 188, at 2.

<sup>230</sup> *PY 2012* see <http://www.doleta.gov/performance/results/pdf/PY2012WIATrends.pdf>.

<sup>231</sup> See *Total Active National Emergency Grant Awards by State*, U.S. Department of Labor

Employment and Labor Administration, [http://www.doleta.gov/neg/neg\\_map\\_data.cfm](http://www.doleta.gov/neg/neg_map_data.cfm) (last updated Aug. 11, 2014).

<sup>232</sup> *WIA Trends Over Time*, *supra* note 213, at 32.

<sup>233</sup> This number is an estimate based on the average number of full-time employees from fourteen boards. The fourteen boards include three from North Carolina, three from West Virginia, one from Virginia, three from Washington, three from Wisconsin, and one from Illinois.

<sup>234</sup> *PY 2011* announcement, see [http://www.doleta.gov/grants/pdf/sga\\_dfa\\_py\\_11\\_02\\_final\\_1\\_11\\_2012.pdf](http://www.doleta.gov/grants/pdf/sga_dfa_py_11_02_final_1_11_2012.pdf).

<sup>235</sup> *Reentry Employment Opportunities (REO)*, Department of Labor Employment and Training Administration, [http://www.doleta.gov/REO/trainingtowork\\_grantees.cfm](http://www.doleta.gov/REO/trainingtowork_grantees.cfm) (last accessed June 24, 2015).

<sup>236</sup> *Notice of Availability of Funds and Solicitation for Grant Applications for Reintegration of Ex-Offenders (RExO) Adult Generation 5*, U.S. Department of Labor Employment and Training Administration 6, [http://www.doleta.gov/grants/pdf/sga\\_dfa\\_py\\_11\\_02\\_final\\_1\\_11\\_2012.pdf](http://www.doleta.gov/grants/pdf/sga_dfa_py_11_02_final_1_11_2012.pdf) (last visited June 24, 2015).

<sup>237</sup> This number is an estimate based on the average number of full-time employees at grantee organizations (17) multiplied by the average number of full-time employees at 11 Training to Work 2 grantees (32.64).

<sup>238</sup> *PY 2011*, [http://www.doleta.gov/business/pdf/H-1B\\_TST\\_R1-R2\\_Grant\\_Summaries\\_Final.pdf](http://www.doleta.gov/business/pdf/H-1B_TST_R1-R2_Grant_Summaries_Final.pdf).

<sup>239</sup> *Overview of the H-1B Technical Skills Training (TST) Grants*, U.S. Department of Labor Employment and Training Administration 1, [http://www.doleta.gov/business/pdf/H-1B\\_TST\\_R1-R2\\_Grant\\_Summaries\\_Final.pdf](http://www.doleta.gov/business/pdf/H-1B_TST_R1-R2_Grant_Summaries_Final.pdf) (last visited June 24, 2015). This is the most recent data available and assumes no variation from year to year of total national programs, although the names of the individual grant programs may shift from year to year. Similar grant activities continue from year to year, even if they are not these same grants.

<sup>240</sup> *Id.* This number is an estimate based on the total number of each grantee's projections.

<sup>241</sup> This number is an estimate based on the average number of full-time employees at six grantees (21.5) multiplied by the number of recipients (36).

<sup>242</sup> 2011, <http://manufacturing.gov/docs/2011-jobs-accelerator-overviews.pdf>.

<sup>243</sup> *Overview of the H-1B Jobs and Innovation Accelerator Challenge (Jobs Accelerator) Grants*, U.S. Department of Labor Employment and Training Administration 1, [http://www.doleta.gov/business/pdf/H-1B\\_Jobs\\_Accelerator\\_R1-R2\\_Project\\_Summaries\\_FINAL.pdf](http://www.doleta.gov/business/pdf/H-1B_Jobs_Accelerator_R1-R2_Project_Summaries_FINAL.pdf) (last visited June 24, 2015).

<sup>244</sup> See *The 2011 Jobs and Innovation Accelerator Challenge*, [manufacturing.gov](http://manufacturing.gov/docs/2011-jobs-accelerator-overviews.pdf), <http://manufacturing.gov/docs/2011-jobs-accelerator-overviews.pdf> (last visited June 24, 2015).

<sup>245</sup> This number is an estimate based on the average number of full-time employees at six grantees.

<sup>246</sup> *FY 2015 Congressional Budget Justification*, U.S. Department of Labor 74, <http://www.dol.gov/dol/budget/2015/PDF/CBJ-2015-V1-04.pdf> (last visited June 24, 2015).

<sup>247</sup> See *Workforce System Results*, *supra* note 188, at 2. This number was derived from adding the number of beneficiaries of the Indian and Native American Adult Program and the program for Indian and Native American Youth.

<sup>248</sup> This number is an estimate based on the assumption that American Indian and Alaskan Natives make up 1.6% of the total number of non-Federal full-time employees as with the total population.

<sup>249</sup> See *National Farmworker Jobs Program*, U.S. Department of Labor Employment and Training Administration, <http://www.doleta.gov/>

Table 2, below, presents the compensation rates for the occupational categories expected to experience an increase in level of effort (workload) due to the proposed rule. The Department used mean hourly wage rates from the Bureau of Labor Statistics' Occupational Employment Statistics (OES) program for private, State and local employees.<sup>258</sup> The Department adjusted the wage rates using a loaded wage factor to reflect total compensation, which includes health and retirement benefits. For these State and local sectors, the Department used a loaded wage factor of 1.55, which represents the ratio of total compensation to wages.<sup>259</sup> The Department then multiplied the loaded wage factor by each occupational category's wage rate to calculate an hourly compensation rate. The Department used the hourly compensation rates presented in Table 2 extensively throughout this document to calculate the estimated labor costs for each provision. This analysis uses the wages of managers and computer programmers and the Federal minimum wage for beneficiaries. Throughout this analysis, the Department assumes Equal Opportunity Officers (EO Officers), at

*Farmworker/html/NFJP\_factsheet.cfm* (last visited June 24, 2015).

<sup>250</sup> *Workforce System Results*, *supra* note 188, at 2.

<sup>251</sup> This number is an estimate based on the average number of full-time employees at state-level Department of Labor equivalents multiplied by the number of grantees.

<sup>252</sup> *FY 2016 Department of Labor Budget in Brief*, U.S. Department of Labor 14, <http://www.dol.gov/dol/budget/2016/PDF/FY2016BIB.pdf> (last visited June 24, 2015).

<sup>253</sup> *Workforce System Results*, *supra* note 188, at 2.

<sup>254</sup> This number is based on the average number of employees at twenty-three grantees multiplied by the number of grantees.

<sup>255</sup> This number was provided by the Apprenticeship Program Office at the Department of Labor.

<sup>256</sup> *Registered Apprenticeship National Results: Fiscal Year 2014*, U.S. Department of Labor Employment and Training Administration, [http://doleta.gov/oa/data\\_statistics.cfm](http://doleta.gov/oa/data_statistics.cfm) (last updated Feb. 23, 2015). In FY 2014, more than 170,500 individuals nationwide entered the apprenticeship system. We estimate in FY 2014, 5.9% (9,488 active female apprentices/159,773 total active apprentices in the Registered Apprenticeship Partners Information Management Data System (RAPIDS) database) of active apprentices were women.

<sup>257</sup> This number is an estimate based on the average number of paid employees per firm (4.43) multiplied by the number of recipients. See *Statistics about Business Size (including Small Business) from the U.S. Census Bureau*, U.S. Census Bureau, <http://www.census.gov/econ/smallbus.html> (last visited June 24, 2015).

<sup>258</sup> [http://www.bls.gov/oes/current/oes\\_nat.htm](http://www.bls.gov/oes/current/oes_nat.htm).

<sup>259</sup> Discerning the number of State and local-sector employees and private-sector employees at the local level is difficult; therefore, the CRC used the State and local-sector loaded wage factor (1.55) instead of the private-sector wage factor (1.42) for all employees to avoid underestimating the costs.

both the state and local level, are managers. This assumption is based upon our experience with recipients combined with the proposed language in the NPRM in which the Department states that the EO Officer must report directly to the Governor or the chief operating officer or equivalent of the recipient.<sup>260</sup> Further, the Department is aware that administrative support workers may perform some of the functions where the need for computer

programmers is indicated. However, since there is currently no data to indicate the proportion of computer programmer versus administrative support staff that would be used for the various functions, this analysis uses the wages for computer programmers in estimating the NPRM costs, thereby providing an upper-bound of cost for these functions. The beneficiary wage rate in Table 2 is used in this document to calculate the estimated costs to

beneficiaries throughout this document. Throughout this analysis, the Department assumes that beneficiaries would be paid at least the Federal minimum wage.

The Department invites comments regarding data sources for the wages and the loaded wage factors that reflect employee benefits used in the analysis as well as other assumptions used in calculating burden and costs.

TABLE 2—CALCULATION OF HOURLY COMPENSATION RATES

Position	Mean hourly wage A	Loaded wage factor B	Hourly compensation rate C = A × B
Managers <sup>261</sup> .....	\$56.35	1.55	\$87.34
Computer Programmers <sup>262</sup> .....	39.75	.....	61.61
Beneficiaries <sup>263</sup> .....	7.25	.....	7.25

4. Subject-by-Subject Benefit-Cost Analysis

The Department’s analysis below covers the expected impacts of the following proposed provisions of the WIOA NPRM against the baseline of practice under WIA Section 188 and implementing regulations at part 37.

The Department emphasizes that many of the NPRM provisions are also existing requirements under WIA. For example, 29 CFR 38.5 prohibits recipients from excluding an individual from participation in, denial of the benefits of, discrimination in or denial of employment in the administration of or in connection with, any WIOA Title I-financially assisted program or activity on the basis of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries only, citizenship status or participation in any WIOA Title I-financially assisted program or activity. The NPRM retains these requirements, but revises the language to make it easier to read, and also provides separate sections in the rule defining discrimination based on national origin, sex, and citizenship status to aid recipients in meeting their obligations.<sup>264</sup> Accordingly, this regulatory analysis focuses on “new” benefits and costs that can be attributed to revisions of existing obligations and new requirements contained in this NPRM. Much of WIA’s infrastructure and operations are carried forward under the WIOA and therefore are not

considered “new” cost burdens under this proposed rulemaking.

Request for Comments

This NPRM implements the nondiscrimination and equal opportunity provisions of Section 188 of WIOA, and requests comments about the burden and costs associated with this NPRM including from: State and local governments, public interest groups, current and potential grant applicants for and recipients of WIOA Title I-federal financial assistance (particularly current and potential providers of training services), current and potential beneficiaries of such Federal financial assistance, and the public.

Discussion of Impacts

In this section, the Department presents a summary of the costs associated with the new requirements of the regulations.

The NPRM proposes revising 29 CFR part 38, issuing new regulations that set forth the requirements that recipients must meet in fulfilling their obligations under Section 188 of WIOA to ensure nondiscrimination and equal opportunity in WIOA Title I-federally assisted programs, services, aid, and activities.

There will be approximately 34,458 recipients of WIOA Title I federal financial assistance annually who will serve approximately 56,321,699

beneficiaries annually with approximately 881,009 non-Federal employees of recipients annually based on our informed estimates.<sup>265</sup>

Cost of Regulatory Familiarization

Agencies are required to include in the burden analysis the estimated time it takes for recipients to review and understand the instructions for compliance.<sup>266</sup>

Based on its experience with recipients’ compliance with the laws the Civil Rights Center (CRC) enforces and the mandate of the existing and revised regulations that each recipient has an EO Officer (see 29 CFR 38.28 and 38.29), CRC believes that EO Officers at each recipient will be responsible for understanding or becoming familiar with the new requirements. Therefore, the Department estimates that it will take 4 hours for the EO Officer at each recipient to read the rule. Consequently, the estimated burden for rule familiarization for these managers is 137,832 hours (34,458 × 4 hours). The Department calculates the total estimated cost as \$12,038,247 (137,832 × \$87.34/hour).<sup>267</sup>

The following is a description of additional costs and burdens as a result of this NPRM. It follows the organization of the NPRM for ease of reference.

<sup>260</sup> See proposed §§ 38.28–38.31.

<sup>261</sup> BLS OES, May 2014, 11–1021 General and Operations Managers (<http://www.bls.gov/oes/current/oes111021.htm>).

<sup>262</sup> BLS OES, May 2014, 15–1131 Computer Programmers (<http://www.bls.gov/oes/current/oes151131.htm>).

<sup>263</sup> This is the current Federal minimum wage. 29 U.S.C. 206(a)(1)(C).

<sup>264</sup> See 29 CFR 38.9, 38.7, and 38.11.

<sup>265</sup> See Table 1 for a breakdown of these numbers.

<sup>266</sup> See 5 CFR 1320.3(b)(1)(i).

<sup>267</sup> Throughout this proposed rule, the Department assumes that EO Officers are managers.



### Subpart A—General Provisions

#### Discrimination Prohibited Based on Pregnancy § 38.8

The rule proposes a new § 38.8 titled, “Discrimination Prohibited Based on Pregnancy.”

The language in the NPRM requires recipients in certain situations to provide reasonable accommodations or modifications to a pregnant applicant or participant who is temporarily unable to participate in some portions of a WIOA Title I-financially assisted training program or activity because of pregnancy, childbirth, and/or related medical conditions, when such accommodations or modifications are provided, or are required to be provided, by a recipient’s policy or by other relevant laws, to other applicants or participants not so affected but similar in their ability or inability to participate.

To determine the burden of this accommodation provision, the Department estimated the number of beneficiaries of WIOA Title I-financially assisted programs and activities and the number of employees of recipients of WIOA Title I-financially assisted programs who may need an accommodation during pregnancy in a year. No specific data sets detail the characteristics of beneficiaries and employees of WIOA Title I-financially assisted programs or activities relating to pregnancy. Thus, the Department relied on the data sets available from the Employment and Training Administration for beneficiaries of WIOA Title I-financially assisted training programs, including the Job Corps Program, and estimated the number of employees of recipients and the data sets available for the general population and general labor force.<sup>268</sup> The Department believes that the characteristics of the general labor force are similar to the WIOA Title I-financially assisted workforce.

Not every pregnant employee of a recipient in the WIOA Title I-financially assisted workforce will require an accommodation that might involve more than a *de minimis* cost. In fact, the Department believes most will not. Many will have no medical condition associated with their pregnancies that require such accommodation. Providing light duty or accommodations for pregnancy generally involves adjusting work schedules or allowing more frequent breaks, both of which the Department believes would incur little

<sup>268</sup> Note that the analysis used is modeled after that used by OFCCP in its Sex Discrimination NPRM issued on January 30, 2015 at 80 FR 5246.

to no additional cost in most cases. However, for those who do have such conditions, the positions held by employees or training opportunities that beneficiaries may participate in that require such accommodation generally involve physical exertion or standing; such positions are likely to be found in the job categories of craft workers, operatives, laborers, and service workers. The majority of employees of recipients and beneficiaries of WIOA Title I-financial assistance will not be undertaking employment or training requiring accommodations for pregnancy related medical conditions.

Similarly, only beneficiaries who participate in the job training opportunities for occupations that require physical exertion or standing will require accommodations. For example, the number of women who are pregnant of the individuals who are beneficiaries of unemployment insurance will not need accommodations as services are obtained in large part electronically. As stated above, providing light duty or accommodation for pregnancy involves adjusting schedules or allowing more frequent breaks at little or no additional cost. However, a small percentage of the adult women who will annually receive training from eligible training providers, on-the-job training programs or Registered Apprenticeship programs and a small percentage of the female students who will receive Job Corps Center services annually will participate in training opportunities that may require physical exertion or standing for long periods of time and may need accommodations. The Department estimates that of the women who are employees of recipients or participants in training programs or in Job Corps Centers, 21 percent work in or are in training for job categories likely to require accommodations that might involve more than a *de minimis* cost.<sup>269</sup>

Because these data do not indicate gender demographics, the Department used data from the Bureau of Labor Statistics that indicate that 47 percent of the workforce is female.<sup>270</sup> Therefore, the Department estimates that 57,666 (122,693 × .47) adult women are beneficiaries of eligible training providers and on the job training

<sup>269</sup> Note that the analysis used is modeled after that used by OFCCP in their Sex Discrimination NPRM issued on January 30, 2015 at 80 FR 5246, 5248. OFCCP based this estimation on data from the Employer Information Report EEO-1. See 80 FR 5246, 5262.

<sup>270</sup> *Women in the Labor Force: A Databook*, BLS Reports, available at <http://www.bls.gov/cps/wlf-databook-2012.pdf> (last accessed Oct. 6, 2014).

employers annually.<sup>271</sup> In addition, the Department estimates that 10,060 (170,500 × .059) adult women were beneficiaries of Registered Apprenticeship programs annually.<sup>272</sup> Moreover, the Department estimates that there are 43,851 girls and women who are annual beneficiaries of the Job Corps program (109,627 × .40).<sup>273</sup> In addition, the Department estimated the number of individuals employed by recipients of WIOA Title I financial assistance to be 528,303 non-Federal employees of eligible training providers and on-the-job training programs, Registered Apprenticeship programs, and Job Corps Centers. (439,936 + 85,317 + 3,050). Because these data do not indicate gender demographics, the Department again used data from the Bureau of Labor Statistics that indicate that 47 percent of the workforce is female.<sup>274</sup> Using these assumptions there are 248,302 (528,303 × .47) adult women non-Federal employees of recipients.

Based on these data, in the following paragraphs, the Department estimates the approximate number of beneficiaries and employees in (1) eligible training provider programs and on-the-job training programs, (2) Job Corps Centers and (3) Registered Apprenticeship Programs who are pregnant in a given year. Following the analysis adopted by the Office of Federal Contract Compliance Programs (OFCCP) to calculate similar costs, the Department turned to data from the U.S. Census (Census). U.S. Census American Fact Finder does not report on pregnancy, but does report on births. Census data also shows whether the mother was in the labor force. The definition of labor force used by Census includes individuals in the civilian labor force who are employed or unemployed, and the term unemployed, as used by Census, includes those who were actively looking for work during the last four weeks and were available to accept a job. The Department determined that this number would be the best data

<sup>271</sup> Provided by the Employment and Training Administration (ETA), U.S. Department of Labor, from the burden analysis contained in WIOA NPRM implementing Titles I and III available at <https://www.federalregister.gov/articles/2015/04/16/2015-05530/workforce-innovation-and-opportunity-act> [hereinafter ETA NPRM] (last visited June 24, 2015).

<sup>272</sup> 5.9 percent of active beneficiaries in the Registered Apprenticeship program in 2014 were female. Registered Apprenticeship Partners Information Management Data System (RAPIDS) managed by Department of Labor staff only.

<sup>273</sup> Forty percent of the students benefiting from Job Corps programs annually are girls and young women. See [http://www.jobcorps.gov/libraries/pdf/who\\_job\\_corps\\_serves.sflb](http://www.jobcorps.gov/libraries/pdf/who_job_corps_serves.sflb).

<sup>274</sup> *Women in the Labor Force: A Databook*, BLS Reports, available at <http://www.bls.gov/cps/wlf-databook-2012.pdf> (last accessed Oct. 6, 2014).

available to use to estimate the percentage of participants in programs and activities receiving financial assistance from Title I of WIOA as well as employees of WIOA Title I-financially assisted programs and activities. As the Department believes these are the best data available, the Department used the ratio of births among working and non-working mothers to determine the pregnancy rate of women in the workforce. Thus, the Department determined that the pregnancy rate for women in the workforce is approximately 61 percent of the rate for women in the general population, translating to a pregnancy rate of 6.7 percent of women who are beneficiaries of WIOA Title I-financially assisted programs and activities and employees of WIOA Title I-financially assisted programs and activities.<sup>275</sup>

### Training Program Beneficiaries

As calculated above, approximately 57,666 women annually participate in eligible training provider or on-the-job training provider programs that receive WIOA Title I financial assistance. Of this number, using the pregnancy rate data above, 3,864 ( $57,666 \times .067$ ) women might be pregnant annually. Of this number, the Department estimates that no more than 21 percent, or 811 women ( $.21 \times 3,864$ ), would be participating in job training categories likely to require accommodations that might involve more than a *de minimis* cost.

### Registered Apprenticeship Beneficiaries

As calculated above, approximately 10,060 women annually benefit from Registered Apprenticeship programs. Of this number, using the pregnancy rate data above, 674 ( $10,060 \times .67$ ) women might be pregnant annually. Of this number, the Department estimates that no more than 21 percent, or 142 women ( $.21 \times 674$ ), would be participating in job training categories likely to require accommodations that might involve more than a *de minimis* cost.

<sup>275</sup> U.S. Census Bureau, *American Fact Finder*, Women 16 to 50 Years Who Had a Birth in the Past 12 Months by Marital Status and Labor Force Status, 2009 to 2011 American Community Survey 3-Year Estimates, available at [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_11\\_3YR\\_B13012&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_3YR_B13012&prodType=table) (last accessed Feb. 12, 2015). The data table reports birth rates for women in the labor force at 5.1 percent, compared to women not in the labor force at 8.4 percent. Comparing the two rates (5.1 percent to 8.4 percent), the birth rate of women in the labor force was 61 percent that of women not in the labor force. Therefore, multiplying the pregnancy rate among women of working age, 10.9 percent, by 61 percent results in a 6.7 percent pregnancy rate.

### Job Corps Program Beneficiaries

Job Corps does not keep data on the percentage of students who are pregnant. The Job Corps program serves youth and young adults between the ages of 16 and 24.<sup>276</sup> Forty percent of Job Corps students or approximately 43,851 are female.<sup>277</sup> Applying the .067 rate of pregnancies used above to all female Job Corps students approximately 2,938 of them may become pregnant annually ( $43,851 \times .067$ ). The Job Corps Program has three stages through which participants move: Career Preparation Period, Career Development Period, and Career Transition Period. Not all of those students will be in the Career Development Period of their Job Corps Center experience, which is the stage when they would participate in technical training and most need accommodations. The Department estimates that at any given time, no more than a third of students are in the Career Development Period, so approximately 970 ( $2,938 \times .33$ ) pregnant young women would be in this part of their educational experience annually. Of this number, the Department estimates that no more than 21 percent would be participating in job training that requires physical exertion or standing for long periods of time, so at most 204 ( $970 \times .21$ ) Job Corps students may be participating in job training categories likely to require accommodations that might involve more than a *de minimis* cost.

### Non-Federal Employees of Recipients

The Department determined that there are approximately 528,303 non-Federal employees who work for recipients of training programs, Job Corps Programs and Registered Apprenticeships. Because these data do not indicate gender demographics, CRC used data from the Bureau of Labor Statistics that indicate that 47 percent of the workforce is female.<sup>278</sup> Since approximately 248,302 of the employees of recipients are women, 16,636 ( $248,302 \times .067$ ) may be pregnant annually based on the data

<sup>276</sup> Job Corps Eligibility Information available at [http://www.jobcorps.gov/AboutJobCorps/program\\_design.aspx](http://www.jobcorps.gov/AboutJobCorps/program_design.aspx).

<sup>277</sup> Workforce System Results, for the Quarter ending June 30, 2013, ETA, DOL. Annual data for the four quarters ending June 2013. Includes the number of students active on the start date, number of students enrolled during the timeframe, number of graduates separated prior to the start date and in the placement service window during the timeframe, and number of former enrollees separated prior to the start date and in the placement service window during the timeframe.

<sup>278</sup> *Women in the Labor Force: A Databook*, BLS Reports, available at <http://www.bls.gov/cps/wlf-databook-2012.pdf> (last accessed Oct. 6, 2014).

provided above. Since the majority of the employees of recipients have office jobs that do not require physical exertion or standing, the Department anticipates that no more than 21 percent,<sup>279</sup> or 3,494 women ( $.21 \times 16,636$ ) of these pregnant employees who are trainers at One Stop Career Centers or at Job Corps Centers, may be participating in job training categories likely to require accommodations that might involve more than a *de minimis* cost.

Therefore, a total of 4,651 women ( $811 + 142 + 204 + 3,494$ ) who are beneficiaries or non-Federal employees of WIOA Title I-financially assisted programs may be participating in job training categories likely to require accommodations that might involve more than a *de minimis* cost.

### Limited Need for Accommodations

Reports from NIH show that the incidence of medical conditions during pregnancy that require accommodations ranges from 0.5 percent (placenta previa) to 50 percent (back issues).<sup>280</sup> Thus, the Department estimates that of the approximately 4,651 (811 job training beneficiaries + 142 Registered Apprenticeship beneficiaries + 204 Job Corps beneficiaries + 3,494 non-Federal employees of recipients) women beneficiaries and employees in positions that may require physical exertion or standing according to our previous calculations, 50 percent (2,326) may require some type of an accommodation or light duty.<sup>281</sup>

The types of accommodations needed during pregnancy also vary. They range from time off for medical appointments and more frequent breaks to stools for sitting and assistance with heavy lifting.<sup>282</sup> Reports from the W.K. Kellogg Foundation on women's child bearing experiences and the National Women's Law Center on accommodating pregnant workers state that the costs associated with accommodating pregnant workers are minimal and generally involve schedule adjustments or modified work

<sup>279</sup> See 80 FR 5262 (January 30, 2015).

<sup>280</sup> S. Malmqvist et. al., *Prevalence of low back and pelvic pain during pregnancy* (Abstract), J. Manipulative Physiological Therapy, National Center for Biotechnology Information (2012), available at <http://www.ncbi.nlm.nih.gov/pubmed/22632586> (last accessed Oct. 6, 2014).

<sup>281</sup> This is the same data used by OFCCP in *Discrimination on the Basis of Sex*, Proposed Rule 80 FR 46 (January 30, 2015).

<sup>282</sup> *Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities: Meeting of the U.S. Equal Emp. Opportunity Comm'n 8* (Feb. 15, 2012) (statement of Dr. Stephen Benard, Professor of Sociology, Indiana University), available at <http://www.eeoc.gov/eeoc/meetings/2-15-12/transcript.cfm> (last accessed Oct. 6, 2014).

duties.<sup>283</sup> One study found that when faced with a pregnancy-related need for accommodation, between 62 percent and 74 percent of pregnant women asked their employer to address their needs. The study further found that between 87 percent and 95 percent of the pregnant women who requested an adjustment to their work schedule or job duties worked for employers that attempted to address those requests. The study specifically found that 63 percent of pregnant women who needed a change in duties such as less lifting or more sitting asked their employers to address that need, and 91 percent of those women worked for employers that attempted to address their needs.<sup>284</sup> Based on this study, the Department believes that most employers and training providers do provide some form of accommodation to employees and participants when requested.

To determine the cost of accommodation or light duty imposed by the proposed rule, the Department considered the types of light duty or accommodations needed for employees of recipients of WIOA Title I-financial assistance and participants in WIOA Title I-financially assisted programs and activities. Generally, providing light duty or accommodation for pregnancy involves adjusting work schedules or allowing more frequent breaks. The Department believes that these accommodations would incur little to no additional cost.

Additional accommodations may involve either modifications to work environments (providing a stool for sitting rather than standing) or to job duties—for example, lifting restrictions. In making such an accommodation, recipients of WIOA Title I financial assistance have discretion regarding how they would make such modifications. For example, a recipient may provide an employee with an existing stool, or a recipient may have other employees assist when heavy lifting is required. To determine the cost of such accommodations, the Department referred to the Job Accommodation Network (JAN). JAN reports that the average cost of accommodation is \$500.<sup>285</sup>

<sup>283</sup> National Women's Law Center & A Better Balance, *It Shouldn't Be a Heavy Lift: Fair Treatment for Pregnant Workers* 12 (2013), available at [http://www.nwlc.org/sites/default/files/pdfs/pregnant\\_workers.pdf](http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf) (last accessed Dec. 30, 2014).

<sup>284</sup> Eugene Declerq et al., W.K. Kellogg Foundation, *Listening to Mothers III: New Mothers Speak Out*, 36, (2013).

<sup>285</sup> Beth Loy, *Job Accommodation Network, Workplace Accommodations: Low Cost, High Impact*, available at <http://askjan.org/media/lowcosthighimpact.html> (last updated Sept. 1, 2014) (last accessed Oct. 6, 2014).

As stated above, 63 percent of pregnant women who needed a change in duties related to less lifting or more sitting requested such an accommodation from their employers. Thus, the Department estimates that 1,465 women ( $2,326 \times .63$ ) who may require accommodations would have made such a request, and 91 percent, or 1,333 of those requests ( $1,465 \times .91$ ) would have been addressed. In addition, the Department assumes that of the remaining 37 percent ( $2,326 \times .37 = 861$  women) who did not make such a request for a pregnancy accommodation, had they made the request, the needs of 91 percent of them ( $861 \times .91 = 784$  women) would also have been addressed. Thus, this proposed rule would require recipients of WIOA Title I financial assistance to accommodate the remaining 9 percent of pregnant women whose needs were not addressed. Therefore, the Department estimates that the cost, accounting for those pregnant women who made requests and those additional women who could make requests, would be \$104,500 ( $((1,465 - 1,333 = 132) + (861 - 784 = 71)) \times \$500$ ). This is a first year cost and a recurring cost.

The Department believes that this cost estimate may be an overestimate because recipients with 15 or more employees are covered by a similar requirement found in Title VII and 36 states have requirements that apply to employers with fewer than 15 employees.<sup>286</sup> Although the Department seeks comments on all aspects of its calculation of burden and costs, the agency specifically seeks comments on the burden associated with providing accommodations to pregnant employees.

#### Discrimination Prohibited Based on National Origin, Including Limited English Proficiency § 38.9

The NPRM proposes language regarding the limited circumstances

<sup>286</sup> State laws covering employers with one employee: Alaska, Colorado, Hawaii, Maine, Michigan, Minnesota, Montana, New Jersey, North Dakota, Oklahoma, Oregon, South Dakota, Vermont, and Wisconsin; state laws covering employers with two employees: Wyoming; state laws covering employers with three employees: Connecticut; state laws covering employers with four employees: Delaware, Iowa, Kansas, New Mexico, New York, Ohio, Pennsylvania, and Rhode Island; state laws covering employers with five employees: California and Idaho; state laws covering employers with six employees: Indiana, Massachusetts, Missouri, New Hampshire, and Virginia; state laws covering employers with eight or more employees: Kentucky, Tennessee, and Washington; state laws covering employers with nine or more employees: Arkansas; state laws covering employers with 12 or more employees: West Virginia. In addition, the District of Columbia and Puerto Rico's laws cover employers with one employee.

when a limited English proficient (LEP) individual may elect to use their own interpreter and how that choice must be documented by the recipient. In § 38.9(f)(2), the proposed rule states that an accompanying adult may interpret or facilitate communication when “the information conveyed is of minimal importance to the services to be provided or when the LEP individual specifically requests that the accompanying adult provides language assistance, the accompanying adult agreed to provide assistance, and reliance on that adult for such assistance is appropriate under the circumstances.” The NPRM goes on to state that, “when the recipient permits the accompanying adult to provide such assistance, it must make and retain a record of the LEP individual's decision to use their own interpreter.” There is currently no data available regarding the number of LEP individuals who are beneficiaries of recipients and the Department cannot determine how often an LEP individual will request that the accompanying adult provide language assistance, the accompanying adult agrees to provide it, and when reliance on that adult is appropriate. However, the Department estimates that all of these conditions will be met infrequently, creating a *de minimis* cost. Therefore, the Department seeks comment on any potential sources of data on the number of LEP individuals who are beneficiaries of recipients who would decide to use their own interpreter.

In addition, provisions are included in § 38.9(g) regarding a recipient's obligations to provide translation of vital information. Section 38.9(g)(1) addresses that obligation for languages spoken by a significant number or portion of the population eligible to be served, or likely to be encountered, stating that “a recipient must translate vital information in written materials into these languages and make the translations readily available in hard copy, upon request, or electronically such as on a Web site.” Importantly, written training materials offered or used within employment-related training programs as defined under this part are excluded from these requirements. Section 38.9(g)(2) addresses the obligations of recipients for languages not spoken by a significant number or portion of the population eligible to be served, or likely to be encountered, stating that “a recipient must make reasonable steps to meet the particularized language needs of LEP individuals who seek to learn about, participate in, and/or access the aid,

benefit, service or training that the recipient provides.” This section also allows that vital information may be conveyed orally if not translated. These requirements are contained in a DOL LEP guidance issued in 2003<sup>287</sup> and regulations implementing Section 188 of WIA contained at 29 CFR 35.37, which address a recipient’s language access requirements. However, their more detailed inclusion in the regulations is new. The Department is aware that, although these obligations are not new to recipients, not all recipients currently provide language access consistent with these proposed requirements; as a result, many recipients may incur cost associated with the burden to come into compliance with these provisions. The Department cannot determine with accuracy based on its enforcement experiences how many recipients are currently meeting their obligations as to LEP individuals, nor is it aware of data from which to base a calculation for these costs. Similarly, the Department is unable to determine what information each recipient will determine is vital, and thus needs to be translated, or what language(s) they would be translated into, because both factors are based on individual recipient assessments. The Department seeks comment on the current compliance status of recipients as to their LEP obligations, the availability of data related to the languages for which translations would be required, and a method by which to estimate the quantity of vital information that recipients generally will need to translate to be in compliance. Furthermore, as discussed in § 38.9, the Department has not defined “significant number or portion of the population,” and is considering other methods of determining when the obligations related to that determination would be triggered in this section. The Department welcomes comments on ways to calculate any new burden and costs incurred as a result of these proposed provisions.

*Subpart B—Recordkeeping and Other Affirmative Obligations of Recipients*

*Recipients’ Obligations To Publish Equal Opportunity Notice § 38.36*

The NPRM proposes changes to the specific language provided by the Department for recipients to use in the equal opportunity notice and poster that they are required to post prominently in physical locations and on the recipient’s Web site.<sup>288</sup> The changes state that “sex discrimination includes pregnancy,

childbirth and related medical conditions, transgender status, and gender identity; and that national origin discrimination may include limited English proficiency.”<sup>289</sup> This notice and other notices throughout this NPRM are required to be provided in English as well as appropriate languages other than English. The Department will make translations of this notice available to recipients in the ten most frequently spoken languages in the U.S. other than English. The NPRM also proposes language in the poster stating that the CRC will accept complaints via U.S. Mail and email at an address provided on the CRC’s Web site.<sup>290</sup>

The NPRM requires that the notice be placed in employee and participant handbooks, including electronic and paper form if both are available, provided to each employee and placed in each employee’s file, both paper and electronic, if both are available.<sup>291</sup>

The Department estimates that it would take each EO Officer approximately 15 minutes to print out the notices, and another 15 minutes to ensure that new notices and posters are disseminated. Dissemination includes posting the notice in conspicuous locations in the physical space of the recipient as well as posting it on appropriate Web pages on the recipient’s Web site. Consequently, the estimated first year dissemination burden is 17,229 hours (34,458 recipients × .5 hours). The Department calculated the total estimated first year and dissemination cost for the EO Officers as \$1,504,781 (17,229 × \$87.34/hour). The Department also calculated that each EO Officer will make thirty copies of the notice (this assumes ten copies each in no more than three of the appropriate languages) for posting in his or her establishment for a first year operational and maintenance cost of \$82,699 (34,458 × \$0.08 × 30).

Additionally, the Department assumes it will take a computer programmer 30 minutes to place the notice on appropriate Web pages of the recipient’s Web site. The Department assumes that each recipient has one Web site. The Department calculates the first year burden to update their Web sites to be an additional 17,229 hours (34,458 × .5 hours) and the first year costs for recipients to update their Web sites to be an additional \$1,061,479 (17,229 × \$61.61/hour). The Department also calculates it will take an EO Officer 30 minutes to disseminate to all employees of recipients a copy of the notice and

place a copy in the employees’ files. The Department estimates an additional first year burden for dissemination to be 17,229 hours (34,458 × .5 hours) and an additional first year cost to be \$1,504,781 (17,229 × \$87.34/hour).

Moreover, there is a recurring burden each time an employee is hired. The Department assumes a 1.5 percent<sup>292</sup> employee turnover rate per year for a total of 13,215 new employees the second and future years (881,009 (total number of recipients’ employees) × .015). The Department estimates it will take an EO Officer fifteen minutes to disseminate the notice to only new recipient’s employees each year, which equates to a burden of 8,615 hours (34,458 × .25 hours) and the total recurring cost to be \$752,434 (8,615 hours × \$87.34). The first year operation and maintenance cost for printing the two copies of the notice (one to disseminate to the employee and one to place in their file) for the first year is \$140,961 (881,009 total number of recipients’ employees × \$0.08 × 2) and the second and future years operation and maintenance cost is \$2,114 (13,215 new employees × \$0.08 × 2) for copies made for new employees each year.

*Data and Information Collection, Analysis, and Maintenance § 38.41*

Proposed paragraph (a)(2) adds “limited English proficient” and “preferred language” to the list of categories of information that each recipient must collect about each applicant, registrant, and participant. The proposal does not apply these data collection obligations to applicants for employment and employees of recipients because the obligation as to LEP individuals does not apply to those categories of individuals. This change is intended to ensure that recipients collect information related to serving LEP individuals. The Department believes that these terms best capture this information as to LEP individuals and is also used by several states with language access laws.<sup>293</sup> The

<sup>292</sup> <http://www.bls.gov/jlt/#news> State and local government preliminary “hires” data for February 2015.

<sup>293</sup> Pursuant to the DC Language Access Act, the DC Office of Human Rights requires covered entities to collect data on the number of LEP individuals served in an annual report. See Final rulemaking at 55 DCR 6348 (June 8, 2008); as amended by Final Rulemaking published at 61 DCR 9836 (September 26, 2014). The question on the DC Office of Human Rights Complaint Form for the purposes of capturing this information is “What language do you prefer to communicate in?” Available at <http://dcforms.dc.gov/webform/employment-intake-questionnaire-form> (last visited March 3, 2015). Hawaii passed their language access law in 2006 See Hawaii Rev. Stat. §§ 371–31 to 37. In California, the Dymally-Alatorre Bilingual Services Act

<sup>287</sup> 68 FR 32290, May 29, 2003.

<sup>288</sup> Proposed 29 CFR 38.35; 29 CFR 38.36(a)(1).

<sup>289</sup> Proposed 29 CFR 38.35.

<sup>290</sup> *Id.*

<sup>291</sup> Proposed 29 CFR 38.36(b).

Department calculates the cost of adding this category to the list of categories of information that each recipient must collect about each applicant and participant as *de minimis* for the recipient because they are already collecting demographic data from beneficiaries in several other categories and these additions will be added to this existing process. Further, it is estimated on average it will take beneficiaries 5 seconds to provide LEP information including preferred language, where applicable, voluntarily. This equates to a cost of \$567,131 ( $56,321,699 \times 5 \text{ seconds} = 281,608,495 / 60 = 4,693,475 \text{ minutes} / 60 = 78,225 \text{ hours} \times \$7.25 = \$567,131$ ).

For those recipients that are not already collecting this information,<sup>294</sup> the Department estimates that there will be a first year cost to each recipient of 1.5 hours of a computer programmer's personnel time to incorporate these new categories into an online form for data collection. The Department believes that all recipients use computer-based data collection methods, and the one-time burden is \$3,184,436 ( $34,458 \text{ recipients} \times 1.5 \text{ hours} = 51,687 \times \$61.61/\text{hour}$ ).

#### Required Maintenance of Records by Recipients § 38.43

The NPRM proposes language that specifies the types of records that need to be retained by a recipient when a complaint has been filed, and also requires that records be kept if a compliance review has been initiated. Records that must be kept include any type of hard-copy or electronic record related to the complaint or the compliance review.

The Department assumes that the only additional burden and associated cost would be in identifying any additional files that a recipient must retain beyond three years if they are under a compliance review. The Department further assumes this cost to be *de minimis*.

requires local agencies to provide language access to limited English-proficient speakers. Ca. Govt. Code § 7290–7299.8. The Bilingual Services Program at the California Department of Human Resources provides oversight, including conducting language surveys on implementation. <http://www.calhr.ca.gov/state-hr-professionals/Pages/Bilingual-Services.aspx>.

<sup>294</sup> Programs providing core and intensive services through the One Stop delivery system currently collect information regarding LEP status and some may be doing so voluntarily, however, we have no way of knowing how many recipients overall are currently collecting information from beneficiaries regarding LEP status, so we are including the cost to all recipients for this analysis.

#### Subpart C—Governor's Responsibilities To Implement the Nondiscrimination and Equal Opportunity Requirements of WIOA.

##### Governor's Oversight and Monitoring Responsibilities for State Programs § 38.51

Proposed § 38.51(b) requires the Governor to monitor on an annual basis the compliance of State Programs with WIOA Section 188 and this part. Under § 37.54(d)(2)(ii), Governors are currently required to “periodically” monitor compliance of recipients. The proposed annual monitoring requirement is intended to: (1) Enable the timely identification and elimination of discriminatory policies and practices, thereby reducing the number of individuals impacted by discrimination; (2) be consistent with ETA proposed regulations requiring annual oversight of One-Stop Career Centers;<sup>295</sup> and (3) establish a consistent State-level practice nationwide. It is anticipated that this change will pose burden on some Governors who are not already interpreting the term “periodically” in the current regulations to require annual oversight.

The Department anticipates that this change will not impose a burden on all states because approximately half of them are currently conducting this monitoring annually, pursuant to their Methods of Administration.<sup>296</sup> Thus, the Department estimates the burden would be imposed on 28 of the 56 States subject to this requirement that currently do not annually monitor their recipients for compliance with Section 188 of WIA. Of the states that do not conduct annual monitoring, CRC is aware that the monitoring is conducted on average every three years. So, for those 28 states, they will need to increase their monitoring to be two thirds more frequent. Based on CRC's experience and interaction with several states with varying populations and geographic sizes, the average amount of time that it takes to conduct this annual monitoring is approximately 4,000 total hours carried out by multiple people. The additional burden on each of the 28 states that previously conduct monitoring every three years versus every year is estimated to be 2,680 hours

<sup>295</sup> WIOA NPRM implementing Titles I and III available at <https://www.federalregister.gov/articles/2015/04/16/2015-05530/workforce-innovation-and-opportunity-act>.

<sup>296</sup> This is based on CRC's records of reporting and discussions with EO Officers for the states over the past few years.

( $4,000 \text{ hours} \times .67$ )<sup>297</sup> per state or 75,040 for all 28 states. The Department calculates the total estimated annual cost for states as \$6,553,994 ( $2,680 \text{ hours} \times 28 \text{ states} \times \$87.34/\text{hour}$ ) since the EO Officer and similar managers are likely to conduct the monitoring.

##### Governor's Obligation To Develop and Implement a Nondiscrimination Plan § 38.54

This rule changes the name “Methods of Administration” for the document described in § 37.54 to “Nondiscrimination Plan,” but retains the definition and contents of the document. Since the contents of the Plan do not change, the change of the title of the document is presumed to be incurred in the total cost of the issuance of the Plan. The Department welcomes comments on this assumption.

##### Subpart D—Compliance Procedures

##### Notice To Show Cause Issued to a Recipient § 38.66

The new language in § 38.66, paragraph (b), states that the Director may issue a Notice to Show Cause to a recipient “after a Letter of Findings and/or an Initial Determination has been issued, and after a reasonable period of time has passed within which the recipient refuses to negotiate a conciliation agreement with the Director regarding the violation(s).” The Department proposes this change to expand the circumstances in which the Director may issue a Notice to Show Cause. The proposal seeks to use the Notice to Show Cause at this later stage because it has been the Department's experience that, after issuing a letter of findings, the Governor or other recipients agree in principle to enter into a conciliation agreement that resolves the identified violations, but then frequently fail to respond to correspondence from the CRC regarding finalizing and signing the agreement. With proposed § 38.66(b), the Director could issue a Notice to Show Cause prior to issuing a Final Determination, providing Governors and other recipients another opportunity to take the corrective or remedial actions required by the Director to bring the recipient into compliance before enforcement proceedings are initiated. Recipients are already familiar with the Notice to Show Cause since it is currently described and contained in the implementing regulations found at 29 CFR 37.67, so these changes are slight, and the proposed language is

<sup>297</sup> Based on information from CRC's experience working with the states and asking less than 6 EO Officers these questions.

clear in terms of the new circumstances under which the Director can issue them. The Department estimates that it will issue at most two additional Show Cause Notices per year on average as a result of this change. As a result, the CRC estimates the burden incurred to be *de minimis* and invites comment on the burden associated with this provision.

**Required Elements of a Recipient's Complaint Processing Procedures § 38.72**

The NPRM proposes adding to the procedures that the recipient must adopt and publish the requirement that recipients provide complainants a copy of the notice of rights contained in § 38.35, along with the already-required initial written acknowledgement of

receipt of the complaint and notice of the complainant's right to representation. This requirement is designed to ensure that complainants are aware of their rights, including that they have the option of filing with the recipient or with CRC, and that they are aware of the deadlines applicable to filing a subsequent complaint with CRC once they file initially with the recipient.

The Department anticipates that this requirement, under which recipients provide complainants a copy of the notice of rights contained in § 38.35, is limited to the operational costs of making additional copies of the notice for this purpose, and the first year personnel cost of 30 minutes of the EO Officer's time, who is most likely to be

responsible for implementing this requirement, to include it in the documents routinely provided to complainants. Based upon complaint log data from 2003 to 2008, CRC estimates that on average, each recipient will receive one Section 188 complaint each year. The Department assumes that the EO Officer will handle the complaint for each recipient and it will take them approximately 30 minutes to process the complaint. The total annual burden is estimated to be 17,229 hours (34,458 × .5 hours) for a total cost of \$1,504,781 (17,229 hours × \$87.34/hr). Additionally, the Department estimates there are first year and recurring operation and maintenance costs of \$2,757 (\$.08 × 34,458) to copy the equal opportunity notice for complainants.

**TABLE 3—FIRST YEAR BURDEN AND COSTS**

First year burden and costs	Burden hours	Costs
Rule Familiarization .....	137,832	\$12,038,247
Discrimination prohibited based on pregnancy, § 38.8 .....	0	104,500
Recipients Obligation to Publish Equal Opportunity Notice, § 38.36 .....	51,687	4,071,041
Data and Information Collection, Analysis, and Maintenance, § 38.41 .....	129,912	3,751,567
Governor's oversight and monitoring responsibilities for State programs, § 38.51 .....	75,040	6,553,994
Required elements of a recipient's complaint processing procedures, § 38.72 .....	17,229	1,504,781
Operation and Maintenance Costs .....		226,417
<b>Total .....</b>	<b>411,700</b>	<b>28,250,547</b>

**TABLE 4—SECOND AND FUTURE-YEAR BURDEN AND COSTS**

Second and future-year burden and costs	Burden hours	Costs
Discrimination prohibited based on pregnancy, § 38.8 .....	0	\$104,500
Recipients Obligation to Publish Equal Opportunity Notice, § 38.36 .....	8,615	752,434
Data and Information Collection, Analysis, and Maintenance, § 38.41 .....	78,225	567,131
Governor's oversight and monitoring responsibilities for State programs, § 38.51 .....	75,040	6,553,994
Required elements of a recipient's complaint processing procedures, § 38.72 .....	17,229	1,504,781
Operation and Maintenance Costs .....		4,871
<b>Total .....</b>	<b>179,109</b>	<b>9,487,711</b>

**B. Paperwork Reduction Act**

The purposes of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, include minimizing the paperwork burden on affected entities. The PRA requires certain actions before an agency can adopt or revise a collection of information, including publishing the information collection for public comment.

As part of continuing efforts to reduce paperwork and respondent burden, the Department conducts preclearance consultation activities to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the

PRA.<sup>298</sup> This activity helps to ensure that: (1) The public understands the collection instructions; (2) respondents can provide the requested data in the desired format; (3) reporting burden (time and financial resources) is minimized; (4) respondents clearly understand the collection instruments; and (5) the Department can properly assess the impact of collection requirements on respondents. Furthermore, the PRA requires all Federal agencies to analyze proposed regulations for potential burdens on the regulated community created by provisions in the proposed regulations, which require the submission of information. The information collection

requirements must also be submitted to the OMB for approval.

The Department notes that a Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number.<sup>299</sup> The Department obtains approval for Nondiscrimination Compliance

<sup>298</sup> See 44 U.S.C. 3506(c)(2)(A).

<sup>299</sup> See 44 U.S.C. 3512; 5 CFR 1320.5(a) and 1320.6).

Information Reporting under Control Number 1225–0077.

The information collections in this NPRM are summarized in the section-by-section discussion of this NPRM, Section II. The Department has identified that the following proposed sections contain information collections: 29 CFR 38.14, 38.16f, 25, 38.27, 38.29, 38.34–38.36, 38.38, 38.39–38.43, 38.51, 38.52–54, 38.55, 387.69, 38.70, 38.72, 38.73, 38.74, and 38.77. Additional information collections approved under Control Number 1225–0077 appear in part 37, encompassing similar nondiscrimination requirements under the Workforce Investment Act (WIA), of this title; they will be maintained on a temporary basis while existing WIA grants remain in effect.

Concurrent with the publication of this proposed rule, the Department is submitting an associated information collection request to the Office of Management and Budget for approval. Interested parties may obtain a copy free of charge of one or more of the information collection requests submitted to the OMB on the [reginfo.gov](http://www.reginfo.gov) Web site at <http://www.reginfo.gov/public/do/PRAMain>. From the *Information Collection Review* tab, select *Information Collection Review*. Then select the *Department of Labor* from the *Currently Under Review* dropdown menu, and lookup Control Number 1225–0077. A free copy of the requests may also be obtained by contacting the person named in the **ADDRESSES** section of this preamble.

As noted in the **ADDRESSES** section of this NPRM, interested parties may send comments about the information collections to the Department throughout the 60-day comment period and/or to the OMB within 30 days of publication of this document in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention the applicable OMB Control Number(s). The Departments and OMB are particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who

are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The information collections are summarized as follows:

*Agency:* DOL–OASAM.

*Title of Collection:* Nondiscrimination Compliance Information Reporting.

*OMB Control Number:* 1225–0077.

*Affected Public:* Individuals or Households and Private Sector—businesses or other for profits and not for profit institutions.

*Total Estimated Number of Respondents:* 105,259.

*Total Estimated Number of Responses:* 56,324,784.

*Total Estimated Annual Time Burden:* 315,339.

*Total Estimated Annual Other Costs Burden:* \$0.

#### *C. Executive Order 13132 (Federalism)*

The Department has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have “federalism implications.” This proposed 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.”

#### *D. Unfunded Mandates Reform Act of 1995*

This rule will not include any 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.

#### *E. Plain Language*

The Department drafted this NPRM in plain language.

#### *F. Assessment of Federal Regulations and Policies on Families*

The undersigned hereby certifies that the NPRM would not adverse effect the will-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999. To the contrary, by better ensuring that customers, including job seekers and applicants for unemployment insurance, do not suffer illegal discrimination in accessing DOL financially-assisted programs, services, and activities, the NPRM would have a positive effect on the economic well-being of families.

#### *G. Regulatory Flexibility Act and Executive Order 13272*

The Regulatory Flexibility Act (RFA), 5 U.S.C. 603, requires agencies to prepare a regulatory flexibility analysis to determine whether a regulation will have a significant economic impact on a substantial number of small entities. Section 605 of the RFA allows an agency to certify a rule in lieu of preparing an analysis if the regulation is not expected to have a significant economic impact on a substantial number of small entities. Further, under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C 801 (SBREFA), an agency is required to produce compliance guidance for small entities if the rule has a significant economic impact. The Small Business Administration (SBA) defines a small business as one that is “independently owned and operated and which is not dominant in its field of operation.” The definition of small business varies from industry to industry to the extent necessary to reflect industry size differences properly. An agency must either use the SBA definition for a small entity or establish an alternative definition, in this instance, for the workforce industry. The Department has adopted the SBA definition for the purposes of this certification. The Department has notified the Chief Counsel for Advocacy, SBA, under the RFA at 5 U.S.C. 605(b), and proposes to certify that this rule will not have a significant economic impact on a substantial number of small entities. This finding is supported, in large measure, by the fact that small entities are already receiving financial assistance under the WIA program and will likely continue to do so under the WIOA program as articulated in this NPRM. Having made these determinations and pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), CRC certifies that this rule will not have a significant economic impact on a substantial number of small entities. In making this determination, the agency used the SBA definition of small business, found at 13 CFR 121.201

#### *Affected Small Entities*

The proposed rule can be expected to impact small one-stop center operators. One-stop operators can be a single entity (public, private, or nonprofit) or a consortium of entities. The types of entities that might be a one-stop operator include: (1) An institution of higher education; 545 (2) an employment service State agency established under the Wagner-Peyser

Act; (3) a community-based organization, nonprofit organization, or workforce intermediary; (4) a private for-profit entity; (5) a government agency; (6) a Local Board, with the approval of the local CEO and the Governor; or (7) another interested organization or entity that can carry out the duties of the one-stop operator. Examples include, but are not limited to, a local chamber of commerce or other business organization, or a labor organization.

#### Impact on Small Entities

The Department indicates that transfer payments are a significant aspect of this analysis in that the majority of WIOA program cost burdens on State and Local WDBs will be fully financed through Federal transfer payments to States. CRC has highlighted costs that are new to WIOA implementation in this NPRM. Therefore, the Department expects that the WIOA NPRM will have negligible net cost impact on small entities.

#### H. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of \$100 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

#### I. Executive Order 13175 (Indian Tribal Governments)

This proposed rule does not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The proposed rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

#### J. Executive Order 12630 (Government Actions and Interference With Constitutionally Protected Property Rights)

This NPRM is not subject to Executive Order 12630 because it does not involve implementation of a policy that has takings implications or that could impose limitations on private property use.

#### K. Executive Order 12988 (Civil Justice Reform)

The NPRM was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The NPRM was: (1) reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

#### L. Executive Order 13211 (Energy Supply)

This NPRM is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

#### List of Subjects in 29 CFR Part 38

Civil rights, Discrimination in employment, Equal opportunity, Nondiscrimination, Workforce development.

#### Edward C. Hugler,

Deputy Assistant Secretary for Operations,  
Office of the Assistant Secretary for  
Administration and Management, U.S.  
Department of Labor.

For reasons set forth in the preamble, the Department proposes to revise 29 CFR part 38 to read as follows:

### TITLE 29—LABOR

#### PART 38—IMPLEMENTATION OF THE NONDISCRIMINATION AND EQUAL OPPORTUNITY PROVISIONS OF THE WORKFORCE INNOVATION AND OPPORTUNITY ACT

##### Subpart A—General Provisions

Sec.

- 38.1 Purpose.
- 38.2 Applicability.
- 38.3 Effect on other obligations.
- 38.4 Definitions.
- 38.5 General prohibitions on discrimination.
- 38.6 Specific discriminatory actions prohibited on bases other than disability.
- 38.7 Discrimination prohibited based on sex.
- 38.8 Discrimination prohibited based on pregnancy.
- 38.9 Discrimination prohibited based on national origin, including limited English proficiency.
- 38.10 Harassment prohibited.
- 38.11 Discrimination prohibited based on citizenship status.
- 38.12 Discrimination prohibited based on disability.
- 38.13 Accessibility requirements.
- 38.14 Reasonable accommodations and reasonable modifications for individuals with disabilities.
- 38.15 Communications with individuals with disabilities.
- 38.16 Service animals.
- 38.17 Mobility aids and devices.

- 38.18 Employment practices covered.
- 38.19 Intimidation and retaliation prohibited.
- 38.20 Administration of this part.
- 38.21 Interpretation of this part.
- 38.22 Delegation of administration and interpretation of this part.
- 38.23 Coordination with other agencies.
- 38.24 Effect on other laws and policies.

##### Subpart B—Recordkeeping and Other Affirmative Obligations of Recipients.

###### Assurances

- 38.25 A grant applicant's obligation to provide a written assurance.
- 38.26 Duration and scope of the assurance.
- 38.27 Covenants.

###### Equal Opportunity Officers

- 38.28 Designation of Equal Opportunity Officer.
- 38.29 Recipient obligations regarding its Equal Opportunity Officer.
- 38.30 Requisite skill and authority of Equal Opportunity Officer.
- 38.31 Equal Opportunity Officer responsibilities.
- 38.32 Small recipient Equal Opportunity Officer obligations.
- 38.33 Service provider Equal Opportunity Officer obligations.

###### Notice and Communication

- 38.34 Recipients' obligations to disseminate equal opportunity notice.
- 38.35 Equal Opportunity notice/poster.
- 38.36 Recipients' obligations to publish equal opportunity notice.
- 38.37 Notice requirement for service providers.
- 38.38 Publications, broadcasts and other communications.
- 38.39 Communication of notice in orientations.
- 38.40 Affirmative outreach.

###### Data and Information Collection Maintenance

- 38.41 Collection and maintenance of equal opportunity data and other information.
- 38.42 Information to be provided to CRC by grant applicants and recipients.
- 38.43 Required maintenance of records by grant applicants and recipients.
- 38.44 CRC access to information and information sources.
- 38.45 Confidentiality responsibilities of grant applicants, recipients, and the Department.

##### Subpart C—Governor's Responsibilities To Implement the Nondiscrimination and Equal Opportunity Requirements of WIOA

- 38.50 Subpart application to State Programs.
- 38.51 Governor's oversight and monitoring responsibilities for State Programs.
- 38.52 Governor's liability for actions of recipients the Governor has financially assisted under Title I of WIOA.
- 38.53 Governor's oversight responsibility regarding recipients' recordkeeping.
- 38.54 Governor's obligations to develop and implement a Nondiscrimination Plan.
- 38.55 Schedule of the Governor's obligations regarding the Nondiscrimination Plan.



**Subpart D—Compliance Procedures**

- 38.60 Evaluation of compliance.  
38.61 Authority to issue subpoenas.

**Compliance Reviews**

- 38.62 Authority and procedures for pre-approval compliance reviews.  
38.63 Authority and procedures for conducting post-approval compliance reviews.  
38.64 Procedures for concluding post-approval compliance reviews.  
38.65 Authority to monitor the activities of a Governor.  
38.66 Notice to show cause issued to a recipient.  
38.67 Methods by which a recipient may show cause why enforcement proceedings should not be instituted.  
38.68 Failing to show cause.

**Complaint Processing Procedures**

- 38.69 Complaint filing.  
38.70 Required contents of complaint.  
38.71 Right to representation.  
38.72 Required elements of a recipient's complaint processing procedures.  
38.73 Responsibility for developing and publishing complaint processing procedures for service providers.  
38.74 Recipient's obligations when it determines that it has no jurisdiction over a complaint.  
38.75 If the complainant is dissatisfied after receiving a Notice of Final Action.  
38.76 If a recipient fails to issue a Notice of Final Action within 90 days after the complaint was filed.  
38.77 Extension of deadline to file complaint.  
38.78 Determinations regarding acceptance of complaints.  
38.79 When a complaint contains insufficient information.  
38.80 Lack of jurisdiction.  
38.81 Complaint referral.  
38.82 Notice that complaint will not be accepted.  
38.83 Notice of complaint acceptance.  
38.84 Contacting CRC about a complaint.  
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**Complaint Determinations**

- 38.86 Notice at conclusion of complaint investigation.  
38.87 Director's Initial Determination that reasonable cause exists to believe that a violation has taken place.  
38.88 Director's Final Determination that no reasonable cause exists to believe that a violation has taken place.  
38.89 When the recipient fails or refuses to take corrective action listed in the Initial Determination.  
38.90 Corrective or remedial action that may be imposed when the Director finds a violation.  
38.91 Post-violation procedures.  
38.92 Written assurance.  
38.93 Required elements of a conciliation agreement.  
38.94 When voluntary compliance cannot be secured.  
38.95 Enforcement when voluntary compliance cannot be secured.  
38.96 Contents of a Final Determination of a violation.

- 38.97 Notification of finding of noncompliance.

**Breaches of Conciliation Agreements**

- 38.98 Notice of breach of conciliation agreement.  
38.99 Contents of notice of breach of conciliation agreement.  
38.100 Notification of an enforcement action under based on breach of conciliation agreement.

**Subpart E—Federal Procedures for Effecting Compliance**

- 38.110 Enforcement procedures.  
38.111 Hearing procedures.  
38.112 Initial and final decision procedures.  
38.113 Suspension, termination, withholding, denial or discontinuation of financial assistance.  
38.114 Distribution of WIOA Title I financial assistance to an alternative recipient.  
38.115 Post-termination proceedings.

**Authority:** 29 U.S.C. 3101 *et seq.*; 42 U.S.C. 2000d *et seq.*; 29 U.S.C. 794; 42 U.S.C. 6101 *et seq.*; and 20 U.S.C. 1681 *et seq.*

**Subpart A—General Provisions****§ 38.1 Purpose.**

The purpose of this part is to implement the nondiscrimination and equal opportunity provisions of the Workforce Innovation and Opportunity Act (WIOA), which are contained in section 188 of WIOA.<sup>1</sup> Section 188 prohibits discrimination on the basis of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries only, citizenship status or participation in a WIOA Title I-financially assisted program or activity. This part clarifies the application of the nondiscrimination and equal opportunity provisions of WIOA and provides uniform procedures for implementing them.

**§ 38.2 Applicability.**

- (a) This part applies to:  
(1) Any recipient, as defined in § 38.4;  
(2) Programs and activities that are part of the One-Stop delivery system and that are operated by One-Stop partners listed in section 121(b) of WIOA, to the extent that the programs and activities are being conducted as part of the One-Stop delivery system; and  
(3) As provided in § 38.18, the employment practices of a recipient and/or One-Stop partner, to the extent that the employment is in the administration of or in connection with programs and activities that are being conducted as a part of WIOA Title I or the One-Stop delivery system.

(b) *Limitation of Application.* This part does not apply to:

(1) Programs or activities that are financially assisted by the Department exclusively under laws other than Title I of WIOA, and that are not part of the One-Stop delivery system (including programs or activities implemented under, authorized by, and/or financially assisted by the Department under the Workforce Investment Act of 1998 (WIA));

(2) Contracts of insurance or guaranty;

(3) The ultimate beneficiary to a program of Federal financial assistance; and

(4) Federal procurement contracts, with the exception of contracts to operate or provide services to Job Corps Centers.

**§ 38.3 Effect on other obligations.**

(a) A recipient's compliance with this part will satisfy any obligation of the recipient to comply with 29 CFR part 31, the Department's regulations implementing Title VI of the Civil Rights Act of 1964, as amended (Title VI), and with Subparts A, D and E of 29 CFR part 32, the Department's regulations implementing Section 504 of the Rehabilitation Act of 1973, as amended (Section 504).

(b) 29 CFR part 32, subparts B and C and Appendix A, the Department's regulations which implement the requirements of Section 504 pertaining to employment practices and employment-related training, program accessibility, and reasonable accommodation, are hereby incorporated into this part by reference. Therefore, recipients must comply with the requirements set forth in those regulatory sections as well as the requirements listed in this part.

(c) This part does not invalidate or limit the obligations, remedies, rights, and procedures under any Federal law, or the law of any State or political subdivision, that provides greater or equal protection for the rights of persons as compared to this part:

(1) Recipients that are also public entities or public accommodations, as defined by Titles II and III of the Americans with Disabilities Act of 1990 (ADA), should be aware of obligations imposed by those titles.

(2) Similarly, recipients that are also employers, employment agencies, or other entities covered by Title I of the ADA should be aware of obligations imposed by that title.

(d) Compliance with this part does not affect, in any way, any additional obligations that a recipient may have to comply with applicable federal laws

<sup>1</sup> 29 U.S.C. 3248.

and their implementing regulations, such as the following:

- (1) Executive Order 11246, as amended;
- (2) Executive Order 13160;
- (3) Sections 503 and 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 793 and 794);
- (4) The affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212);
- (5) The Equal Pay Act of 1963, as amended (29 U.S.C. 206d);
- (6) Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e *et seq.*);
- (7) The Age Discrimination Act of 1975, as amended (42 U.S.C. 6101);
- (8) The Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 621);
- (9) Title IX of the Education Amendments of 1972, as amended (Title IX) (20 U.S.C. 1681);
- (10) The Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101 *et seq.*); and
- (11) The anti-discrimination provision of the Immigration and Nationality Act, as amended (8 U.S.C. 1324b).

#### § 38.4 Definitions.

For the purpose of this part:

(a) *Administrative Law Judge* means a person appointed as provided in 5 U.S.C. 3105 and 5 CFR 930.203, and qualified under 5 U.S.C. 557, to preside at hearings held under the nondiscrimination and equal opportunity provisions of WIOA and this part.

(b) *Aid, benefit, service, or training* means WIOA Title I-financially assisted services, financial or other aid, training, or benefits provided by or through a recipient or its employees, or by others through contract or other arrangements with the recipient. As used in this part, the term includes any aid, benefits, services, or training provided in or through a facility that has been constructed, expanded, altered, leased, rented, or otherwise obtained, in whole or in part, with Federal financial assistance under Title I of WIOA. "Aid, benefit, service, or training" includes, but is not limited to:

- (1) Career Services;
- (2) Education or training;
- (3) Health, welfare, housing, social service, rehabilitation, or other supportive services;
- (4) Work opportunities; and
- (5) Cash, loans, or other financial assistance to individuals.

(c) *Applicant* means an individual who is interested in being considered for WIOA-Title I financially assisted aid,

benefit, service, or training by a recipient, and who has signified that interest by submitting personal information in response to a request by the recipient. *See also* the definitions of "application for benefits," "eligible applicant/registrant," "participant," "participation," and "recipient" in this section.

(d) *Applicant for employment* means a person or persons who make(s) an application for employment with a recipient of Federal financial assistance under WIOA Title I.

(e) *Application for benefits* means the process by which information, including but not limited to a completed application form, is provided by applicants or eligible applicants before and as a condition of receiving WIOA Title I-financially assisted aid, benefit, service, or training from a recipient.

(f) *Assistant Attorney General* means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

(g) *Assistant Secretary* means the Assistant Secretary for Administration and Management, United States Department of Labor.

(h) *Auxiliary aids or services* includes:

(1) Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective means of making aurally delivered materials available to individuals with hearing impairments;

(2) Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services, devices, and actions.

(i) *Babel Notice* means a short notice included in a document or electronic medium (*e.g.*, Web site, "app," email) in multiple languages informing the reader that the communication contains vital information, and explaining how to access language services to have the contents of the communication provided in other languages.

(j) *Beneficiary* means the individual or individuals intended by Congress to receive aid, benefits, services, or training from a recipient.

(k) *Citizenship* See "Discrimination prohibited based on citizenship status." in § 38.11.

(l) *CRC* means the Civil Rights Center, Office of the Assistant Secretary for Administration and Management, U.S. Department of Labor.

(m) *Department* means the U.S. Department of Labor (DOL), including its agencies and organizational units.

(n) *Departmental grantmaking agency* means a grantmaking agency within the U.S. Department of Labor.

(o) *Director* means the Director, Civil Rights Center (CRC), Office of the Assistant Secretary for Administration and Management, U.S. Department of Labor, or a designee authorized to act for the Director.

(p) *Direct threat* means a significant risk of substantial harm to the health or safety of others that cannot be eliminated or reduced by auxiliary aids and services, reasonable accommodations, or reasonable modifications in policies, practices and/or procedures. The determination whether an individual with a disability poses a direct threat must be based on an individualized assessment of the individual's present ability safely to either: (1) satisfy the essential eligibility requirements of the program or activity (in the case of aid, benefits, services, or training); or (2) perform the essential functions of the job (in the case of employment). This assessment must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

- (1) The duration of the risk;
- (2) The nature and severity of the potential harm;
- (3) The likelihood that the potential harm will occur; and
- (4) The imminence of the potential harm.

(q) *Disability*—(1) *General.* (i) The term "disability" means, with respect to an individual:

(A) A physical or mental impairment that substantially limits one or more of

the major life activities of such individual;

(B) A record of such an impairment; or

(C) Being regarded as having such an impairment.

(ii) *Rules of construction.* (A)

Coverage of a particular individual may be established under any one or more of the three prongs of the general definition in paragraph (1)(i) of this definition: the “actual disability” prong in paragraph (1)(i)(A), the “record of” prong in paragraph (1)(i)(B), or the “regarded as” prong in paragraph (1)(i)(C).

(B) Where a covered entity’s failure to provide reasonable accommodations or reasonable modifications under § 38.14(a) or (b), is not being challenged in a particular case, it is generally unnecessary to proceed under the “actual disability” or “record of” prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the “regarded as” prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. However, a case may proceed under the “actual disability” or “record of” prong regardless of whether the case is challenging a covered entity’s failure to provide reasonable accommodations, or reasonable modifications.

(2) The definition of disability must be construed in favor of broad coverage of individuals, to the maximum extent permitted by Federal disability nondiscrimination law and this part.

(3) *Physical or mental impairment.* (i) The phrase “physical or mental impairment” means—

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems:

neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic and lymphatic, skin, and endocrine; or

(B) Any mental or psychological disorder such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) The phrase “physical or mental impairment” includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular

dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, pregnancy-related medical conditions, specific learning disabilities (including but not limited to dyslexia), HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(iii) The phrase “physical or mental impairment” does not include homosexuality or bisexuality.

(4) *Major life activities.* (i) *General.* Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

(ii) *Major bodily functions.* A major life activity also includes the operation of a major bodily function, including but not limited to, the functions of the immune system, special sense organs and skin, normal cell growth, and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive systems. The operation of a major bodily function includes the operation of an individual organ within a body system.

(iii) In determining other examples of major life activities, the term “major” must not be interpreted strictly to create a demanding standard for disability. Whether an activity is a “major life activity” is not determined by reference to whether it is of “central importance to daily life.”

(5) *Substantially limits*—(i) *Rules of construction.* The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity.

(A) The term “substantially limits” must be construed broadly in favor of expansive coverage, to the maximum extent permitted by Federal disability nondiscrimination law and this part. “Substantially limits” is not meant to be a demanding standard.

(B) An impairment is a disability within the meaning of this part if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.

(C) The primary object of attention in disability cases brought under WIOA

Section 188 should be whether covered entities have complied with their obligations and whether discrimination has occurred, not the extent to which an individual’s impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.

(D) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term “substantially limits” will require a lower degree of functional limitation than the standard for “substantially limits” applied prior to the ADA Amendments Act of 2008 (ADAAA).

(E) The comparison of an individual’s performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence. Nothing in this paragraph is intended, however, to prohibit or limit the use of scientific, medical, or statistical evidence in making such a comparison where appropriate.

(F)(1) The determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures.

(2) *Mitigating measures* include, but are not limited to:

(i) Medication, medical supplies, equipment, appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;

(ii) Use of assistive technology;

(iii) Reasonable modifications of policies, practices, and procedures, or auxiliary aids or services;

(iv) Learned behavioral or adaptive neurological modifications; or

(v) Psychotherapy, behavioral therapy, or physical therapy.

(3) However, the ameliorative effects of ordinary eyeglasses or contact lenses will be considered in determining whether an impairment substantially limits a major life activity. Ordinary eyeglasses or contact lenses are lenses that are intended to fully correct visual acuity or to eliminate refractive error.

(G) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(H) An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

(I) The six-month “transitory” part of the “transitory and minor” exception in paragraph (7) of this definition does not apply to the “actual disability” or “record of” prongs of the definition of disability. The effects of an impairment lasting or expected to last less than six months can be substantially limiting within the meaning of this section for establishing an actual disability or a record of a disability.

(ii) *Predictable assessments.* (A) The principles set forth in paragraph (5)(i) of this definition are intended to provide for more generous coverage and application of the prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities with respect to avoiding discrimination on the basis of disability.

(B) Applying the principles set forth in paragraph (5)(i) of this definition, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under paragraph (1)(i)(A) (the “actual disability” prong) or paragraph (1)(i)(B) (the “record of” prong). Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(C) For example, applying the principles set forth in paragraph (5)(i) of this definition, it should easily be concluded that the following types of impairments, will, at a minimum, substantially limit the major life activities indicated:

(1) Deafness substantially limits hearing and auditory function;

(2) Blindness substantially limits visual function;

(3) An intellectual disability substantially limits reading, learning, and problem solving;

(4) Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function;

(5) Autism substantially limits learning, social interaction, and communication;

(6) Cancer substantially limits normal cell growth;

(7) Cerebral palsy substantially limits brain function;

(8) Diabetes substantially limits endocrine function;

(9) Epilepsy, muscular dystrophy, and multiple sclerosis substantially limit neurological function;

(10) Human Immunodeficiency Virus (HIV) infection substantially limits immune function; and

(11) Major depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia substantially limit brain function. The types of impairments described in this paragraph may substantially limit additional major life activities not explicitly listed above.

(iii) *Condition, manner and duration.* (A) At all times taking into account the principles in paragraph (5)(i) of this definition, in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the conditions under which the individual performs the major life activity; the manner in which the individual performs the major life activity; or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

(B) Consideration of facts such as condition, manner or duration may include, among other things, consideration of the difficulty, effort or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual’s impairment substantially limits a major life activity.

(C) In determining whether an individual has a disability under the “actual disability” or “record of” prongs of the definition of disability, the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more major life activities, including, but not limited to, reading, writing, speaking, or learning, because of the additional time or effort he or she must spend to read, write, speak, or learn compared to most people in the general population.

(6) *A record of such an impairment.*

(i) *General.* An individual has a record of such an impairment if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(ii) *Broad construction.* Whether an individual has a record of an impairment that substantially limited a major life activity must be construed broadly to the maximum extent permitted by Federal disability nondiscrimination law and this part and should not demand extensive analysis. An individual will be considered to fall within this prong of the definition of “disability” if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment. In determining whether an impairment substantially limited a major life activity, the principles articulated in paragraph (5)(i) of this definition apply.

(iii) *Reasonable accommodation or reasonable modification.* An individual with a record of a substantially limiting impairment may be entitled to a reasonable accommodation or reasonable modification if needed and related to the past disability.

(7) *Is regarded as having such an impairment.* (i) An individual is “regarded as having such an impairment” if the individual is subjected to an action prohibited by WIOA Section 188 and this part because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity, except for an impairment that is both transitory and minor. A transitory impairment is an impairment with an actual or expected duration of six months or less.

(ii) An individual is “regarded as having such an impairment” any time a covered entity takes a prohibited action against the individual because of an actual or perceived impairment, even if the entity asserts, or may or does ultimately establish, a defense to such action.

(iii) Establishing that an individual is “regarded as having such an impairment” does not, by itself, establish liability. Liability is established only when it is proven that a covered entity discriminated on the basis of disability within the meaning of this part.

(r) *Eligible applicant/registrant* means an individual who has been determined eligible to participate in one or more

WIOA Title I-financially assisted programs or activities.

(s) *Employment practices* of a recipient include, but are not limited to:

- (1) Recruitment or recruitment advertising;
- (2) Selection, placement, layoff or termination of employees;
- (3) Upgrading, promotion, demotion or transfer of employees;
- (4) Training, including employment-related training;
- (5) Participation in upward mobility programs;
- (6) Deciding rates of pay or other forms of compensation;
- (7) Use of facilities; or
- (8) Deciding other terms, conditions, benefits, and/or privileges of employment.

(t) *Employment-related training* means training that allows or enables an individual to obtain skills, abilities and/or knowledge that are designed to lead to employment.

(u) *Entity* means any person, corporation, partnership, joint venture, sole proprietorship, unincorporated association, consortium, Native American tribe or tribal organization, Native Hawaiian organization, and/or entity authorized by State or local law; any State or local government; and/or any agency, instrumentality or subdivision of such a government.

(v) *Facility* means all or any portion of buildings, structures, sites, complexes, equipment, roads, walks, passageways, parking lots, rolling stock or other conveyances, or other real or personal property or interest in such property, including the site where the building, property, structure, or equipment is located. The phrase "real or personal property" in the preceding sentence includes indoor constructs that may or may not be permanently attached to a building or structure. Such constructs include, but are not limited to, office cubicles, computer kiosks, and similar constructs.

(w) *Federal grantmaking agency* means a Federal agency that provides financial assistance under any Federal statute.

(x) *Financial assistance* means any of the following:

- (1) Any grant, subgrant, loan, or advance of funds, including funds extended to any entity for payment to or on behalf of participants admitted to that recipient for training, or extended directly to such participants for payment to that recipient;
- (2) Provision of the services of grantmaking agency personnel, or of other personnel at the grantmaking agency's expense;

(3) A grant or donation of real or personal property or any interest in or use of such property, including:

- (i) Transfers or leases of property for less than fair market value or for reduced consideration;
- (ii) Proceeds from a subsequent sale, transfer, or lease of such property, if the grantmaking agency's share of the fair market value of the property is not returned to the grantmaking agency; and
- (iii) The sale, lease, or license of, and/or the permission to use (other than on a casual or transient basis), such property or any interest in such property, either:

- (A) Without consideration,
  - (B) At a nominal consideration, or
  - (C) At a consideration that is reduced or waived either for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to or use by the recipient;
- (4) Waiver of charges that would normally be made for the furnishing of services by the grantmaking agency; and
- (5) Any other agreement, arrangement, contract or subcontract (other than a procurement contract or a contract of insurance or guaranty), or other instrument that has as one of its purposes the provision of assistance or benefits under the statute or policy that authorizes assistance by the grantmaking agency.

(y) *Financial assistance under Title I of WIOA* means any of the following, when authorized or extended under WIOA Title I:

- (1) Any grant, subgrant, loan, or advance of federal funds, including funds extended to any entity for payment to or on behalf of participants admitted to that recipient for training, or extended directly to such participants for payment to that recipient;
- (2) Provision of the services of Federal personnel, or of other personnel at Federal expense;
- (3) A grant or donation of Federal real or personal property or any interest in or use of such property, including:
  - (i) Transfers or leases of property for less than fair market value or for reduced consideration;
  - (ii) Proceeds from a subsequent sale, transfer, or lease of such property, if the Federal share of the fair market value of the property is not returned to the Federal Government; and
  - (iii) The sale, lease, or license of, and/or the permission to use (other than on a casual or transient basis), such property or any interest in such property, either:
    - (A) Without consideration,
    - (B) At a nominal consideration, or
    - (C) At a consideration that is reduced or waived either for the purpose of

assisting the recipient, or in recognition of the public interest to be served by such sale or lease to or use by the recipient;

- (4) Waiver of charges that would normally be made for the furnishing of Government services; and
- (5) Any other agreement, arrangement, contract or subcontract (other than a Federal procurement contract or a contract of insurance or guaranty), or other instrument that has as one of its purposes the provision of assistance or benefits under WIOA Title I.

(z) *Fundamental alteration* means:

(1) A change in the essential nature of a program or activity as defined in this part, including but not limited to an aid, service, benefit, or training; or

(2) A cost that a recipient can demonstrate would result in an undue burden. Factors to be considered in making the determination whether the cost of a modification would result in such a burden include:

- (i) The nature and net cost of the modification needed, taking into consideration the availability of tax credits and deductions, and/or outside financial assistance, for the modification;
- (ii) The overall financial resources of the facility or facilities involved in the provision of the modification, including:

(A) The number of persons aided, benefited, served, or trained by, or employed at, the facility or facilities; and

(B) The effect the modification would have on the expenses and resources of the facility or facilities;

(iii) The overall financial resources of the recipient, including:

(A) The overall size of the recipient;

(B) The number of persons aided, benefited, served, trained, or employed by the recipient; and

(C) The number, type and location of the recipient's facilities;

(iv) The type of operation or operations of the recipient, including:

(A) The geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the recipient; and

(B) Where the modification sought is employment-related, the composition, structure and functions of the recipient's workforce; and

(v) The impact of the modification upon the operation of the facility or facilities, including:

(A) The impact on the ability of other participants to receive aid, benefit, service, or training, or of other employees to perform their duties; and

(B) The impact on the facility's ability to carry out its mission.

(aa) *Governor* means the chief elected official of any State, or the Governor's designee.

(bb) *Grant applicant* means an entity that submits required documentation to the Governor, recipient, or Department, before and as a condition of receiving financial assistance under Title I of WIOA.

(cc) *Grantmaking agency* means an entity that provides Federal financial assistance.

(dd) *Guideline* means written informational material supplementing an agency's regulations and provided to grant applicants and recipients to provide program-specific interpretations of their responsibilities under the regulations.

(ee) *Illegal use of drugs* means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act, as amended (21 U.S.C. 812). "Illegal use of drugs" does not include the use of a drug taken under supervision of a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(ff) *Individual with a disability* means a person who has a disability as previously defined in this section.

(1) The term "individual with a disability" does not include an individual on the basis of:

(i) Transvestism, transsexualism, or gender dysphoria not resulting from physical impairments;

(ii) Pedophilia, exhibitionism, voyeurism, or other sexual behavior disorders;

(iii) Compulsive gambling, kleptomania, or pyromania; or

(iv) Psychoactive substance use disorders resulting from current illegal use of drugs.

(2) The term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when a recipient acts on the basis of such use. This limitation does not exclude as an individual with a disability an individual who:

(i) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs;

(ii) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(iii) Is erroneously regarded as engaging in such use, but is not engaging in such use, except that it is not a violation of the nondiscrimination and equal opportunity provisions of

WIOA or this part for a recipient to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (2)(i) or (ii) of this definition is no longer engaging in the illegal use of drugs.

(3) With regard to employment, the term "individual with a disability" does not include any individual who:

(i) Is an alcoholic if:

(A) The individual's current use of alcohol prevents such individual from performing the duties of the job in question, or

(B) The individual's employment, by reason of such current alcohol abuse, would constitute a direct threat to the individual or the safety of others; or

(ii) Has a currently contagious disease or infection, if:

(A) That disease or infection prevents him or her from performing the essential functions of the job in question, or

(B) The individual's employment, because of that disease or infection, would constitute a direct threat to the health or safety of the individual or others.

(gg) *Labor market area* means an economically integrated geographic area within which individuals can reside and find employment within a reasonable distance or can readily change employment without changing their place of residence. Such an area must be identified in accordance with either criteria used by the Bureau of Labor Statistics of the Department of Labor in defining such areas, or similar criteria established by a Governor.

(hh) *Limited English proficient (LEP) individual* means an individual whose primary language for communication is not English and who has a limited ability to read, speak, write, and/or understand English. LEP individuals may be competent in English for certain types of communication (*e.g.*, speaking or understanding), but still be LEP for other purposes (*e.g.*, reading or writing).

(ii) *LWIA (Local Workforce Investment Area) grant recipient* means the entity that receives WIOA Title I financial assistance for a Local Workforce Investment Area directly from the Governor and disburses those funds for workforce investment activities.

(jj) *National Programs* means:

(1) Job Corps; and

(2) Programs receiving Federal financial assistance under Title I, Subtitle D of WIOA directly from the Department. Such programs include, but are not limited to, the Migrant and Seasonal Farmworkers Programs, Native American Programs, National Dislocated

Worker Grant Programs, and YouthBuild programs.

(kk) *Noncompliance* means a failure of a grant applicant or recipient to comply with any of the applicable requirements of the nondiscrimination and equal opportunity provisions of WIOA and this part.

(ll) *Nondiscrimination Plan* means the written document and supporting documentation developed under § 38.54.

(mm) *On-the-Job Training (OJT)* means training by an employer that is provided to a paid participant while the participant is engaged in productive work that:

(1) Provides knowledge or skills essential to the full and adequate performance of the job;

(2) Provides reimbursement to the employer of up to 50 percent of the wage rate of the participant, for the extraordinary costs of providing the training and additional supervision related to the training; and

(3) Is limited in duration as appropriate to the occupation for which the participant is being trained, taking into account the content of the training, the prior work experience of the participant, and the service strategy of the participant, as appropriate.

(nn) *Other power-driven mobility device* means any mobility device powered by batteries, fuel, or other engines—whether or not designed primarily for use by individuals with mobility disabilities—that is used by individuals with mobility disabilities for the purpose of locomotion, including golf cars, electronic personal assistance mobility devices (EPAMDs), such as the Segway® PT, or any mobility device designed to operate in areas without defined pedestrian routes, but that is not a wheelchair within the meaning of this section.

(oo) *Participant* means an individual who has been determined to be eligible to participate in, and who is receiving any aid, benefit, service or training under, a program or activity financially assisted in whole or in part under Title I of WIOA. "Participant" includes, but is not limited to, individuals receiving any service(s) under state Employment Service programs, and claimants receiving any service(s) or benefits under state Unemployment Insurance programs.

(pp) *Participation* is considered to commence on the first day, following determination of eligibility, on which the participant began receiving subsidized aid, benefit, service, or training provided under Title I of WIOA.

(qq) *Parties to a hearing* means the Department and the grant applicant(s), recipient(s), or Governor.

(rr) *Population eligible to be served* means the total population of adults and eligible youth who reside within the labor market area that is served by a particular recipient, and who are eligible to seek WIOA Title I-financially assisted aid, benefits, services or training from that recipient. See the definition of "labor market area" in this section.

(ss) *Program or activity*: See "WIOA Title I-financially assisted program or activity" in this section.

(tt) *Programmatic accessibility* means policies, practices, and procedures providing effective and meaningful opportunity for persons with disabilities to participate in or benefit from aid, benefits, services, and training.

(uu) *Prohibited basis* means any basis upon which it is illegal to discriminate under the nondiscrimination and equal opportunity provisions of WIOA or this part, *i.e.*, race, color, religion, sex, national origin, age, disability, political affiliation or belief, and, for beneficiaries only, citizenship status or participation in a WIOA Title I-financially assisted program or activity.

(vv) *Public entity* means:

(1) Any State or local government; and

(2) Any department, agency, special purpose district, workforce investment board, or other instrumentality of a State or States or local government.

(ww) *Qualified individual with a disability* means—

(1) With respect to employment, an individual who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position;

(2) With respect to aid, benefits, services, or training, an individual who, with or without auxiliary aids and services, reasonable accommodations, and/or reasonable modifications in policies, practices and procedures, meets the essential eligibility requirements for the receipt of such aid, benefits, services, or training.

(xx) *Qualified interpreter* means an interpreter who is able to interpret effectively, accurately, and impartially, either for individuals with disabilities or for individuals who are limited English proficient. The interpreter must be able to interpret both receptively and expressively, using any necessary specialized vocabulary, either in-person, through a telephone, a video remote

interpreting (VRI) service, or via internet, video, or other technological methods.

(1) *Qualified interpreter for an individual with a disability* includes, for example, a sign language interpreter, oral transliterator, and cued-language transliterator. When an interpreter is provided to a person with a disability, the qualified interpreter must be able to sign or otherwise communicate effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.

(2) *Qualified interpreter for an individual who is limited English proficient* means an individual who demonstrates expertise and ability to communicate information effectively, accurately, and impartially, in both English and the other language, and identifies and employs the appropriate mode of interpreting (*e.g.*, consecutive, simultaneous, or sight translation).

(yy) *Reasonable accommodation*. (1) The term "reasonable accommodation" means:

(i) Modifications or adjustments to an application/registration process that enables a qualified applicant/registrant with a disability to be considered for the aid, benefits, services, training, or employment that the qualified applicant/registrant desires; or

(ii) Modifications or adjustments that enable a qualified individual with a disability to perform the essential functions of a job, or to receive aid, benefits, services, or training equal to that provided to qualified individuals without disabilities. These modifications or adjustments may be made to:

(A) The environment where work is performed or aid, benefits, services, or training are given; or

(B) The customary manner in which, or circumstances under which, a job is performed or aid, benefits, services, or training are given; or

(iii) Modifications or adjustments that enable a qualified individual with a disability to enjoy the same benefits and privileges of the aid, benefits, services, training, or employment as are enjoyed by other similarly situated individuals without disabilities.

(2) Reasonable accommodation includes, but is not limited to:

(i) Making existing facilities used by applicants, registrants, eligible applicants/registrants, participants, applicants for employment, and employees readily accessible to and usable by individuals with disabilities; and

(ii) Restructuring of a job or a service, or of the way in which aid, benefits, services, or training is/are provided;

part-time or modified work or training schedules; acquisition or modification of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation, it may be necessary for the recipient to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(4) A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who has an "actual disability" or "record of" a disability, but is not required to provide a reasonable accommodation to an individual who is only "regarded as" having a disability.

(zz) *Recipient* means entity to which financial assistance under Title I of WIOA is extended, directly from the Department or through the Governor or another recipient (including any successor, assignee, or transferee of a recipient). The term excludes any ultimate beneficiary of the WIOA Title I-financially assisted program or activity. In instances in which a Governor operates a program or activity, either directly or through a State agency, using discretionary funds apportioned to the Governor under WIOA Title I (rather than disbursing the funds to another recipient), the Governor is also a recipient. In addition, for purposes of this part, One-Stop partners, as defined in section 121(b) of WIOA, are treated as "recipients," and are subject to the nondiscrimination and equal opportunity requirements of this part, to the extent that they participate in the One-Stop delivery system. "Recipient" includes, but is not limited to:

(1) State-level agencies that administer, or are financed in whole or in part with, WIOA Title I funds;

(2) State Workforce Agencies;

(3) State and local Workforce Investment Boards;

(4) LWIA grant recipients;

(5) One-Stop operators;

(6) Service providers, including eligible training providers;

(7) On-the-Job Training (OJT) employers;

(8) Job Corps contractors and center operators;

(9) Job Corps national training contractors;

(10) Outreach and admissions agencies, including Job Corps contractors that perform these functions;

(11) Placement agencies, including Job Corps contractors that perform these functions;

(12) Other National Program recipients.

(aaa) *Registrant* means the same as “applicant” for purposes of this part. See also the definitions of “application for benefits,” “eligible applicant/registrant,” “participant,” “participation,” and “recipient” in this section.

(bbb) *Respondent* means a grant applicant or recipient (including a Governor) against which a complaint has been filed under the nondiscrimination and equal opportunity provisions of WIOA or this part.

(ccc) *Secretary* means the Secretary of Labor, U.S. Department of Labor, or the Secretary’s designee.

(ddd) *Sectarian activities* means religious worship or ceremony, or sectarian instruction.

(eee) *Section 504* means Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, as amended, which forbids discrimination against qualified individuals with disabilities in federally-financed and conducted programs and activities.

(fff) *Service animal* means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual’s disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal’s presence

and the provision of emotional support, well-being, comfort, or companionship, without more, do not constitute work or tasks for the purposes of this definition.

(ggg) *Service provider* means:

(1) Any operator of, or provider of aid, benefits, services, or training to:

(i) Any program or activity that receives WIOA Title I financial assistance from or through any State or LWIA grant recipient; or

(ii) Any participant through that participant’s Individual Training Account (ITA); or

(2) Any entity that is selected and/or certified as an eligible provider of training services to participants.

(hhh) *Small recipient* means a recipient who:

(1) Serves a total of fewer than 15 beneficiaries during the entire grant year, and

(2) Employs fewer than 15 employees on any given day during the grant year.

(iii) *Solicitor* means the Solicitor of Labor, U.S. Department of Labor, or the Solicitor’s designee.

(jjj) *State* means the individual states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and Palau.

(kkk) *State Programs* means programs financially assisted in whole or in part under Title I of WIOA in which either:

(1) The Governor and/or State receives and disburses the grant to or through LWIA grant recipients; or

(2) The Governor retains the grant funds and operates the programs, either directly or through a State agency.

(3) “State programs” also includes State Workforce Agencies, State Employment Service agencies, and/or State unemployment compensation agencies.

(lll) *State Workforce Agency (SWA)* means the State agency that, under the State Administrator, contains both State agencies with responsibility for administering programs authorized under the Wagner-Peyser Act, and unemployment insurance programs authorized under Title III of the Social Security Act.

(mmm) *Supportive services* means services, such as transportation, child care, dependent care, housing, and needs-related payments, that are necessary to enable an individual to participate in WIOA Title I-financially assisted programs and activities, as consistent with the provisions of WIOA Title I.

(nnn) *Terminee* means a participant whose participation in the program or

employee whose employment with the program ends voluntarily or involuntarily, during the applicable program year.

(ooo) *Title VI* means Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, *et seq.*, as amended, which forbids recipients of Federal financial assistance from discriminating on the basis of race, color, or national origin.

(ppp) *Transferee* means a person or entity to whom or to which real or personal property, or an interest in such property, is transferred.

(qqq) *Ultimate beneficiary* See the definition of “beneficiary” in this section.

(rrr) *Undue burden or undue hardship* has different meanings, depending upon whether it is used with regard to reasonable accommodation of individuals with disabilities, or with regard to religious accommodation.

(1) *Reasonable accommodation of individuals with disabilities.* (i) In general, “undue hardship” means significant difficulty or expense incurred by a recipient, when considered in light of the factors set forth in paragraph (1)(ii) of this definition.

(ii) Factors to be considered in determining whether an accommodation would impose an undue hardship on a recipient include:

(A) The nature and net cost of the accommodation needed, taking into consideration the availability of tax credits and deductions, and/or outside funding, for the accommodation;

(B) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, including:

(1) The number of persons aided, benefited, served, or trained by, or employed at, the facility or facilities, and

(2) The effect the accommodation would have on the expenses and resources of the facility or facilities;

(C) The overall financial resources of the recipient, including:

(1) The overall size of the recipient,

(2) The number of persons aided, benefited, served, trained, or employed by the recipient, and

(3) The number, type and location of the recipient’s facilities;

(D) The type of operation or

operations of the recipient, including:

(1) The geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the recipient, and

(2) Where the individual is seeking an employment-related accommodation, the composition, structure and functions of the recipient’s workforce; and



(E) The impact of the accommodation upon the operation of the facility or facilities, including:

(1) The impact on the ability of other participants to receive aid, benefits, services, or training, or of other employees to perform their duties, and

(2) The impact on the facility's ability to carry out its mission.

(2) *Religious accommodation.* For purposes of religious accommodation only, "undue hardship" means anything more than a *de minimis* cost or operational burden that a particular accommodation would impose upon a recipient.

(sss) *Video remote interpreting (VRI) service* means an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection that delivers high-quality video images, as provided in § 38.15.

(ttt) *Vital information* means information, whether written, oral or electronic, that is necessary for an individual to understand how to obtain any aid, benefit, service and/or training; necessary for an individual to obtain any aid, benefit, service, and/or training; or required by law. Examples of documents containing vital information include, but are not limited to applications, consent, and complaint forms; notices of rights and responsibilities; notices advising LEP individuals of their rights under this part, including the availability of free language assistance; rulebooks; written tests that do not assess English language competency, but rather assess competency for a particular license, job, or skill for which English proficiency is not required; and letters or notices that require a response from the beneficiary or applicant, participant, or employee.

(uuu) *Wheelchair* means a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor and/or outdoor locomotion.

(vvv) *WIOA* means the Workforce Innovation and Opportunity Act.

(www) *WIOA Title I financial assistance.* See the definition of "Financial assistance under WIOA" in this section.

(xxx) *WIOA Title I-financially assisted program or activity* means:

(1) A program or activity, operated by a recipient and financially assisted, in whole or in part, under Title I of WIOA that provides either:

(i) Any aid, benefit, service, or training to individuals; or

(ii) Facilities for furnishing any aid, benefits, services, or training to individuals;

(2) Aid, benefit, service, or training provided in facilities that are being or were constructed with the aid of Federal financial assistance under WIOA Title I; or

(3) Aid, benefit, service, or training provided with the aid of any non-WIOA Title I financial assistance, property, or other resources that are required to be expended or made available in order for the program to meet matching requirements or other conditions which must be met in order to receive the WIOA Title I financial assistance. See the definition of "aid, benefit, service, or training" in this section.

### **§ 38.5 General prohibitions on discrimination.**

No individual in the United States may, on the basis of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries, applicants, and participants only, citizenship or participation in any WIOA Title I-financially assisted program or activity, be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration of or in connection with any WIOA Title I-financially assisted program or activity.

### **§ 38.6 Specific discriminatory actions prohibited on bases other than disability.**

(a) For the purposes of this section, prohibited bases for discrimination are race, color, religion, sex, national origin, age, political affiliation or belief, and for beneficiaries, applicants, and participants only, citizenship or participation in any WIOA Title I-financially assisted program or activity.

(b) A recipient must not, directly or through contractual, licensing, or other arrangements, on a prohibited basis:

(1) Deny an individual any aid, benefit, service, or training provided under a WIOA Title I-financially assisted program or activity;

(2) Provide to an individual any aid, benefit, service, or training that is different, or is provided in a different manner, from that provided to others under a WIOA Title I-financially assisted program or activity;

(3) Subject an individual to segregation or separate treatment in any matter related to receipt of any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity;

(4) Restrict an individual in any way in the enjoyment of any advantage or

privilege enjoyed by others receiving any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity;

(5) Treat an individual differently from others in determining whether the individual satisfies any admission, enrollment, eligibility, membership, or other requirement or condition for any aid, benefit, service, or training provided under a WIOA Title I-financially assisted program or activity;

(6) Deny or limit an individual with respect to any opportunity to participate in a WIOA Title I-financially assisted program or activity, or afford the individual an opportunity to do so that is different from the opportunity afforded others under a WIOA Title I-financially assisted program or activity;

(7) Deny an individual the opportunity to participate as a member of a planning or advisory body that is an integral part of the WIOA Title I-financially assisted program or activity; or

(8) Otherwise limit an individual enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any WIOA Title I-financially assisted aid, benefit, service, or training.

(c) A recipient must not, directly or through contractual, licensing, or other arrangements:

(1) Aid or perpetuate discrimination by providing significant assistance to an agency, organization, or person that discriminates on a basis prohibited by WIOA Section 188 or this part in providing any aid, benefit, service, or training, to registrants, applicants or participants in a WIOA Title I-financially assisted program or activity; or

(2) Refuse to accommodate an individual's religious practices or beliefs, unless to do so would result in undue hardship, as defined in § 38.4(rrr)(2).

(d)(1) In making any of the determinations listed in paragraph (d)(2) of this section, either directly or through contractual, licensing, or other arrangements, a recipient must not use standards, procedures, criteria, or administrative methods that have any of the following purposes or effects:

(i) Subjecting individuals to discrimination on a prohibited basis; or

(ii) Defeating or substantially impairing, on a prohibited basis, accomplishment of the objectives of either:

(A) The WIOA Title I-financially assisted program or activity; or

(B) The nondiscrimination and equal opportunity provisions of WIOA or this part.

(2) The determinations to which this paragraph applies include, but are not limited to:

(i) The types of aid, benefit, service, training, or facilities that will be provided under any WIOA Title I-financially assisted program or activity;

(ii) The class of individuals to whom such aid, benefit, service, training, or facilities will be provided; or

(iii) The situations in which such aid, benefit, service, training, or facilities will be provided.

(3) Paragraph (d) of this section applies to the administration of WIOA Title I-financially assisted programs or activities providing aid, benefit, service, training, or facilities in any manner, including, but not limited to:

(i) Outreach and recruitment;

(ii) Registration;

(iii) Counseling and guidance;

(iv) Testing;

(v) Selection, placement, appointment, and referral;

(vi) Training; and

(vii) Promotion and retention.

(4) A recipient must not take any of the prohibited actions listed in paragraph (d) of this section either directly or through contractual, licensing, or other arrangements.

(e) In determining the site or location of facilities, a grant applicant or recipient must not make selections that have any of the following purposes or effects:

(1) On a prohibited basis:

(i) Excluding individuals from a WIOA Title I-financially assisted program or activity;

(ii) Denying them the benefits of such a program or activity; or

(iii) Subjecting them to discrimination; or

(2) Defeating or substantially impairing the accomplishment of the objectives of either:

(i) The WIOA Title I-financially assisted program or activity; or

(ii) The nondiscrimination and equal opportunity provisions of WIOA or this part.

(f)(1) 29 CFR part 2, subpart D governs the circumstances under which DOL support, including under WIOA Title I-financial assistance, may be used to employ or train participants in religious activities. Under that subpart, such assistance may be used for such employment or training only when the assistance is provided indirectly within the meaning of the Establishment Clause of the U.S. Constitution, and not when the assistance is provided directly. As explained in that subpart, assistance

provided through an Individual Training Account is generally considered indirect, and other mechanisms may also be considered indirect. See also 20 CFR 667.266 and 667.275. 29 CFR part 2, subpart D also contains requirements related to equal treatment of religious organizations in Department of Labor programs, and to protection of religious liberty for Department of Labor social service providers and beneficiaries.

(2) Except under the circumstances described in paragraph (f)(3) of this section, a recipient must not employ participants to carry out the construction, operation, or maintenance of any part of any facility that is used, or to be used, for religious instruction or as a place for religious worship.

(3) A recipient may employ participants to carry out the maintenance of a facility that is not primarily or inherently devoted to religious instruction or religious worship if the organization operating the facility is part of a program or activity providing services to participants.

(g) The exclusion of an individual from programs or activities limited by Federal statute or Executive Order to a certain class or classes of individuals of which the individual in question is not a member is not prohibited by this part.

### **§ 38.7 Discrimination prohibited based on sex.**

(a) In providing any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity, a recipient must not directly or through contractual, licensing, or other arrangements, discriminate on the basis of sex. An individual may not be excluded from participation in, denied the benefits of, or subjected to discrimination under any WIOA Title I-financially assisted program or activity based on sex. The term sex includes, but is not limited to, pregnancy, childbirth, and related medical conditions, transgender status, and gender identity.

(b) Recipients may not make any distinction based on sex in providing any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity. Such unlawful sex-based discriminatory practices include, but are not limited to, the following:

(1) Making a distinction between married and unmarried persons that is not applied equally to both sexes;

(2) Denying individuals of one sex who have children access to any aid, benefit, service, or training that is available to individuals of another sex who have children;

(3) Adversely treating unmarried individuals of one sex, but not unmarried individuals of an other sex, who become parents;

(4) Distinguishing on the basis of sex in formal or informal job training and/or educational programs, other opportunities such as networking, mentoring, individual development plans, or on the job training opportunities;

(5) Posting job announcements for jobs that recruit or advertise for individuals for certain jobs on the basis of sex, including through the use of gender-specific terms for jobs (such as “waitress”);

(6) Treating an individual adversely because the individual identifies with a gender different from that individual’s sex assigned at birth, or the individual has undergone, is undergoing, or is planning to undergo, any processes or procedures designed to facilitate the individual’s transition to a sex other than the individual’s sex assigned at birth;

(7) Denying individuals who are pregnant, who become pregnant, or who plan to become pregnant, opportunities for or access to aid, benefit, service, or training on the basis of pregnancy;

(8) Making any facilities associated with WIOA Title I-financially assisted program or activities available only to members of one sex, except that if the recipient provides restrooms or changing facilities, the recipient must provide separate or single-user restrooms or changing facilities;

(9) Denying individuals access to the bathrooms used by the gender with which they identify.

(c) A recipient’s policies or practices that have an adverse impact on the basis of sex, and are not program-related and consistent with program necessity, constitute sex discrimination in violation of WIOA and this part.

(d) Discrimination on the basis of sex stereotypes, such as stereotypes about how persons of a particular sex are expected to look, speak, or act, is a form of unlawful sex discrimination. Examples of sex stereotyping include, but are not limited to:

(1) Denying an individual access to, or otherwise subjecting the individual to adverse treatment in accessing aid, benefit, service, or training, under a WIOA Title I-financially assisted program or activity because of that individual’s failure to comply with gender norms and expectations for dress, appearance and/or behavior, including wearing jewelry, make-up, high-heeled shoes, suits or neckties.

(2) Harassment or adverse treatment of a male applicant, participant, or

beneficiary of a WIOA Title I-financially assisted program or activity because he is considered effeminate or insufficiently masculine.

(3) Adverse treatment of an applicant, participant, or beneficiary of a WIOA Title I-financially assisted program or activity because of the individual's actual or perceived gender identity.

(4) Adverse treatment of a participant, participant, or beneficiary of a WIOA Title I-financially assisted program or activity based on sex stereotypes about caregiver responsibilities. For example, adverse treatment of a female participant because of a sex assumption that she has (or will have) family caretaking responsibilities, and that those responsibilities will interfere with her ability to access aid, benefit, service or training, is discrimination based on sex.

(5) Adverse treatment of a male applicant, participant, or beneficiary of a WIOA Title I-financially assisted program or activity because he has taken, or is planning to take, care of his newborn or recently adopted or fostered child, based on the sex-stereotyped belief that women, and not men, should care for children.

(6) Denying a woman access to, or otherwise subjecting her to adverse treatment in accessing aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity, based on the sex-stereotyped belief that women with children should not work long hours, regardless of whether the recipient is acting out of hostility or belief that it is acting in her or her children's best interest.

(7) Denying an individual access to, or otherwise subjecting the individual to adverse treatment in accessing aid, benefit, service, or training, under a WIOA Title I-financially assisted program or activity, based on sex stereotyping including the belief that a victim of domestic violence would disrupt the program or activity and/or may be unable to access any aid, benefit, service, or training.

(8) Adverse treatment of a woman applicant, participant, or beneficiary of a WIOA Title I-financially assisted program or activity because she does not dress or talk in a feminine manner.

(9) Denying an individual access to, or otherwise subjecting the individual to adverse treatment in accessing aid, benefit, service, or training, under a WIOA Title I-financially assisted program or activity, because the individual does not conform to a sex stereotype about individuals of a particular sex working in a specific job, sector, or industry.

### **§ 38.8 Discrimination prohibited based on pregnancy.**

Discrimination on the basis of pregnancy, childbirth, or related medical conditions, including childbearing capacity, is a form of sex discrimination and a violation of the nondiscrimination provisions of WIOA and this part. Recipients may not treat persons of childbearing capacity, or those affected by pregnancy, childbirth, or related medical conditions, adversely in accessing aid, benefit, service, or training, under a WIOA Title I-financially assisted program or activity. Related medical conditions include, but are not limited to: Lactation; disorders directly related to pregnancy, such as preeclampsia (pregnancy-induced high blood pressure), placenta previa, and gestational diabetes; symptoms such as back pain; complications requiring bed rest; and the after-effects of a delivery. A pregnancy-related medical condition may also be a disability. See § 38.4(q)(3)(ii). Examples of unlawful pregnancy discrimination may include:

(a) Refusing to provide any aid, benefit, service, or training, under a WIOA Title I-financially assisted program or activity to a pregnant individual or an individual of childbearing capacity, or otherwise subjecting such individuals to adverse treatment on the basis of pregnancy or childbearing capacity;

(b) Limiting an individual's access to any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity based on her pregnancy, or requiring a doctor's note in order for a pregnant woman to begin or continue participation while pregnant when doctors' notes are not required for participants who are similarly situated;

(c) Denying an individual access to any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity or requiring the individual to terminate participation in any WIOA Title I-financially assisted program or activity when the individual becomes pregnant or has a child;

(d) Denying reasonable accommodations or modifications of policies, practices, or procedures to a pregnant applicant or participant who is temporarily unable to participate in some portions of a WIOA Title I-financially assisted program or activity because of pregnancy, childbirth, and/or related medical conditions, when such accommodations or modifications are provided, or are required to be provided, by a recipient's policy or by other relevant laws, to other applicants or participants not so affected but

similar in their ability or inability to participate.

### **§ 38.9 Discrimination prohibited based on national origin, including limited English proficiency.**

(a) In providing any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity, a recipient must not, directly or through contractual, licensing, or other arrangements, discriminate on the basis of national origin. An individual must not be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under, any WIOA Title I-financially assisted program or activity based on national origin. National origin discrimination includes treating individual beneficiaries, participants, or applicants for aid, benefit, service or training under any WIOA Title I-financially assisted program or activity adversely because they (or their families or ancestors) are from a particular country or part of the world, because of ethnicity or accent (including physical, linguistic, and cultural characteristics closely associated with a national origin group), or because the recipient perceives the individual to be of a certain national origin, even if they are not.

(b) A recipient must take reasonable steps to ensure meaningful access to each limited English proficient (LEP) individual served or encountered so that LEP individuals are effectively informed about and/or able to participate in the program or activity.

(1) Reasonable steps generally may include, but are not limited to, an assessment of an LEP individual to determine language assistance needs; providing oral interpretation or written translation of both hard-copy and electronic materials, in the appropriate non-English languages, to LEP individuals; and outreach to LEP communities to improve service delivery in needed languages.

(2) Reasonable steps to provide meaningful access to training programs may include, but are not limited to, providing:

(i) Written training materials in appropriate non-English languages by written translation or by oral interpretation or summarization; and

(ii) Oral training content in appropriate non-English languages through in-person interpretation or telephone interpretation.

(c) A recipient should ensure that every program delivery avenue (e.g., electronic, in person, telephonic) conveys in the appropriate languages how an individual may effectively learn about, participate in, and/or access any

aid, benefit, service, or training that the recipient provides. As a recipient develops new methods for delivery of information or assistance, it is required to take reasonable steps to ensure that LEP individuals remain able to learn about, participate in, and/or access any aid, benefit, service, or training that the recipient provides.

(d) Any language assistance services, whether oral interpretation or written translation, must be provided in a timely manner and free of charge. Language assistance will be considered timely when it is provided at a place and time that ensures equal access and avoids the delay or denial of any aid, benefit, service, or training at issue.

(e) A recipient must provide adequate notice to LEP individuals of the existence of interpretation and translation services and that they are available free of charge.

(f)(1) A recipient shall not require an LEP individual to provide their own interpreter.

(2) A recipient also shall not rely on an LEP individual's minor child or adult family or friend(s) to interpret or facilitate communication, except:

(i) An LEP individual's minor child or adult family or friend(s) may interpret or facilitate communication in emergency situations while awaiting a qualified interpreter; or

(ii) The accompanying adult (but not minor child) may interpret or facilitate communication when the information conveyed is of minimal importance to the services to be provided or when the LEP individual specifically requests that the accompanying adult provide language assistance, the accompanying adult agrees to provide assistance, and reliance on that adult for such assistance is appropriate under the circumstances. When the recipient permits the accompanying adult to provide such assistance, it must make and retain a record of the LEP individual's decision to use their own interpreter.

(3) Where precise, complete, and accurate interpretations or translation of information and/or testimony are critical for adjudicatory or legal reasons, or where the competency of the interpreter requested by the LEP individual is not established, a recipient may decide to provide its own, independent interpreter, even if an LEP individual wants to use their own interpreter as well.

(g) With regard to vital information:

(1) For languages spoken by a significant number or portion of the population eligible to be served, or likely to be encountered, a recipient must translate vital information in

written materials into these languages and make the translations readily available in hard copy, upon request, or electronically such as on a Web site. Written training materials offered or used within employment-related training programs as defined under § 38.4(t) are excluded from these translation requirements. However, recipients must take reasonable steps to ensure meaningful access as stated in § 38.9(b).

(2) For languages not spoken by a significant number or portion of the population eligible to be served, or likely to be encountered, a recipient must make reasonable steps to meet the particularized language needs of LEP individuals who seek to learn about, participate in, and/or access the aid, benefit, service or training that the recipient provides. Vital information may be conveyed orally if not translated.

(3) Recipients must include a "Babel notice," indicating that language assistance is available, in all communications of vital information, such as hard-copy letters or decisions or those communications posted on Web sites.

(h) To the extent otherwise required by this part, once a recipient becomes aware of the non-English preferred language of an LEP beneficiary, participant, or applicant for aid, benefit, service or training, the recipient must convey vital information in that language.

(i) Recipients are required to take reasonable steps to provide language assistance and should develop a written language access plan to ensure that LEP individuals have meaningful access. The Appendix to this section provides guidance to recipients on developing a language access plan.

#### **Appendix to § 38.9—Guidance to Recipients**

##### **Recipient Language Assistance Plan (LEP Plan): Promising Practices**

The guidelines in this appendix are consistent with and, in large part, derived from existing federal guidance to federal financial assistance recipients to take reasonable steps to ensure access by limited English proficient (LEP) individuals.

Recipients that develop, implement, and periodically revise a written language assistance plan are more likely to fulfill their obligation of taking reasonable steps to ensure access to programs and activities by LEP individuals. The guidelines set forth below provide a clear framework for developing a written plan that will ensure meaningful access to LEP individuals. Developing and implementing a written plan has many benefits, including providing the recipient with a roadmap for establishing and

documenting compliance with nondiscrimination obligations and ensuring that LEP beneficiaries receive the necessary assistance to participate in the recipient's programs and activities.

The elements of a successful LEP plan are not fixed. Written LEP plans must be tailored to the recipient's specific programs and activities. And, over time, plans will need to be revised to reflect new recommendations and government guidance; changes in the recipient's operations, as well as the recipient's experiences and lessons learned; changing demographics; and stakeholder and beneficiary feedback. Nonetheless, a recipient that develops an LEP plan incorporating the elements identified below will benefit greatly in accomplishing its mission and providing an equal opportunity for LEP individuals to participate in its programs and activities.

A written LEP plan should identify and describe:

1. The process the recipient will use to determine the language needs of individuals who may or may seek to participate in the recipient's program and activities (self- or needs-assessment)
2. The results of the assessment, *e.g.*, identifying the LEP populations to be served by the recipient
3. Timelines for implementing the written LEP plan
4. All language services to be provided to LEP individuals
5. The manner in which LEP individuals will be advised of available services
6. Steps individuals should take to request language assistance
7. The manner in which staff will provide language assistance services
8. What steps must be taken to implement the LEP plan, *e.g.*, creating or modifying policy documents, employee manuals, employee training material, posters, Web sites, outreach material, contracts, and electronic and information technologies, applications, or adaptations
9. The manner in which staff will be trained
10. Steps the recipient will take to ensure quality control, including monitoring implementation, establishing a complaint process, timely addressing complaints, and obtaining feedback from stakeholders and employees
11. The manner in which the recipient will document the provision of language services
12. The schedule for revising the LEP plan
13. The individual(s) assigned to oversee implementation of the plan (*e.g.*, LEP Coordinator or Program Manager)
14. Allocation of resources to implement the plan

##### **Illustrative Applications in Recipient Programs and Activities**

###### *Unemployment Insurance Program Example*

1. Unemployment insurance programs are recipients covered under this proposed rule, and States must take reasonable steps to provide meaningful access to LEP individuals served or encountered in its unemployment insurance programs and activities. For example, given the nature and importance of unemployment insurance, if

an LEP individual who speaks Urdu seeks information about unemployment insurance from a state's telephone call center that assists unemployment insurance enrollees and applicants, the State may consider the proportion of Urdu-speaking LEP individuals served or encountered by the State's unemployment insurance program; the frequency with which Urdu-speaking LEP individuals come in contact with the State's unemployment insurance program; and the resources available to the State and costs in determining how it will provide this LEP individual with language assistance. Urdu is a language that is rarely, if ever, encountered by this State's UI program. Because low-cost commercial language services, such as telephonic oral interpretation services, are widely available, the State should, at a minimum, provide the Urdu-speaking LEP individual telephonic interpretation services to ensure meaningful access to unemployment insurance because, even if Urdu is a non-frequently encountered, non-English language, low-cost commercial language services, such as telephonic oral interpretation services, are widely available.

*Population Significance as it Pertains to Vital Information*

2. Recipients have some flexibility on the means to provide language assistance services to LEP individuals, as long as they take reasonable steps to provide meaningful access to their program or activity. For instance, if a recipient provides career services to an LEP individual who speaks Tagalog and the individual requests a translated brochure on an upcoming job fair, the recipient should consider the importance of the information in the brochure, and may consider: The proportion of Tagalog-speaking LEP individuals served or encountered; the frequency with which Tagalog-speaking LEP individuals come in contact with the recipient; and the resources available to the recipient. In this instance, the recipient would be required to provide a written translation of the brochure for the LEP individual if Tagalog were a language spoken by a significant number or proportion of the LEP persons in the eligible service population and a language frequently encountered in the career services program. But if Tagalog is not spoken by a significant number or proportion of the population eligible to be served, and was not frequently encountered by the career services program, it would be reasonable for the recipient to provide an oral summary of the brochure's contents in Tagalog.

*Training Provider Example Incorporating English Language Learning*

3. Providing English language learning opportunities may be one step that a recipient takes in order to take reasonable steps to provide an LEP individual meaningful access to its programs or activities. For example, John, a Korean-speaking LEP individual, learns through the One Stop Center about available welding positions at ABC Welding, Co. He also learns through the One Stop Center about upcoming welder training courses offered at XYZ Technical Institute, an eligible training

provider. John decides to enroll in one of the XYZ welding courses. XYZ, which conducts its training courses in English, must take reasonable steps to provide John meaningful access to the welder training course.

Recipients may work together to provide meaningful access, but remain independently obligated to take reasonable steps to provide meaningful access to programs and activities. In this regard, XYZ is not required to administer an English language learning class itself. Instead, XYZ may coordinate with the One Stop Center to ensure that John receives appropriate English language learning either directly from the One Stop or from another organization that provides such English language training. The English language class would not be offered to John instead of the training program, but John could attend the English language class at the same time as or prior to the training program. Whether John takes the English class before or concurrently with the welding course will depend on many factors including an objective, individualized analysis of John's English proficiency relative to the welding course. Regardless of how the English language learning is delivered, it must be provided at no cost to John.

In evaluating whether reasonable steps include oral interpretation, written translation, English language learning, another language service, or some combination of these services, XYZ may work with the One-Stop Center to provide meaningful access to John.

**§ 38.10 Harassment prohibited.**

Harassment of an individual based on race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries, applicants and participants only, citizenship status or participation in any WIOA Title I-financially assisted program or activity is a violation of the nondiscrimination provisions of WIOA and this part.

(a) Unwelcome sexual advances, requests for sexual favors, or offensive remarks about a person's race, color, religion, sex, national origin, age, disability, political affiliation or belief, or citizenship or participation, and other unwelcome verbal or physical conduct based on one or more of these protected categories constitutes unlawful harassment on that basis(es) when:

(1) Submission to such conduct is made either explicitly or implicitly a term or condition of accessing the aid, benefit, service, or training of, or employment in the administration of or in connection with, any WIOA Title I-financially assisted program or activity;

(2) Submission to or rejection of such conduct by an individual is used as the basis for limiting that individual's access to any aid, benefit, service, training or employment from, or employment in the administration of or in connection with, any WIOA Title I-

financially assisted program or activity; or

(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's participation in a WIOA Title I-financially assisted program or activity creating an intimidating, hostile or offensive program environment.

(b) Harassment because of sex includes harassment based on gender identity and failure to comport with sex stereotypes; harassment based on pregnancy, childbirth, or related medical conditions; and sex-based harassment that is not sexual in nature but that is because of sex or where one sex is targeted for the harassment.

**§ 38.11 Discrimination prohibited based on citizenship status.**

In providing any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity, a recipient must not directly or through contractual, licensing, or other arrangements, discriminate on the basis of citizenship status. Individuals protected under this section include citizens and nationals of the United States, lawfully admitted permanent resident aliens, refugees, asylees, and parolees, and other immigrants authorized by the Secretary of Homeland Security or the Secretary's designee to work in the United States. Citizenship discrimination occurs when a recipient maintains and enforces policies and procedures that have the purpose or effect of discriminating against individual beneficiaries, applicants, and participants, on the basis of their status as citizens or nationals of the United States lawfully admitted permanent resident aliens, refugees, asylees, and parolees, or other immigrants authorized by the Secretary of Homeland Security or the Secretary's designee to work in the United States.

**§ 38.12 Discrimination prohibited based on disability.**

(a) In providing any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity, a recipient must not, directly or through contractual, licensing, or other arrangements, on the basis of disability:

(1) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, service, or training;

(2) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefits, services, or training that is not equal to that afforded others;

(3) Provide a qualified individual with a disability with any aid, benefit, service or training that is not as effective

in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(4) Provide different, segregated, or separate aid, benefit, service, or training to individuals with disabilities, or to any class of individuals with disabilities, unless such action is necessary to provide qualified individuals with disabilities with any aid, benefit, service or training that are as effective as those provided to others;

(5) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards; or

(6) Otherwise limit a qualified individual with a disability in enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, service or training.

(b) A recipient must not, directly or through contractual, licensing, or other arrangements, aid or perpetuate discrimination against qualified individuals with disabilities by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, service or training to registrants, applicants, or participants.

(c) A recipient must not deny a qualified individual with a disability the opportunity to participate in WIOA Title I-financially assisted programs or activities despite the existence of permissibly separate or different programs or activities.

(d) A recipient must administer WIOA Title I-financially assisted programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e) A recipient must not, directly or through contractual, licensing, or other arrangements, use standards, procedures, criteria, or administrative methods:

(1) That have the purpose or effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(2) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the WIOA Title I-financially assisted program or activity with respect to individuals with disabilities; or

(3) That perpetuate the discrimination of another entity if both entities are subject to common administrative control or are agencies of the same state.

(f) In determining the site or location of facilities, a grant applicant or recipient must not make selections that

have any of the following purposes or effects:

(1) On the basis of disability:

(i) Excluding qualified individuals from a WIOA Title I-financially assisted program or activity;

(ii) Denying qualified individuals the benefits of such a program or activity; or

(iii) Subjecting qualified individuals to discrimination; or

(2) Defeating or substantially impairing the accomplishment of the disability-related objectives of either:

(i) The WIOA Title I-financially assisted program or activity; or

(ii) The nondiscrimination and equal opportunity provisions of WIOA or this part.

(g) A recipient, in the selection of contractors, must not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(h) A recipient must not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a recipient establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a recipient are not, themselves, covered by this part.

(i) A recipient must not impose or apply eligibility criteria that screen out or tend to screen out individuals with disabilities or any class of individuals with disabilities from fully and equally enjoying any aid, benefit, service, training, program, or activity, unless such criteria can be shown to be necessary for the provision of aid, benefit, service, training, program, or activity being offered.

(j) Nothing in this part prohibits a recipient from providing aid, benefit, service, training, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities, beyond those required by this part.

(k) A recipient must not place a surcharge on a particular individual with a disability, or any group of individuals with disabilities, to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by WIOA Title I or this part.

(l) A recipient must not exclude, or otherwise deny equal aid, benefits, services, training, programs, or activities

to, an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(m) The exclusion of an individual without a disability from the benefits of a program limited by federal law to individuals with disabilities, or the exclusion of a specific class of individuals with disabilities from a program limited by Federal statute or Executive Order to a different class of individuals with disabilities, is not prohibited by this part.

(n) This part does not require a recipient to provide any of the following to individuals with disabilities:

(1) Personal devices, such as wheelchairs;

(2) Individually prescribed devices, such as prescription eyeglasses or hearing aids;

(3) Readers for personal use or study;

or

(4) Services of a personal nature, including assistance in eating, toileting, or dressing.

(o)(1) Nothing in this part requires an individual with a disability to accept an accommodation, aid, benefit, service, training, or opportunity provided under WIOA Title I or this part that such individual chooses not to accept.

(2) Nothing in this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(p) *Claims of no disability.* Nothing in this part provides the basis for a claim that an individual without a disability was subject to discrimination because of a lack of disability, including a claim that an individual with a disability was granted auxiliary aids or services, reasonable modifications, or reasonable accommodations that were denied to an individual without a disability.

### § 38.13 Accessibility requirements.

(a) *Physical accessibility.* No qualified individual with a disability may be excluded from participation in, or be denied the benefits of a recipient's service, program, or activity or be subjected to discrimination by any recipient because a recipient's facilities are inaccessible or unusable by individuals with disabilities. Recipients that are subject to Title II of the ADA must also ensure that new facilities or alterations of facilities that began construction after January 26, 1992, comply with the applicable federal accessible design standards, such as the ADA Standards for Accessible Design (1991 or 2010) or the Uniform Federal Accessibility Standards. In addition, recipients that receive federal financial

assistance must meet their accessibility obligations under Section 504 of the Rehabilitation Act and the implementing regulations at 29 CFR part 32. Some recipients may be subject to additional accessibility requirements under other statutory authority, including Title III of the ADA, that is not enforced by CRC. As indicated in § 38.3(d)(10), compliance with this part does not affect a recipient's obligation to comply with Title III ADA Standards.

(b) *Programmatic accessibility.* All WIOA Title I-financially assisted programs and activities must be programatically accessible, which includes providing reasonable accommodations for individuals with disabilities, making reasonable modifications to policies, practices, and procedures, administering programs in the most integrated setting appropriate, communicating with persons with disabilities as effectively as with others, and providing appropriate auxiliary aids or services, including assistive technology devices and services, where necessary to afford individuals with disabilities an equal opportunity to participate in, and enjoy the benefits of, the program or activity.

**§ 38.14 Reasonable accommodations and reasonable modifications for individuals with disabilities.**

(a) With regard to aid, benefit, service, training, and employment, a recipient must provide reasonable accommodations to qualified individuals with disabilities who are applicants, registrants, eligible applicants/registrants, participants, employees, or applicants for employment, unless providing the accommodation would cause undue hardship. See the definitions of “reasonable accommodation” and “undue hardship” in § 38.4(rrr)(1).

(1) In those circumstances where a recipient believes that the proposed accommodation would cause undue hardship, the recipient has the burden of proving that the accommodation would result in such hardship.

(2) The recipient must make the decision that the accommodation would cause such hardship only after considering all factors listed in the definition of “undue hardship” in § 38.4(rrr)(1). The decision must be accompanied by a written statement of the recipient's reasons for reaching that conclusion. The recipient must provide a copy of the statement of reasons to the individual or individuals who requested the accommodation.

(3) If a requested accommodation would result in undue hardship, the recipient must take any other action that

would not result in such hardship, but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the aid, benefit, service, training, or employment provided by the recipient.

(b) With regard to aid, benefit, service, training, and employment, a recipient must also make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless making the modifications would fundamentally alter the nature of the service, program, or activity. See the definition of “fundamental alteration” in § 38.4(z).

(1) In those circumstances where a recipient believes that the proposed modification would fundamentally alter the program, activity, or service, the recipient has the burden of proving that the modification would result in such an alteration.

(2) The recipient must make the decision that the modification would result in such an alteration only after considering all factors listed in the definition of “fundamental alteration” in § 38.4(z). The decision must be accompanied by a written statement of the recipient's reasons for reaching that conclusion. The recipient must provide a copy of the statement of reasons to the individual or individuals who requested the modification.

(3) If a modification would result in a fundamental alteration, the recipient must take any other action that would not result in such an alteration, but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the aid, benefits, services, training, or employment provided by the recipient.

**§ 38.15 Communications with individuals with disabilities.**

(a) *General.* (1)(i) A recipient must take appropriate steps to ensure that communications with individuals with disabilities, such as beneficiaries, registrants, applicants, eligible applicants/registrants, participants, applicants for employment, employees, members of the public, and their companions are as effective as communications with others.

(ii) For purposes of this section, “companion” means a family member, friend, or associate of an individual seeking access to an aid, benefit, service, training, program, or activity of a recipient, who, along with such individual, is an appropriate person with whom the recipient should communicate.

(2)(i) A recipient must furnish appropriate auxiliary aids and services

where necessary to afford individuals with disabilities, including beneficiaries, registrants, applicants, eligible applicants/registrants, participants, members of the public, and companions, an equal opportunity to participate in, and enjoy the benefits of, a WIOA Title I-financially assisted service, program, or activity of a recipient.

(ii) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a recipient must give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

(3)(i) A recipient must not require an individual with a disability to bring another individual to interpret for him or her.

(ii) A recipient must not rely on an adult accompanying an individual with a disability to interpret or facilitate communication except—

(A) In an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available; or

(B) Where the individual with a disability specifically requests that an accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.

(iii) A recipient must not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.

(4) *Video remote interpreting (VRI) services.* A recipient that chooses to provide qualified interpreters via VRI services must ensure that it provides—

(i) Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;

(ii) A sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers, and the participating individual's face, arms, hands, and fingers, regardless of his or her body position;

(iii) A clear, audible transmission of voices; and

(iv) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI.

(5) When developing, procuring, maintaining, or using electronic and information technology, a recipient must utilize electronic and information technologies, applications, or adaptations which:

(i) Incorporate accessibility features for individuals with disabilities,

(ii) Comply with applicable accessibility guidelines and standards, including any web accessibility standards under Title II of the Americans with Disabilities Act (ADA), and

(iii) Provide individuals with disabilities access to, and use of, information, resources, programs, and activities that are fully accessible, or ensure that the opportunities and benefits provided by the electronic and information technologies are provided to individuals with disabilities in an equally effective and equally integrated manner.

(b) *Telecommunications.* (1) Where a recipient communicates by telephone with beneficiaries, registrants, applicants, eligible applicants/registrants, participants, applicants for employment, employees, and/or members of the public, text telephones (TTYs) or equally effective telecommunications systems must be used to communicate with individuals who are deaf or hard of hearing or have speech impairments.

(2) When a recipient uses an automated-attendant system, including, but not limited to, voicemail and messaging, or an interactive voice response system, for receiving and directing incoming telephone calls, that system must provide effective real-time communication with individuals using auxiliary aids and services, including TTYs and all forms of FCC-approved telecommunications relay systems, including Internet-based relay systems.

(3) A recipient must respond to telephone calls from a telecommunications relay service established under title IV of the Americans with Disabilities Act in the same manner that it responds to other telephone calls.

(c) *Information and signage.* (1) A recipient must ensure that interested individuals, including individuals with visual or hearing impairments, can obtain information as to the existence and location of accessible services, activities, and facilities.

(2)(i) A recipient must provide signage at the public entrances to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The signage provided must meet the most current Standards for Accessible Design under the Americans with Disabilities Act, as prescribed by the U.S. Department of Justice. Alternative standards for the signage may be adopted when it is clearly evident that such alternative standards provide equivalent or greater access to the information.

(ii) The international symbol for accessibility must be used at each primary entrance of an accessible facility.

(d) *Fundamental alteration.* This section does not require a recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of a WIOA Title I-financially assisted service, program, or activity.

(1) In those circumstances where a recipient believes that the proposed action would fundamentally alter the WIOA Title I-financially assisted program, activity, or service, the recipient has the burden of proving that compliance with this section would result in such an alteration.

(2) The decision that compliance would result in such an alteration must be made by the recipient after considering all resources available for use in the funding and operation of the WIOA Title I-financially assisted program, activity, or service, and must be accompanied by a written statement of the recipient's reasons for reaching that conclusion.

(3) If an action required to comply with this section would result in the fundamental alteration described in paragraph (d)(1) of this section, the recipient must take any other action that would not result in such an alteration or such burdens, but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the recipient.

#### § 38.16 Service animals.

(a) *General.* Generally, a recipient shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability.

(b) *Exceptions.* A recipient may ask an individual with a disability to remove a service animal from the premises if—

(1) The animal is out of control and the animal's handler does not take effective action to control it; or

(2) The animal is not housebroken.

(c) *If an animal is properly excluded.* If a recipient properly excludes a service animal under paragraph (b) of this section, the recipient must give the individual with a disability the opportunity to participate in the WIOA Title I-financially assisted service, program, or activity without having the service animal on the premises.

(d) *Animal under handler's control.* A service animal must be under the control of its handler. A service animal must have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (e.g., voice control, signals, or other effective means).

(e) *Care or supervision.* A recipient is not responsible for the care or supervision of a service animal.

(f) *Inquiries.* A recipient must not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal. A recipient may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A recipient must not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. Generally, a recipient may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (e.g., the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).

(g) *Access to areas of a recipient's facilities.* (1) *In general.* Individuals with disabilities must be permitted to be accompanied by their service animals in all areas of a recipient's facilities where members of the public, participants in services, programs or activities, beneficiaries, registrants, applicants, eligible applicants/registrants, applicants for employment and employees, or invitees, as relevant, are allowed to go.



(2) *Use of service animals in food preparation areas.* An employee, applicant or beneficiary with a disability who needs to use a service animal in a food preparation area must be allowed to do so unless the employer recipient, after an individualized assessment, can demonstrate, that the presence of the service animal presents a direct threat to health or safety that cannot be eliminated or reduced by a reasonable accommodation to the employee, applicant or beneficiary.

(h) *Surcharges.* A recipient must not ask or require an individual with a disability to pay a surcharge because of his or her service animal, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets. If a recipient normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal.

#### **§ 38.17 Mobility aids and devices.**

(a) *Use of wheelchairs and manually-powered mobility aids.* A recipient must permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, such as walkers, crutches, canes, braces, or other similar devices designed for use by individuals with mobility disabilities, in any areas open to pedestrian use.

(b)(1) *Use of other power-driven mobility devices.* A recipient must make reasonable modifications in its policies, practices, or procedures to permit the use of other power-driven mobility devices by individuals with mobility disabilities, unless the recipient can demonstrate that the class of other power-driven mobility devices cannot be operated in accordance with legitimate safety requirements that the recipient has adopted.

(2) *Assessment factors.* In determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification under paragraph (b)(1) of this section, a recipient must consider—

(i) The type, size, weight, dimensions, and speed of the device;

(ii) The facility's volume of pedestrian traffic (which may vary at different times of the day, week, month, or year);

(iii) The facility's design and operational characteristics (e.g., whether its WIOA Title I-financially assisted service, program, or activity is conducted indoors, its square footage, the density and placement of stationary devices, and the availability of storage for the device, if requested by the user);

(iv) Whether legitimate safety requirements can be established to permit the safe operation of the other power-driven mobility device in the specific facility; and

(v) Whether the use of the other power-driven mobility device creates a substantial risk of serious harm to the immediate environment or natural or cultural resources, or poses a conflict with Federal land management laws.

#### **§ 38.18 Employment practices covered.**

(a) It is an unlawful employment practice to discriminate on the basis of race, color, religion, sex (including pregnancy, childbirth, and related medical conditions, transgender status and gender identity), national origin, age, disability, or political affiliation or belief in the administration of, or in connection with:

(1) Any WIOA Title I-financially assisted program or activity; and

(2) Any program or activity that is part of the One-Stop delivery system and is operated by a One-Stop partner listed in Section 121(b) of WIOA, to the extent that the program or activity is being conducted as part of the One-Stop delivery system.

(b) *Employee selection procedures.* In implementing this section, a recipient must comply with the Uniform Guidelines on Employee Selection Procedures, 41 CFR part 60–3, where applicable.

(c) *Standards for employment-related investigations and reviews.* In any investigation or compliance review, the Director must consider Equal Employment Opportunity Commission (EEOC) regulations, guidance and appropriate case law in determining whether a recipient has engaged in an unlawful employment practice.

(d) As provided in § 38.3(b), 29 CFR part 32, subparts B and C and Appendix A, which implement the requirements of Section 504 pertaining to employment practices and employment-related training, program accessibility, and reasonable accommodation, have been incorporated into this part by reference. Therefore, recipients must comply with the requirements set forth in those regulatory sections as well as the requirements listed in this part.

(e)(1) Recipients that are also employers, employment agencies, or other entities subject to or covered by Titles I and II of the ADA should be aware of obligations imposed by those titles. See 29 CFR part 1630 and 28 CFR part 35.

(2) Recipients that are also employers, employment agencies, or other entities subject to or covered by Section 503 of the Rehabilitation Act of 1973 (29 U.S.C.

793) must meet their obligations imposed by that provision.

(f) Similarly, recipients that are also employers covered by the anti-discrimination provision of the Immigration and Nationality Act should be aware of the obligations imposed by that provision. See 8 U.S.C. 1324b, as amended.

(g) This section does not preempt consistent State and local requirements.

#### **§ 38.19 Intimidation and retaliation prohibited.**

(a) A recipient must not discharge, intimidate, retaliate, threaten, coerce or discriminate against any individual because the individual has:

(1) Filed a complaint alleging a violation of Section 188 of WIOA or this part;

(2) Opposed a practice prohibited by the nondiscrimination and equal opportunity provisions of WIOA or this part;

(3) Furnished information to, or assisted or participated in any manner in, an investigation, review, hearing, or any other activity related to any of the following:

(i) Administration of the nondiscrimination and equal opportunity provisions of WIOA or this part;

(ii) Exercise of authority under those provisions; or

(iii) Exercise of privilege secured by those provisions; or

(4) Otherwise exercised any rights and privileges under the nondiscrimination and equal opportunity provisions of WIOA or this part.

(b) The sanctions and penalties contained in Section 188(b) of WIOA or this part may be imposed against any recipient that engages in any such retaliation or intimidation, or fails to take appropriate steps to prevent such activity.

#### **§ 38.20 Administration of this part.**

The Civil Rights Center (CRC), in the Office of the Assistant Secretary for Administration and Management, U.S. Department of Labor, is responsible for administering and enforcing the nondiscrimination and equal opportunity provisions of WIOA and this part, and for developing and issuing policies, standards, guidance, and procedures for effecting compliance.

#### **§ 38.21 Interpretations of this part.**

The Director will make any rulings under, or interpretations of, the nondiscrimination and equal opportunity provisions of WIOA or this part.

**§ 38.22 Delegation of administration and interpretation of this part.**

(a) The Secretary may from time to time assign to officials of other departments or agencies of the Federal Government (with the consent of such department or agency) responsibilities in connection with the effectuation of the nondiscrimination and equal opportunity provisions of WIOA and this part (other than responsibility for final decisions under § 38.112), including the achievement of effective coordination and maximum uniformity within the Department and within the executive branch of the Government in the application of the nondiscrimination and equal opportunity provisions of WIOA or this part to similar programs and similar situations.

(b) Any action taken, determination made, or requirement imposed by an official of another department or agency acting under an assignment of responsibility under this section has the same effect as if the action had been taken by the Director.

**§ 38.23 Coordination with other agencies.**

(a) Whenever a compliance review or complaint investigation under this part reveals possible violation of one or more of the laws listed in paragraph (b) of this section, or of any other Federal civil rights law, that is not also a violation of the nondiscrimination and equal opportunity provisions of WIOA or this part, the Director must attempt to notify the appropriate agency and provide it with all relevant documents and information.

(b) This section applies to the following:

(1) Executive Order 11246, as amended;

(2) Section 503 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 793);

(3) The affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212);

(4) The Equal Pay Act of 1963, as amended (29 U.S.C. 206d);

(5) Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e *et seq.*);

(6) The Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 621);

(7) The Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101 *et seq.*);

(8) The anti-discrimination provision of the Immigration and Nationality Act, as amended (8 U.S.C. 1324b); and

(9) Any other Federal civil rights law.

**§ 38.24 Effect on other laws and policies.**

(a) *Effect of State or local law or other requirements.* The obligation to comply with the nondiscrimination and equal opportunity provisions of WIOA or this part are not excused or reduced by any State or local law or other requirement that, on a prohibited basis, prohibits or limits an individual's eligibility to receive aid, benefit, service, or training; to participate in any WIOA Title I-financially assisted program or activity; to be employed by any recipient; or to practice any occupation or profession.

(b) *Effect of private organization rules.* The obligation to comply with the nondiscrimination and equal opportunity provisions of WIOA Title I-financially assisted program or activity and this part is not excused or reduced by any rule or regulation of any private organization, club, league or association that, on a prohibited basis, prohibits or limits an individual's eligibility to participate in any WIOA financially assisted program or activity to which this part applies.

(c) *Effect of possible future exclusion from employment opportunities.* A recipient must not exclude any individual from, or restrict any individual's participation in, any program or activity based on the recipient's belief or concern that the individual will encounter limited future employment opportunities because of the individual's race, color, religion, sex, national origin, age, disability, political affiliation or belief, citizenship status, or participation in a WIOA Title I-financially assisted program or activity.

**Subpart B—Recordkeeping and Other Affirmative Obligations of Recipients****Assurances****§ 38.25 A grant applicant's obligation to provide a written assurance.**

(a)(1) Each application for financial assistance, under Title I of WIOA, as defined in § 38.4, must include the following assurance:

As a condition to the award of financial assistance from the Department of Labor under Title I of WIOA, the grant applicant assures that it has the ability to comply with the nondiscrimination and equal opportunity provisions of the following laws and will remain in compliance for the duration of the award of federal financial assistance:

Section 188 of the Workforce Innovation and Opportunity Act (WIOA), which prohibits discrimination against all individuals in the United States on the basis of race, color,

religion, sex (including pregnancy, childbirth, and related medical conditions, transgender status and gender identity), national origin, age, disability, political affiliation or belief, and against beneficiaries on the basis of either citizenship status or participation in any WIOA Title I-financially assisted program or activity;

Title VI of the Civil Rights Act of 1964, as amended, which prohibits discrimination on the bases of race, color and national origin;

Section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination against qualified individuals with disabilities;

The Age Discrimination Act of 1975, as amended, which prohibits discrimination on the basis of age; and

Title IX of the Education Amendments of 1972, as amended, which prohibits discrimination on the basis of sex in educational programs.

The grant applicant also assures that, as a recipient of WIOA Title I financial assistance, it will comply with 29 CFR part 38 and all other regulations implementing the laws listed above. This assurance applies to the grant applicant's operation of the WIOA Title I-financially assisted program or activity, and to all agreements the grant applicant makes to carry out the WIOA Title I-financially assisted program or activity. The grant applicant understands that the United States has the right to seek judicial enforcement of this assurance.

(2) The assurance is considered incorporated by operation of law in the grant, cooperative agreement, contract or other arrangement whereby Federal financial assistance under Title I of WIOA is made available, whether it is explicitly incorporated in such document and whether there is a written agreement between the Department and the recipient, between the Department and the Governor, between the Governor and the recipient, or between recipients. The assurance also may be incorporated by reference in such grants, cooperative agreements, contracts, or other arrangements.

(b) *Continuing State programs.* Each Strategic Four-Year State Plan submitted by a State to carry out a continuing WIOA financially assisted program or activity must provide the text of the assurance in paragraph (a)(1) of this section, as a condition to the approval of the Four-Year Plan and the extension of any WIOA Title I assistance under the Plan. The State also must certify that it has developed and maintains a Nondiscrimination Plan under § 38.54.

**§ 38.26 Duration and scope of the assurance.**

(a) Where the WIOA Title I financial assistance is intended to provide, or is in the form of, either personal property, real property, structures on real property, or interest in any such property or structures, the assurance will obligate the recipient, or (in the case of a subsequent transfer) the transferee, for the longer of:

(1) The period during which the property is used either:

(i) For a purpose for which WIOA Title I financial assistance is extended; or

(ii) For another purpose involving the provision of similar services or benefits; or

(2) The period during which either:

(i) The recipient retains ownership or possession of the property; or

(ii) The transferee retains ownership or possession of the property without compensating the Departmental grantmaking agency for the fair market value of that ownership or possession.

(b) In all other cases, the assurance will obligate the recipient for the period during which WIOA Title I financial assistance is extended.

**§ 38.27 Covenants.**

(a) Where WIOA Title I financial assistance is provided in the form of a transfer of real property, structures, or improvements on real property or structures, or interests in real property or structures, the instrument effecting or recording the transfer must contain a covenant assuring nondiscrimination and equal opportunity for the period described in § 38.25(a)(1).

(b) Where no Federal transfer of real property or interest therein from the Federal Government is involved, but real property or an interest therein is acquired or improved under a program of WIOA Title I financial assistance, the recipient must include the covenant described in paragraph (a) of this section in the instrument effecting or recording any subsequent transfer of such property.

(c) When the property is obtained from the Federal Government, the covenant described in paragraph (a) of this section also may include a condition coupled with a right of reverter to the Department in the event of a breach of the covenant.

**Equal Opportunity Officers****§ 38.28 Designation of Equal Opportunity Officer.**

(a) Every Governor must designate an individual as a State Level Equal Opportunity Officer (EO Officer), who reports directly to the Governor and is

responsible for statewide coordination of compliance with the equal opportunity and nondiscrimination requirements in WIOA and this part, including but not limited to §§ 38.51, 38.53, 38.54 and 38.55. The State Level EO Officer must have staff and resources sufficient to carry out these requirements.

(b) Every recipient except small recipients and service providers, as defined in § 38.4(fff) and § 38.4(eee), must designate an EO Officer and staff and resources sufficient to carry out the requirements of this section and § 38.31 of this part. The responsibilities of small recipients and service providers are described in §§ 38.32 and 38.33.

**§ 38.29 Recipient obligations regarding its Equal Opportunity Officer.**

The recipient has the following obligations related to its EO Officer:

(a) Ensuring that the EO Officer is a senior level employee reporting directly to the Chief Executive Officer, Chief Operating Officer, or equivalent official;

(b) Designating an individual who can fulfill the responsibilities of an EO Officer as described in § 38.31;

(c) Making the EO Officer's name, position title, address, and telephone number (voice and TDD/TTY) public;

(d) Ensuring that the EO Officer's identity and contact information appears on all internal and external communications about the recipient's nondiscrimination and equal opportunity programs;

(e) Assigning sufficient authority, staff, and resources to the EO Officer, and support of top management, to ensure compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part; and

(f) Ensuring that the EO Officer and the EO Officer's staff are afforded the opportunity to receive (at the recipient's expense) the training necessary and appropriate to maintain competency.

**§ 38.30 Requisite skill and authority of Equal Opportunity Officer.**

The EO Officer must be a senior level employee of the recipient who has the knowledge, skills and abilities necessary to fulfill the responsibilities competently as described in this subpart. Depending upon the size of the recipient, the size of the recipient's WIOA Title I-financially assisted programs or activities, and the number of applicants, registrants, and participants served by the recipient, the EO Officer may, or may not, be assigned other duties. However, he or she must not have other responsibilities or activities that create a conflict or the

appearance of a conflict with the responsibilities of an EO Officer.

**§ 38.31 Equal Opportunity Officer responsibilities.**

An Equal Opportunity Officer is responsible for coordinating a recipient's obligations under this part. Those responsibilities include, but are not limited to:

(a) Serving as a recipient's liaison with CRC;

(b) Monitoring and investigating the recipient's activities, and the activities of the entities that receive WIOA Title I-financial assistance from the recipient, to make sure that the recipient and its subrecipients are not violating their nondiscrimination and equal opportunity obligations under WIOA Title I and this part, which includes monitoring the collection of data required in this part to ensure compliance with the nondiscrimination and equal opportunity requirements of WIOA and this part;

(c) Reviewing the recipient's written policies to make sure that those policies are nondiscriminatory;

(d) Developing and publishing the recipient's procedures for processing discrimination complaints under §§ 38.72 through 38.73, including tracking the discrimination complaints filed against the recipient, developing procedures for investigating and resolving discrimination complaints filed against the recipient, making sure that those procedures are followed, and making available to the public, in appropriate languages and formats, the procedures for filing a complaint;

(e) Conducting outreach and education about equal opportunity and nondiscrimination requirements consistent with § 38.40 and how an individual may file a complaint consistent with § 38.69.

(f) Undergoing training (at the recipient's expense) to maintain competency of the EO Officer and staff, as required by the Director; and

(g) If applicable, overseeing the development and implementation of the recipient's Nondiscrimination Plan under § 38.54.

**§ 38.32 Small recipient Equal Opportunity Officer obligations.**

Although small recipients, as defined in § 38.4(hhh), do not need to designate EO Officers who have the full range of responsibilities listed above, they must designate an individual who will be responsible for adopting and publishing complaint procedures, and processing complaints, as explained in §§ 38.72 through 38.75.

**§ 38.33 Service provider Equal Opportunity Officer obligations.**

Service providers, as defined in § 38.4(ggg), are not required to designate an EO Officer. The obligation for ensuring service provider compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part rests with the Governor or LWIA grant recipient, as specified in the State's Nondiscrimination Plan.

**Notice and Communication****§ 38.34 Recipients' obligations to disseminate equal opportunity notice.**

(a) A recipient must provide initial and continuing notice as defined in § 38.36 that it does not discriminate on any prohibited basis. This notice must be provided to:

- (1) Registrants, applicants, and eligible applicants/registrants;
- (2) Participants;
- (3) Applicants for employment and employees;
- (4) Unions or professional organizations that hold collective bargaining or professional agreements with the recipient;
- (5) Subrecipients that receive WIOA Title I financial assistance from the recipient; and
- (6) Members of the public, including those with impaired vision or hearing and those with limited English proficiency.

(b) As provided in § 38.15, the recipient must take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others and that this notice is provided in appropriate languages to ensure meaningful access for LEP individuals as described in § 38.9.

**§ 38.35 Equal opportunity notice/poster.**

The notice must contain the following specific wording:

**Equal Opportunity Is the Law**

It is against the law for this recipient of Federal financial assistance to discriminate on the following bases: Against any individual in the United States, on the basis of race, color, religion, sex (including pregnancy, childbirth and related medical conditions, sex stereotyping, transgender status, and gender identity), national origin (including limited English proficiency), age, disability, political affiliation or belief; and against any beneficiary of programs financially assisted under Title I of the Workforce Innovation and Opportunity Act, on the basis of the beneficiary's citizenship status or his or her participation in any WIOA Title I-financially assisted program or activity.

The recipient must not discriminate in any of the following areas:

Deciding who will be admitted, or have access, to any WIOA Title I-financially assisted program or activity;

providing opportunities in, or treating any person with regard to, such a program or activity; or

making employment decisions in the administration of, or in connection with, such a program or activity.

**What To Do If You Believe You Have Experienced Discrimination**

If you think that you have been subjected to discrimination under a WIOA Title I-financially assisted program or activity, you may file a complaint within 180 days from the date of the alleged violation with either:

The recipient's Equal Opportunity Officer (or the person whom the recipient has designated for this purpose); or  
the Director, Civil Rights Center (CRC), U.S. Department of Labor, 200 Constitution Avenue NW., Room N-4123, Washington, DC 20210 or electronically as directed on the CRC Web site at [www.dol.gov/crc](http://www.dol.gov/crc).

If you file your complaint with the recipient, you must wait either until the recipient issues a written Notice of Final Action, or until 90 days have passed (whichever is sooner), before filing with the Civil Rights Center (see address above).

If the recipient does not give you a written Notice of Final Action within 90 days of the day on which you filed your complaint, you may file a complaint with CRC before receiving that Notice. However, you must file your CRC complaint within 30 days of the 90-day deadline (in other words, within 120 days after the day on which you filed your complaint with the recipient).

If the recipient does give you a written Notice of Final Action on your complaint, but you are dissatisfied with the decision or resolution, you may file a complaint with CRC. You must file your CRC complaint within 30 days of the date on which you received the Notice of Final Action.

**§ 38.36 Recipients' obligations to publish equal opportunity notice.**

(a) At a minimum, the Equal Opportunity Notice required by §§ 38.34 and 38.35 must be:

- (1) Posted prominently, in reasonable numbers and places, in available and conspicuous physical locations and on the recipient's Web site pages;
- (2) Disseminated in internal memoranda and other written or electronic communications with staff;
- (3) Included in employee and participant handbooks or manuals regardless of form, including electronic and paper form if both are available; and
- (4) Provided to each participant and employee; the notice must be made part of each employee's and participant's file. It must be a part of both paper and electronic files, if both are maintained.

(b) The notice must be provided in appropriate formats to registrants, applicants, eligible applicants/registrants, applicants for employment and employees and participants with visual impairments. Where notice has

been given in an alternate format to registrants, applicants, eligible applicants/registrants, participants, applicants for employment and employees with a visual impairment, a record that such notice has been given must be made a part of the employee's or participant's file.

(c) The notice must be provided to participants in appropriate languages other than English as required in § 38.9.

(d) The notice required by §§ 38.34 and 38.35 must be initially published and provided within 90 days of the effective date of this part, or of the date this part first applies to the recipient, whichever comes later.

**§ 38.37 Notice requirement for service providers.**

The Governor or the LWIA grant recipient, as determined by the Governor and as provided in that State's Nondiscrimination Plan, will be responsible for meeting the notice requirement provided in §§ 38.34 and 38.35 with respect to a State's service providers.

**§ 38.38 Publications, broadcasts, and other communications.**

(a) Recipients must indicate that the WIOA Title I-financially assisted program or activity in question is an "equal opportunity employer/program," and that "auxiliary aids and services are available upon request to individuals with disabilities," in recruitment brochures and other materials that are ordinarily distributed or communicated in written and/or oral form, electronically and/or on paper, to staff, clients, or the public at large, to describe programs financially assisted under Title I of WIOA or the requirements for participation by recipients and participants. Where such materials indicate that the recipient may be reached by voice telephone, the materials must also prominently provide the telephone number of the text telephone (TTY) or equally effective telecommunications system, such as a relay service, used by the recipient, as required by § 38.15(b).

(b) Recipients that publish or broadcast program information in the news media must ensure that such publications and broadcasts state that the WIOA Title I-financially assisted program or activity in question is an equal opportunity employer/program (or otherwise indicate that discrimination in the WIOA Title I-financially assisted program or activity is prohibited by Federal law), and indicate that auxiliary aids and services are available upon request to individuals with disabilities.

(c) A recipient must not communicate any information that suggests, by text or illustration, that the recipient treats beneficiaries, registrants, applicants, participants, employees or applicants for employment differently on any prohibited basis specified in § 38.5, except as such treatment is otherwise permitted under Federal law or this part.

**§ 38.39 Communication of notice in orientations.**

During each presentation to orient new participants, new employees, and/or the general public to its WIOA Title I-financially assisted program or activity, in person or over the Internet or using other technology, a recipient must include a discussion of rights and responsibilities under the nondiscrimination and equal opportunity provisions of WIOA and this part, including the right to file a complaint of discrimination with the recipient or the Director. This information must be communicated in appropriate languages as required in § 38.9 and in formats accessible for individuals with disabilities as required in this part and specified in § 38.15.

**§ 38.40 Affirmative outreach.**

Recipients must take appropriate steps to ensure that they are providing equal access to their WIOA Title I-financially assisted programs and activities. These steps should involve reasonable efforts to include members of the various groups protected by these regulations including but not limited to persons of different sexes, various racial and ethnic/national origin groups, various religions, individuals with limited English proficiency, individuals with disabilities, and individuals in different age groups. Such efforts may include, but are not limited to:

(a) Advertising the recipient's programs and/or activities in media, such as newspapers or radio programs, that specifically target various populations;

(b) Sending notices about openings in the recipient's programs and/or activities to schools or community service groups that serve various populations; and

(c) Consulting with appropriate community service groups about ways in which the recipient may improve its outreach and service to various populations.

**Data and Information Collection Maintenance**

**§ 38.41 Collection and maintenance of equal opportunity data and other information.**

(a) The Director will not require submission of data that can be obtained from existing reporting requirements or sources, including those of other agencies, if the source is known and available to the Director.

(b)(1) Each recipient must collect such data and maintain such records, in accordance with procedures prescribed by the Director, as the Director finds necessary to determine whether the recipient has complied or is complying with the nondiscrimination and equal opportunity provisions of WIOA or this part. The system and format in which the records and data are kept must be designed to allow the Governor and CRC to conduct statistical or other quantifiable data analyses to verify the recipient's compliance with section 188 of WIOA and this part.

(2) Such records must include, but are not limited to, records on applicants, registrants, eligible applicants/registrants, participants, terminees, employees, and applicants for employment. Each recipient must record the race/ethnicity, sex, age, and where known, disability status, of every applicant, registrant, participant, terminee, applicant for employment, and employee. For applicants, registrants, participants, and terminees, each recipient must also record the limited English proficiency and preferred language of an individual. Such information must be stored in a manner that ensures confidentiality, and must be used only for the purposes of recordkeeping and reporting; determining eligibility, where appropriate, for WIOA Title I-financially assisted programs or activities; determining the extent to which the recipient is operating its WIOA Title I-financially assisted program or activity in a nondiscriminatory manner; or other use authorized by law.

(3) Any medical or disability-related information obtained about a particular individual, including information that could lead to the disclosure of a disability, must be collected on separate forms. All such information, whether in hard copy, electronic, or both, must be maintained in one or more separate files, apart from any other information about the individual, and treated as confidential. Whether these files are electronic or hard copy, they must be locked or otherwise secured (for example, through password protection).

(i) *Knowledge of disability status or medical condition and access to information in related files.* Persons in the following categories may be informed about an individual's disability or medical condition and have access to the information in related files under the following listed circumstances:

(A) Program staff who are responsible for documenting eligibility, where disability is an eligibility criterion for a program or activity.

(B) First aid and safety personnel who need access to underlying documentation related to a participant's medical condition in an emergency.

(C) Government officials engaged in enforcing this part, any other laws administered by the Department, or any other Federal laws. See also § 38.44.

(ii) *Knowledge of disability status or medical condition only.* Supervisors, managers, and other necessary personnel may be informed regarding restrictions on the activities of individuals with disabilities and regarding reasonable accommodations for such individuals.

(c) Each recipient must maintain, and submit to CRC upon request, a log of complaints filed with the recipient that allege discrimination on the basis(es) of race, color, religion, sex (including pregnancy, childbirth or related medical conditions, transgender status and gender identity), national origin, age, disability, political affiliation or belief, citizenship, and/or participation in a WIOA Title I-financially assisted program or activity. The log must include: The name and address of the complainant; the basis of the complaint; a description of the complaint; the date the complaint was filed; the disposition and date of disposition of the complaint; and other pertinent information. Information that could lead to identification of a particular individual as having filed a complaint must be kept confidential.

(d) Where designation of individuals by race or ethnicity is required, the guidelines of the Office of Management and Budget must be used.

(e) A service provider's responsibility for collecting and maintaining the information required under this section may be assumed by the Governor or LWIA grant recipient, as provided in the State's Nondiscrimination Plan.

**§ 38.42 Information to be provided to CRC by grant applicants and recipients.**

In addition to the information which must be collected, maintained, and, upon request, submitted to CRC under § 38.41:

(a) Each grant applicant and recipient must promptly notify the Director when any administrative enforcement actions or lawsuits are filed against it alleging discrimination on the basis of race, color, religion, sex (including pregnancy, childbirth or related medical conditions, transgender status, and gender identity), national origin (including limited English proficiency), age, disability, political affiliation or belief, and for beneficiaries only, citizenship or participation in a WIOA Title I-financially assisted program or activity. This notification must include:

(1) The names of the parties to the action or lawsuit;

(2) The forum in which each case was filed; and

(3) The relevant case numbers.

(b) Each recipient (as part of a compliance review conducted under § 38.63, or monitoring activity carried out under § 38.65) must provide the following information:

(1) The name of any other Federal agency that conducted a civil rights compliance review or complaint investigation, and that found the grant applicant or recipient to be in noncompliance, during the two years before the grant application was filed or CRC began its examination; and

(2) Information about any administrative enforcement actions or lawsuits that alleged discrimination on any protected basis, and that were filed against the grant applicant or recipient during the two years before the application or renewal application, compliance review, or monitoring activity. This information must include:

(i) The names of the parties;

(ii) The forum in which each case was filed; and

(iii) The relevant case numbers.

(c) At the discretion of the Director, grant applicants and recipients may be required to provide, in a timely manner, any information and data that the Director considers necessary to investigate complaints and conduct compliance reviews on bases prohibited under the nondiscrimination and equal opportunity provisions of WIOA and this part.

(d) At the discretion of the Director, recipients may be required to provide, in a timely manner, the particularized information and/or to submit the periodic reports that the Director considers necessary to determine compliance with the nondiscrimination and equal opportunity provisions of WIOA or this part.

(e) At the discretion of the Director, grant applicants may be required to submit, in a timely manner, the particularized information that the

Director considers necessary to determine whether or not the grant applicant, if financially assisted, would be able to comply with the nondiscrimination and equal opportunity provisions of WIOA or this part.

(f) Where designation of individuals by race or ethnicity is required, the guidelines of the Office of Management and Budget must be used.

#### **§ 38.43 Required maintenance of records by recipients.**

(a) Each recipient must maintain the following records, whether they exist in electronic form (including email) or hard copy, for a period of not less than three years from the close of the applicable program year:

(1) The records of applicants, registrants, eligible applicants/registrants, participants, terminees, employees, and applicants for employment; and

(2) Such other records as are required under this part or by the Director.

(b) Where a discrimination complaint has been filed or compliance review initiated, every recipient that possesses or maintains any type of hard-copy or electronic record related to the complaint (including records that have any relevance to the underlying allegations in the complaint, as well as records regarding actions taken on the complaint) or to the subject of the compliance review must preserve all records, regardless whether hard-copy or electronic, that may be relevant to a complaint investigation or compliance review, and maintain those records for a period of not less than three years from the date of final action related to resolution of the complaint or compliance review.

#### **§ 38.44 CRC access to information and information sources.**

(a) Each grant applicant and recipient must permit access by the Director or the Director's designee during normal business hours to its premises and to its employees and participants, to the extent that such individuals are on the premises during the course of the investigation, for the purpose of conducting complaint investigations, compliance reviews, or monitoring activities associated with a State's development and implementation of a Nondiscrimination Plan, and for inspecting and copying such books, records, accounts and other materials as may be pertinent to ascertain compliance with and ensure enforcement of the nondiscrimination and equal opportunity provisions of WIOA or this part.

(b) Asserted considerations of privacy or confidentiality are not a basis for withholding information from CRC and will not bar CRC from evaluating or seeking to enforce compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part.

(c) Whenever any information that the Director asks a grant applicant or recipient to provide is in the exclusive possession of another agency, institution, or person, and that agency, institution, or person fails or refuses to furnish the information upon request, the grant applicant or recipient must certify to CRC that it has made efforts to obtain the information and that the agency, institution, or person has failed or refused to provide it. This certification must list the name and address of the agency, institution, or person that has possession of the information and the specific efforts the grant applicant or recipient made to obtain it.

#### **§ 38.45 Confidentiality responsibilities of grant applicants, recipients, and the Department.**

Grant applicants, recipients and the Department must keep confidential to the extent possible, consistent with a fair determination of the issues, the identity of any individual who furnishes information relating to, or assists in, an investigation or a compliance review, including the identity of any individual who files a complaint. An individual whose identity is disclosed must be protected from retaliation (*See* § 38.19).

### **Subpart C—Governor's Responsibilities To Implement the Nondiscrimination and Equal Opportunity Requirements of WIOA**

#### **§ 38.50 Subpart application to State Programs.**

This subpart applies to State Programs as defined in § 38.4. However, the provisions of § 38.52(b) do not apply to State Workforce Agencies (SWA), because the Governor's liability for any noncompliance on the part of a SWA cannot be waived.

#### **§ 38.51 Governor's oversight and monitoring responsibilities for State Programs.**

The Governor is responsible for oversight and monitoring of all WIOA Title I-financially assisted State Programs. This responsibility includes:

(a) Ensuring compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part, and negotiating, where appropriate, with a recipient to secure voluntary compliance when

noncompliance is found under § 38.91(b).

(b) Annually monitoring the compliance of recipients with WIOA section 188 and this part, including a determination as to whether each recipient is conducting its WIOA Title I-financially assisted program or activity in a nondiscriminatory way. At a minimum, each annual monitoring review required by this paragraph must include:

(1) A statistical or other quantifiable analysis of records and data kept by the recipient under § 38.41, including analyses by race/ethnicity, sex, limited English proficiency, preferred language, age, and disability status;

(2) An investigation of any significant differences identified in paragraph (b)(i) of this section in participation in the programs, activities, or employment provided by the recipient, to determine whether these differences appear to be caused by discrimination. This investigation must be conducted through review of the recipient's records and any other appropriate means; and

(3) An assessment to determine whether the recipient has fulfilled its administrative obligations under Section 188 of WIOA or this part (for example, recordkeeping, notice and communication) and any duties assigned to it under the Nondiscrimination Plan.

**§ 38.52 Governor's liability for actions of recipients the Governor has financially assisted under Title I of WIOA.**

(a) The Governor and the recipient are jointly and severally liable for all violations of the nondiscrimination and equal opportunity provisions of WIOA and this part by the recipient, unless the Governor has:

(1) Established and implemented a Nondiscrimination Plan, under § 38.54, designed to give a reasonable guarantee of the recipient's compliance with such provisions;

(2) Entered into a written contract with the recipient that clearly establishes the recipient's obligations regarding nondiscrimination and equal opportunity;

(3) Acted with due diligence to monitor the recipient's compliance with these provisions; and

(4) Taken prompt and appropriate corrective action to effect compliance.

(b) If the Director determines that the Governor has demonstrated substantial compliance with the requirements of paragraph (a) of this section, the Director may recommend to the Secretary that the imposition of sanctions against the Governor be waived and that sanctions be imposed

only against the noncomplying recipient.

**§ 38.53 Governor's oversight responsibilities regarding recipients' recordkeeping.**

The Governor must ensure that recipients collect and maintain records in a manner consistent with the provisions of § 38.41 and any procedures prescribed by the Director under § 38.41(a). The Governor must further ensure that recipients are able to provide data and reports in the manner prescribed by the Director.

**§ 38.54 Governor's obligations to develop and implement a Nondiscrimination Plan.**

(a)(1) Each Governor must establish and implement a Nondiscrimination Plan for State programs as defined in § 38.4(l). In those States in which one agency contains both SWA or unemployment insurance and WIOA Title I-financially assisted programs, the Governor must develop a combined Nondiscrimination Plan.

(2) Each Nondiscrimination Plan must be designed to give a reasonable guarantee that all recipients will comply, and are complying, with the nondiscrimination and equal opportunity provisions of WIOA and this part.

(b) The Nondiscrimination Plan must be:

(1) In writing, addressing each requirement of § 38.54(c) with narrative and documentation;

(2) Reviewed and updated as required in § 38.55; and

(3) Signed by the Governor.

(c) At a minimum, each Nondiscrimination Plan must:

(1) Describe how the State programs and recipients have satisfied the requirements of the following regulations:

(i) §§ 38.25 through 38.27

(Assurances);

(ii) §§ 38.28 through 38.33 (Equal Opportunity Officers);

(iii) §§ 38.34 through 38.39 (Notice and Communication);

(iv) §§ 38.41 through 38.45 (Data and Information Collection and Maintenance);

(v) § 38.40 (Affirmative Outreach);

(vi) § 38.53 (Governor's Oversight Responsibility Regarding Recipients' Recordkeeping);

(vii) §§ 38.72 through 38.75

(Complaint Processing Procedures); and

(viii) § 38.51, § 38.53 (Governor's Oversight and Monitoring Responsibilities for State Programs).

(2) Include the following additional elements:

(i) A system for determining whether a grant applicant, if financially assisted,

and/or a training provider, if selected as eligible under Section 122 of WIOA, is likely to conduct its WIOA Title I-financially assisted programs or activities in a nondiscriminatory way, and to comply with the regulations in this part;

(ii) A review of recipient policy issuances to ensure they are nondiscriminatory;

(iii) A system for reviewing recipients' job training plans, contracts, assurances, and other similar agreements to ensure that they are both nondiscriminatory and contain the required language regarding nondiscrimination and equal opportunity;

(iv) Procedures for ensuring that recipients comply with the nondiscrimination and equal opportunity requirements of §§ 38.5 regarding race, color, religion, sex (including pregnancy, childbirth and related medical conditions, transgender status, and gender identity), national origin (including limited English proficiency), age, political affiliation or belief, citizenship, or participation in any WIOA Title I financially-assisted program or activity;

(v) Procedures for ensuring that recipients comply with the requirements of applicable Federal disability nondiscrimination law, including Section 504; Title II of the Americans with Disabilities Act of 1990, as amended, if applicable; WIOA Section 188, and this part with regard to individuals with disabilities;

(vi) A system of policy communication and training to ensure that EO Officers and members of the recipients' staffs who have been assigned responsibilities under the nondiscrimination and equal opportunity provisions of WIOA or this part are aware of and can effectively carry out these responsibilities;

(vii) Procedures for obtaining prompt corrective action or, as necessary, applying sanctions when noncompliance is found; and

(viii) Supporting documentation to show that the commitments made in the Nondiscrimination Plan have been and/or are being carried out. This supporting documentation includes, but is not limited to:

(A) Policy and procedural issuances concerning required elements of the Nondiscrimination Plan;

(B) Copies of monitoring instruments and instructions;

(C) Evidence of the extent to which nondiscrimination and equal opportunity policies have been developed and communicated as required by this part;

(D) Information reflecting the extent to which Equal Opportunity training, including training called for by §§ 38.29(f) and 38.31(f), is planned and/or has been carried out;

(E) Reports of monitoring reviews and reports of follow-up actions taken under those reviews where violations have been found, including, where appropriate, sanctions; and

(F) Copies of any notices made under §§ 38.34 through 38.40.

**§ 38.55 Schedule of the Governor's obligations regarding the Nondiscrimination Plan.**

(a) Within 180 days of either the date on which this final rule is effective, or the date on which the Governor is required to review and update their Methods of Administration as determined by the schedule in § 37.55 of this chapter, whichever is later, a Governor must:

(1) Develop and implement a Nondiscrimination Plan consistent with the requirements of this part, and

(2) Submit a copy of the Nondiscrimination Plan to the Director.

(b) The Governor must promptly update the Nondiscrimination Plan whenever necessary, and submit the changes made to the Director in writing at the time that any such updates are made.

(c) Every two years from the date on which the initial Nondiscrimination Plan is submitted to the Director under paragraph (a)(2) of this section, the Governor must review the Nondiscrimination Plan and the manner in which it has been implemented, and determine whether any changes are necessary in order for the State to comply fully and effectively with the nondiscrimination and equal opportunity provisions of WIOA and this part.

(1) If any such changes are necessary, the Governor must make the appropriate changes and submit them, in writing, to the Director.

(2) If the Governor determines that no such changes are necessary, s/he must certify, in writing, to the Director that the Nondiscrimination Plan previously submitted continues in effect.

(3) Submit a copy of all reports of any monitoring reviews conducted by the Governor pursuant to § 38.51(b) since the last Nondiscrimination Plan update.

**Subpart D—Compliance Procedures**

**§ 38.60 Evaluation of compliance.**

From time to time, the Director may conduct pre-approval compliance reviews of grant applicants for, and post-approval compliance reviews of

recipients of, WIOA Title I-financial assistance to determine the ability to comply or compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part. Reviews may focus on one or more specific programs or activities, or one or more issues within a program or activity. The Director may also investigate and resolve complaints alleging violations of the nondiscrimination and equal opportunity provisions of WIOA and this part.

**§ 38.61 Authority to issue subpoenas.**

Section 183(c) of WIOA authorizes the issuance of subpoenas. The subpoena may require the appearance of witnesses, and the production of documents, from any place in the United States, at any designated time and place. A subpoena may direct the individual named on the subpoena to take the following actions:

(a) To appear:

(1) Before a designated CRC representative,

(2) At a designated time and place;

(b) To give testimony; and/or

(c) To produce documentary evidence.

**Compliance Reviews**

**§ 38.62 Authority and procedures for pre-approval compliance reviews.**

(a) As appropriate and necessary to ensure compliance with the nondiscrimination and equal opportunity provisions of WIOA or this part, the Director may review any application, or class of applications, for Federal financial assistance under Title I of WIOA, before and as a condition of their approval. The basis for such review may be the assurance specified in § 38.25, information and reports submitted by the grant applicant under this part or guidance published by the Director, and any relevant records on file with the Department.

(b) When awarding financial assistance under Title I of WIOA, departmental grantmaking agencies must consult with the Director to review whether the CRC has issued a Notice to Show Cause under § 38.66(b) or a Final Determination against an applicant that has been identified as a probable awardee.

(c) The grantmaking agency will consider, in consultation with the Director, the above information, along with any other information provided by the Director in determining whether to award a grant or grants. Departmental grantmaking agencies must consider refraining from awarding new grants to applicants or must consider including

special terms in the grant agreement for entities named by the Director as described in subsection (b). Special terms will not be lifted until a compliance review has been conducted by the Director, and the Director has approved a determination that the applicant is likely to comply with the nondiscrimination and equal opportunity requirements of WIOA and this part.

(d) Where the Director determines that the grant applicant for Federal financial assistance under Title I of WIOA, if financially assisted, is not likely to comply with the nondiscrimination and equal opportunity requirements of WIOA or this part, the Director must:

(1) Notify, in a timely manner, the Departmental grantmaking agency and the Assistant Attorney General of the findings of the pre-approval compliance review; and (2) Issue a Letter of Findings. The Letter of Findings must advise the grant applicant, in writing, of:

(i) The preliminary findings of the review;

(ii) The proposed remedial or corrective action under § 38.90 and the time within which the remedial or corrective action should be completed;

(iii) Whether it will be necessary for the grant applicant to enter into a written Conciliation Agreement as described in §§ 38.91 and 38.93; and (iv) The opportunity to engage in voluntary compliance negotiations.

(2) [Reserved]

(e) If a grant applicant has agreed to certain remedial or corrective actions in order to receive WIOA Title I financial assistance, the Department must ensure that the remedial or corrective actions have been taken, or that a Conciliation Agreement has been entered into, before approving the award of further assistance under WIOA Title I. If a grant applicant refuses or fails to take remedial or corrective actions or to enter into a Conciliation Agreement, as applicable, the Director must follow the procedures outlined in §§ 38.95 through 38.97.

**§ 38.63 Authority and procedures for conducting post-approval compliance reviews.**

(a) The Director may initiate a post-approval compliance review of any recipient to determine compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part. The initiation of a post-approval review may be based on, but need not be limited to, the results of routine program monitoring by other



Departmental or Federal agencies, or the nature or frequency of complaints.

(b) A post-approval review must be initiated by a Notification Letter, advising the recipient of:

- (1) The practices to be reviewed;
- (2) The programs to be reviewed;
- (3) The information, records, and/or data to be submitted by the recipient within 30 days of the receipt of the Notification Letter, unless this time frame is modified by the Director; and
- (4) The opportunity, at any time before receipt of the Final Determination described in §§ 38.95 and 38.96, to make a documentary or other written submission that explains, validates or otherwise addresses the practices under review.

(c) The Director may conduct post-approval reviews using such techniques as desk audits and on-site reviews.

**§ 38.64 Procedures for concluding post-approval compliance reviews.**

(a) Where, as the result of a post-approval review, the Director has made a finding of noncompliance, he or she must issue a Letter of Findings. This Letter must advise the recipient, in writing, of:

- (1) The preliminary findings of the review;
- (2) Where appropriate, the proposed remedial or corrective action to be taken, and the time by which such action should be completed, as provided in § 38.90;
- (3) Whether it will be necessary for the recipient to enter into a written assurance or Conciliation Agreement, as provided in §§ 38.95 and 38.96; and
- (4) The opportunity to engage in voluntary compliance negotiations.

(b) Where no violation is found, the recipient must be so informed in writing.

**§ 38.65 Authority to monitor the activities of a Governor.**

(a) The Director may periodically review the adequacy of the Nondiscrimination Plan established by a Governor, as well as the adequacy of the Governor's performance under the Nondiscrimination Plan, to determine compliance with the requirements of §§ 38.50 through 38.55. The Director may review the Nondiscrimination Plan during a compliance review under §§ 38.62 and 38.63, or at another time.

(b) Nothing in this subpart limits or precludes the Director from monitoring directly any WIOA Title I recipient or from investigating any matter necessary to determine a recipient's compliance with the nondiscrimination and equal opportunity provisions of WIOA or this part.

(c) Where the Director determines that the Governor has not complied with the oversight and monitoring responsibilities set forth in the nondiscrimination and equal opportunity requirements of WIOA or this part, the Director may:

- (1) Issue a Letter of Findings. The Letter of Findings must advise the Governor, in writing, of:
  - (i) The preliminary findings of the review;
  - (ii) The proposed remedial or corrective action under § 38.90 and the time within which the remedial or corrective action should be completed;
  - (iii) Whether it will be necessary for the Governor to enter into a conciliation agreement as described in §§ 38.95 and 38.96; and
  - (iv) The opportunity to engage in voluntary compliance negotiations.
- (2) If a Governor refuses or fails to take remedial or corrective actions or to enter into a conciliation agreement, the Director may follow the procedures outlined in §§ 38.89, 38.90, and 38.91.

**§ 38.66 Notice to show cause issued to a recipient.**

(a) The Director may issue a Notice to Show Cause to a recipient failing to comply with the requirements of this part, where such failure results in the inability of the Director to make a finding. Such a failure includes, but is not limited to, the recipient's failure or refusal to:

- (1) Submit requested information, records, and/or data within the timeframe specified in a Notification Letter issued pursuant to § 38.64;
- (2) Submit, in a timely manner, information, records, and/or data requested during a compliance review, complaint investigation, or other action to determine a recipient's compliance with the nondiscrimination and equal opportunity provisions of WIOA or this part; or
- (3) Provide CRC access in a timely manner to a recipient's premises, records, or employees during a compliance review or complaint investigation, as required in § 38.42(c).

(b) The Director may issue a Notice to Show Cause to a recipient after a Letter of Findings and/or an Initial Determination has been issued, and after a reasonable period of time has passed within which the recipient refuses to negotiate a conciliation agreement with the Director regarding the violation(s).

(c) A Notice to Show Cause must contain:

- (1) A description of the violation and a citation to the pertinent nondiscrimination or equal opportunity provision(s) of WIOA and this part;

(2) The corrective action necessary to achieve compliance or, as may be appropriate, the concepts and principles of acceptable corrective or remedial action and the results anticipated; and

(3) A request for a written response to the findings, including commitments to corrective action or the presentation of opposing facts and evidence.

(d) A Notice to Show Cause must give the recipient 30 days from receipt of the Notice to show cause why enforcement proceedings under the nondiscrimination and equal opportunity provisions of WIOA or this part should not be instituted.

**§ 38.67 Methods by which a recipient may show cause why enforcement proceedings should not be instituted.**

A recipient may show cause why enforcement proceedings should not be instituted by, among other means:

(a) Correcting the violation(s) that brought about the Notice to Show Cause and entering into a Conciliation Agreement, under §§ 38.91 through 38.93;

(b) Demonstrating that CRC does not have jurisdiction; or

(c) Demonstrating that the violation alleged by CRC did not occur.

**§ 38.68 Failing to show cause.**

If the recipient fails to show cause why enforcement proceedings should not be initiated, the Director may follow the enforcement procedures outlined in § 38.95.

**Complaint Processing Procedures**

**§ 38.69 Complaint filing.**

(a) Any person or his/her representative who believes that any of the following circumstances exist may file a written complaint:

- (1) A person, or any specific class of individuals, has been or is being discriminated against on the basis of race, color, religion, sex (including pregnancy, childbirth, or related medical conditions, transgender status, and gender identity), national origin (including limited English proficiency), age, disability, political affiliation or belief, citizenship status, or participation in any WIOA Title I-financially-assisted program or activity as prohibited by WIOA or this part.
- (2) Either the person, or any specific class of individuals, has been or is being retaliated against as described in § 38.19.

(b) A person or the person's representative may file a complaint with either the recipient or the Director. Complaints filed with the Director should be sent to the address listed in

the notice or filed electronically as described in the notice in § 38.35.

(c) Generally, a complaint must be filed within 180 days of the alleged discrimination or retaliation. However, for good cause shown, the Director may extend the filing time. The time period for filing is for the administrative convenience of CRC, and does not create a defense for the respondent.

#### § 38.70 Required contents of complaint.

Each complaint must be filed in writing, either electronically or in hard copy, and must contain the following information:

(a) The complainant's name, mailing address, and, if available, email address (or another means of contacting the complainant);

(b) The identity of the respondent (the individual or entity that the complainant alleges is responsible for the discrimination);

(c) A description of the complainant's allegations. This description must include enough detail to allow the Director or the recipient, as applicable, to decide whether:

(1) CRC or the recipient, as applicable, has jurisdiction over the complaint;

(2) The complaint was filed in time; and

(3) The complaint has apparent merit; in other words, whether the complainant's allegations, if true, would indicate noncompliance with any of the nondiscrimination and equal opportunity provisions of WIOA or this part.

(d) The written or electronic signature of the complainant or the written or electronic signature of the complainant's representative.

(e) A complainant may file a complaint by completing and submitting CRC's Complaint Information and Privacy Act Consent Forms, which may be obtained either from the recipient's EO Officer or from CRC. The forms are available electronically on CRC's Web site, and in hard copy via postal mail upon request. The latter requests may be sent to CRC at the address listed in the notice contained in § 38.35.

#### § 38.71 Right to representation.

Both the complainant and the respondent have the right to be represented by an attorney or other individual of their choice.

#### § 38.72 Required elements of a recipient's complaint processing procedures.

(a) The procedures that a recipient adopts and publishes for processing complaints permitted under this part and WIOA Section 188 must state that

the recipient will issue a written Notice of Final Action on complaints within 90 days of the date on which the complaint is filed.

(b) At a minimum, the procedures must include the following elements:

(1) Initial, written notice to the complainant that contains the following information:

(i) An acknowledgment that the recipient has received the complaint, and

(ii) Notice that the complainant has the right to be represented in the complaint process;

(iii) Notice of rights contained in § 38.35; and

(iv) Notice that the complainant has the right to request and receive, at no cost, auxiliary aids and services, language assistance services, and that this notice will be translated into the non-English languages as required in § 38.4(h), § 38.4(i) and § 38.34 and § 38.36.

(2) A written statement of the issue(s), provided to the complainant, that includes the following information:

(i) A list of the issues raised in the complaint, and

(ii) For each such issue, a statement whether the recipient will accept the issue for investigation or reject the issue, and the reasons for each rejection;

(3) A period for fact-finding or investigation of the circumstances underlying the complaint;

(4) A period during which the recipient attempts to resolve the complaint. The methods available to resolve the complaint must include alternative dispute resolution (ADR), as described in paragraph (c) of this section.

(5) A written Notice of Final Action, provided to the complainant within 90 days of the date on which the complaint was filed, that contains the following information:

(i) For each issue raised in the complaint, a statement of either:

(A) The recipient's decision on the issue and an explanation of the reasons underlying the decision, or

(B) A description of the way the parties resolved the issue; and

(ii) Notice that the complainant has a right to file a complaint with CRC within 30 days of the date on which the Notice of Final Action is issued if the complainant is dissatisfied with the recipient's final action on the complaint.

(c) The procedures the recipient adopts must provide for alternative dispute resolution (ADR). The recipient's ADR procedures must provide that:

(1) ADR may be attempted any time after a written complaint has been filed with the recipient;

(2) The choice whether to use ADR or the customary process rests with the complainant;

(3) A party to any agreement reached under ADR may notify the Director in the event the agreement is breached. In such circumstances, the following rules will apply:

(i) The non-breaching party may notify with the Director within 30 days of the date on which the non-breaching party learns of the alleged breach;

(ii) The Director must evaluate the circumstances to determine whether the agreement has been breached. If the Director determines that the agreement has been breached, the complaint will be reinstated and processed in accordance with the recipient's procedures.

(4) If the parties do not reach an agreement under ADR, the complainant may file a complaint with the Director as described in §§ 38.69 through 38.71.

#### § 38.73 Responsibility for developing and publishing complaint processing procedures for service providers.

The Governor or the LWIA grant recipient, as provided in the State's Nondiscrimination Plan, must develop and publish, on behalf of its service providers, the complaint processing procedures required in § 38.73. The service providers must then follow those procedures.

#### § 38.74 Recipient's obligations when it determines that it has no jurisdiction over a complaint.

If a recipient determines that it does not have jurisdiction over a complaint, it must notify the complainant, in writing within five business days of making such determination. This Notice of Lack of Jurisdiction must include:

(a) A statement of the reasons for that determination, and

(b) Notice that the complainant has a right to file a complaint with CRC within 30 days of the date on which the complainant receives the Notice.

#### § 38.75 If the complainant is dissatisfied after receiving a Notice of Final Action.

If the recipient issues its Notice of Final Action before the 90-day period ends, but the complainant is dissatisfied with the recipient's decision on the complaint, the complainant or the complainant's representative may file a complaint with the Director within 30 days after the date on which the complainant receives the Notice.

**§ 38.76 If a recipient fails to issue a Notice of Final Action within 90 days after the complaint was filed.**

If, by the end of 90 days from the date on which the complainant filed the complaint, the recipient has failed to issue a Notice of Final Action, the complainant or the complainant's representative may file a complaint with the Director within 30 days of the expiration of the 90-day period. In other words, the complaint must be filed with the Director within 120 days of the date on which the complaint was filed with the recipient.

**§ 38.77 Extension of deadline to file complaint.**

(a) The Director may extend the 30-day time limit for filing a complaint:

(1) If a recipient does not include in its Notice of Final Action the required notice about the complainant's right to file with the Director, as described in § 38.72(b)(5); or

(2) For other good cause shown.

(b) The complainant has the burden of proving to the Director that the time limit should be extended.

**§ 38.78 Determinations regarding acceptance of complaints.**

The Director must decide whether CRC will accept a particular complaint for resolution. For example, a complaint need not be accepted if:

(a) It has not been timely filed;

(b) CRC has no jurisdiction over the complaint; or

(c) CRC has previously decided the matter.

**§ 38.79 When a complaint contains insufficient information.**

(a) If a complaint does not contain enough information to identify the respondent or the basis of the alleged discrimination, the timeliness of the complaint, or the apparent merit of the complaint, the Director must try to get the needed information from the complainant.

(b) The Director may close the complainant's file, without prejudice, if:

(1) The Director makes reasonable efforts to try to find the complainant, but is unable to reach him or her; or

(2) The complainant does not provide the needed information to CRC within the time specified in the request for more information.

(c) If the Director closes the complainant's file, the Director must send written notice to the complainant's last known address, email address (or another known method of contacting the complainant in writing).

**§ 38.80 Lack of jurisdiction.**

If CRC does not have jurisdiction over a complaint, the Director must:

(a) Notify the complainant in writing and explain why the complaint falls outside the coverage of the nondiscrimination and equal opportunity provisions of WIOA or this part; and

(b) Where possible, transfer the complaint to an appropriate Federal, State or local authority.

**§ 38.81 Complaint referral.**

The Director refers complaints to other agencies in the following circumstances:

(a) Where the complaint alleges discrimination based on age, and the complaint falls within the jurisdiction of the Age Discrimination Act of 1975, as amended, then the Director must refer the complaint, in accordance with the provisions of 45 CFR 90.43(c)(3).

(b) Where the only allegation in the complaint is a charge of individual employment discrimination that is covered both by WIOA or this part and by one or more of the laws listed below, then the complaint is a "joint complaint," and the Director may refer it to the EEOC for investigation and conciliation under the procedures described in 29 CFR part 1640 or 1691, as appropriate. The relevant laws are:

(1) Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e to 2000e-17);

(2) The Equal Pay Act of 1963, as amended (29 U.S.C. 206(d));

(3) The Age Discrimination in Employment Act of 1976, as amended (29 U.S.C. 621, *et seq.*); and

(4) Title I of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101 *et seq.*).

(c) Where the complaint alleges discrimination by an entity that operates a program or activity financially assisted by a Federal grantmaking agency other than the Department, but that participates as a partner in a One-Stop delivery system, the following procedures apply:

(1) Where the complaint alleges discrimination on a basis that is prohibited both by Section 188 of WIOA and by a civil rights law enforced by the Federal grantmaking agency, then CRC and the grantmaking agency have dual jurisdiction over the complaint, and the Director will refer the complaint to the grantmaking agency for processing. In such circumstances, the grantmaking agency's regulations will govern the processing of the complaint.

(2) Where the complaint alleges discrimination on a basis that is prohibited by Section 188 of WIOA, but not by any civil rights laws enforced by the Federal grantmaking agency, then CRC has sole jurisdiction over the

complaint, and will retain the complaint and process it pursuant to this part.

Such bases generally include religion, political affiliation or belief, citizenship, and/or participation in a WIOA Title I-financially assisted program or activity.

(d) Where the Director makes a referral under this section, he or she must notify the complainant and the respondent about the referral.

**§ 38.82 Notice that complaint will not be accepted.**

If a complaint will not be accepted, the Director must notify the complainant, in writing, about that fact, and provide the complainant the Director's reasons for making that determination.

**§ 38.83 Notice of complaint acceptance.**

If the Director accepts the complaint for resolution, he or she must notify in writing the complainant, the respondent, and the grantmaking agency. The notice must:

(a) State that the complaint will be accepted,

(b) Identify the issues over which CRC has accepted jurisdiction; and

(c) Explain the reasons why any issues were rejected.

**§ 38.84 Contacting CRC about a complaint.**

Both the complainant and the respondent, or their representative, may contact CRC for information about the complaint. The Director will determine what information, if any, about the complaint will be released.

**§ 38.85 Alternative dispute resolution.**

The Director may offer the option of alternative dispute resolution (ADR) of the complaint filed with CRC. In such circumstances, the following rules apply:

(a) ADR is voluntary; consent must be given by the complainant and respondent before the ADR process will proceed.

(b) The ADR will be conducted under the guidance of the Director.

(c) ADR may take place at any time after a complaint has been filed under § 38.69, as deemed appropriate by the Director.

(d) CRC will not suspend its investigation and complaint processes during ADR.

**Complaint Determinations**

**§ 38.86 Notice at conclusion of complaint investigation.**

At the conclusion of the investigation of the complaint, the Director must take the following actions:

(a) Determine whether there is reasonable cause to believe that the

respondent has violated the nondiscrimination and equal opportunity provisions of WIOA or this part; and

(b) Notify the complainant, the respondent, and the grantmaking agency, in writing, of that determination as provided in §§ 38.87 and 38.88.

**§ 38.87 Director's Initial Determination that reasonable cause exists to believe that a violation has taken place.**

If the Director finds reasonable cause to believe that the respondent has violated the nondiscrimination and equal opportunity provisions of WIOA or this part the Director must issue an Initial Determination. The Initial Determination must include:

(a) The specific findings of the investigation;

(b) The corrective or remedial action that the Department proposes to the respondent, under § 38.90;

(c) The time by which the respondent must complete the corrective or remedial action;

(d) Whether it will be necessary for the respondent to enter into a written agreement under §§ 38.91 through 38.93; and

(e) The opportunity to engage in voluntary compliance negotiations.

**§ 38.88 Director's Final Determination that no reasonable cause exists to believe that a violation has taken place.**

If the Director determines that there is no reasonable cause to believe that a violation has taken place, the Director must issue a Final Determination under § 38.96. The Final Determination represents the Department's final agency action on the complaint.

**§ 38.89 When the recipient fails or refuses to take the corrective action listed in the Initial Determination.**

Under such circumstances, following a complaint investigation or compliance review, the Department may take the actions described in § 38.95.

**§ 38.90 Corrective or remedial action that may be imposed when the Director finds a violation.**

(a) A Letter of Findings, Notice to Show Cause, or Initial Determination, issued under §§ 38.62 or 38.63, 38.66 and 38.67, or 38.87, respectively, must include the specific steps the grant applicant or recipient, as applicable, must take within a stated period of time in order to achieve voluntary compliance.

(b) Such steps must include:

(1) Actions to end and/or redress the violation of the nondiscrimination and equal opportunity provisions of WIOA or this part;

(2) Make whole relief where discrimination has been identified, including, as appropriate, back pay (which must not accrue from a date more than 2 years before the filing of the complaint or the initiation of a compliance review), or other monetary relief; hire or reinstatement; retroactive seniority; promotion; benefits or other services discriminatorily denied; and

(3) Such other remedial or affirmative relief as the Director deems necessary, including but not limited to outreach, recruitment and training designed to ensure equal opportunity.

(c) Monetary relief may not be paid from Federal funds.

**§ 38.91 Post violation procedures.**

(a) *Violations at the State Level.*

Where the Director has determined that a violation of the nondiscrimination and equal opportunity provisions of WIOA or this part has occurred at the State level, the Director must notify the Governor of that State through the issuance of a Letter of Findings, Notice to Show Cause, or Initial Determination, as appropriate, under §§ 38.62 or 38.63, 38.66 and 38.67, or 38.87, respectively. The Director may secure compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part through, among other means, the execution of a written assurance or Conciliation Agreement.

(b) *Violations below State level.*

Where the Director has determined that a violation of the nondiscrimination and equal opportunity provisions of WIOA or this part has occurred below the State level, the Director must so notify the Governor and the violating recipient(s) through the issuance of a Letter of Findings, Notice to Show Cause or Initial Determination, as appropriate, under §§ 38.62 or 38.63, 38.66 and 38.67, or 38.87, respectively.

(1) Such issuance may:

(i) Direct the Governor to initiate negotiations immediately with the violating recipient(s) to secure compliance by voluntary means;

(ii) Direct the Governor to complete such negotiations within 30 days of the Governor's receipt of the Notice to Show Cause or within 45 days of the Governor's receipt of the Letter of Findings or Initial Determination, as applicable. The Director reserves the right to enter into negotiations with the recipient at any time during the period. For good cause shown, the Director may approve an extension of time to secure voluntary compliance. The total time allotted to secure voluntary compliance must not exceed 60 days.

(iii) Include a determination as to whether compliance must be achieved by:

(A) Immediate correction of the violation(s) and written assurance that such violations have been corrected, under § 38.92; or

(B) Entering into a written Conciliation Agreement under § 38.93.

(2) If the Governor determines, at any time during the period described in paragraph (b)(1)(ii) of this section, that a recipient's compliance cannot be achieved by voluntary means, the Governor must so notify the Director.

(3) If the Governor is able to secure voluntary compliance under paragraph (b)(1) of this section, he or she must submit to the Director for approval, as applicable:

(i) Written assurance that the required action has been taken, as described in § 38.92; or

(ii) A copy of the Conciliation Agreement, as described in § 38.93.

(4) The Director may disapprove any written assurance or Conciliation Agreement submitted for approval under paragraph (b)(3) of this section that fails to satisfy each of the applicable requirements provided in §§ 38.92 and 38.93.

(c) *Violations in National Programs.* Where the Director has determined that a violation of the nondiscrimination and equal opportunity provisions of WIOA or this part has occurred in a National Program, the Director must notify the Federal grantmaking agency and the recipient by issuing a Letter of Findings, Notice to Show Cause, or Initial Determination, as appropriate, under §§ 38.62 or 38.63, 38.66 and 38.67, or 38.87, respectively. The Director may secure compliance with the nondiscrimination and equal opportunities provisions of WIOA through, among other means, the execution of a written assurance or conciliation agreement under §§ 38.92 or 38.93.

**§ 38.92 Written assurance.**

A written assurance is the resolution document that may be used when the Director determines that a recipient has, within fifteen business days after receipt of the Letter of Findings or Initial Determination identifying the violations, taken all corrective actions to remedy the violations specified in those documents.

**§ 38.93 Required elements of a conciliation agreement.**

A conciliation agreement must:

(a) Be in writing;

(b) Address the legal and contractual obligations of the recipient;

- (c) Address each cited violation;
- (d) Specify the corrective or remedial action to be taken within a stated period of time to come into compliance;
- (e) Provide for periodic reporting on the status of the corrective and remedial action;
- (f) State that the violation(s) will not recur;
- (g) State that nothing in the agreement will prohibit CRC from sending the agreement to the complainant, making it available to the public, or posting it on the CRC or recipient's Web site;
- (h) State that, in any proceeding involving an alleged violation of the conciliation agreement, CRC may seek enforcement of the agreement itself and shall not be required to present proof of the underlying violations resolved by the agreement; and
- (i) Provide for enforcement for a breach of the agreement.

**§ 38.94 When voluntary compliance cannot be secured.**

The Director will conclude that compliance cannot be secured by voluntary means under the following circumstances:

- (a) The Governor, grant applicant or recipient fails to or refuses to correct the violation(s) within the time period established by the Letter of Findings, Notice to Show Cause or Initial Determination; or
- (b) The Director has not approved an extension of time for agreement on voluntary compliance under § 38.91(b)(1)(ii) and he or she either:
  - (1) Has not been notified under § 38.91(b)(3), that the Governor, grant applicant or recipient has agreed to voluntary compliance;
  - (2) Has disapproved a written assurance or Conciliation Agreement, under § 38.91(b)(4); or
  - (3) Has received notice from the Governor, under § 38.91(b)(2), that the grant applicant or recipient will not comply voluntarily.

**§ 38.95 Enforcement when voluntary compliance cannot be secured.**

If the Director concludes that compliance cannot be secured by voluntary means, the Director must either:

- (a) Issue a Final Determination;
- (b) Refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted; or
- (c) Take such other action as may be provided by law.

**§ 38.96 Contents of a Final Determination of a violation.**

A Final Determination must contain the following information:

- (a) A statement of the efforts made to achieve voluntary compliance, and a

statement that those efforts have been unsuccessful;

- (b) A statement of those matters upon which the grant applicant or recipient and CRC continue to disagree;

(c) A list of any modifications to the findings of fact or conclusions that were set forth in the Initial Determination, Notice to Show Cause or Letter of Findings;

(d) A statement of the grant applicant's or recipient's liability, and, if appropriate, the extent of that liability;

(e) A description of the corrective or remedial actions that the grant applicant or recipient must take to come into compliance;

(f) A notice that if the grant applicant or recipient fails to come into compliance within 10 days of the date on which it receives the Final Determination, one or more of the following consequences may result:

- (1) After the grant applicant or recipient is given the opportunity for a hearing, its WIOA Title I financial assistance may be terminated, discontinued, or withheld in whole or in part, or its application for such financial assistance may be denied, as appropriate;
- (2) The Secretary of Labor may refer the case to the Department of Justice with a request to file suit against the grant applicant or recipient; or
- (3) The Secretary may take any other action against the grant applicant or recipient that is provided by law;

(g) A notice of the grant applicant's or recipient's right to request a hearing under the procedures described in §§ 38.112 through 37.115; and

(h) A determination of the Governor's liability, if any, under § 38.52.

**§ 38.97 Notification of finding of noncompliance.**

Where a compliance review or complaint investigation results in a finding of noncompliance, the Director must notify:

- (a) The grant applicant or recipient;
- (b) The grantmaking agency; and
- (c) The Assistant Attorney General.

**Breaches of Conciliation Agreements**

**§ 38.98 Notice of breach of conciliation agreement.**

(a) When it becomes known to the Director that a Conciliation Agreement has been breached, the Director may issue a Notification of Breach of Conciliation Agreement.

(b) The Director must send a Notification of Breach of Conciliation Agreement to the Governor, the grantmaking agency, and/or other party(ies) to the Conciliation Agreement, as applicable.

**§ 38.99 Contents of notice of breach of conciliation agreement.**

A Notification of Breach of Conciliation Agreement must:

- (a) Specify any efforts made to achieve voluntary compliance, and indicate that those efforts have been unsuccessful;
- (b) Identify the specific provisions of the Conciliation Agreement violated;
- (c) Determine liability for the violation and the extent of the liability;
- (d) Indicate that failure of the violating party to come into compliance within 10 days of the receipt of the Notification of Breach of Conciliation Agreement may result, after opportunity for a hearing, in the termination or denial of the grant, or discontinuation of assistance, as appropriate, or in referral to the Department of Justice with a request from the Department to file suit;
- (e) Advise the violating party of the right to request a hearing, and reference the applicable procedures in § 38.111; and
- (f) Include a determination as to the Governor's liability, if any, in accordance with the provisions of § 38.52.

**§ 38.100 Notification of an enforcement action based on breach of conciliation agreement.**

In such circumstances, the Director must notify:

- (a) The grantmaking agency; and
- (b) The Governor, recipient or grant applicant, as applicable.

**Subpart E—Federal Procedures for Effecting Compliance**

**§ 38.110 Enforcement procedures.**

(a) Sanctions; judicial enforcement. If compliance has not been achieved after issuance of a Final Determination under §§ 38.95 and 38.96, or a Notification of Breach of Conciliation Agreement under §§ 38.98 through 38.100, the Secretary may:

- (1) After opportunity for a hearing, suspend, terminate, deny or discontinue the WIOA Title I financial assistance, in whole or in part;
- (2) Refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted; or
- (3) Take such action as may be provided by law, which may include seeking injunctive relief.

(b) Deferral of new grants. When proceedings under § 38.111 have been initiated against a particular recipient, the Department may defer action on that recipient's applications for new WIOA Title I financial assistance until a Final Decision under § 38.112 has been rendered. Deferral is not appropriate

when WIOA Title I financial assistance is due and payable under a previously approved application.

(1) New WIOA Title I financial assistance includes all assistance for which an application or approval, including renewal or continuation of existing activities, or authorization of new activities, is required during the deferral period.

(2) New WIOA Title I financial assistance does not include assistance approved before the beginning of proceedings under § 38.111, or increases in funding as a result of changed computations of formula awards.

#### § 38.111 Hearing procedures.

(a) *Notice of opportunity for hearing.* As part of a Final Determination, or a Notification of Breach of a Conciliation Agreement, the Director must include, and serve on the grant applicant or recipient (by certified mail, return receipt requested), a notice of opportunity for hearing.

(b) *Complaint; request for hearing; answer.* (1) In the case of noncompliance that cannot be voluntarily resolved, the Final Determination or Notification of Breach of Conciliation Agreement is considered the Department's formal complaint.

(2) To request a hearing, the grant applicant or recipient must file a written answer to the Final Determination or Notification of Breach of Conciliation Agreement, and a copy of the Final Determination or Notification of Breach of Conciliation Agreement, with the Office of the Administrative Law Judges, 800 K Street NW., Suite 400, Washington, DC 20001.

(i) The answer must be filed within 30 days of the date of receipt of the Final Determination or Notification of Breach of Conciliation Agreement.

(ii) A request for hearing must be set forth in a separate paragraph of the answer.

(iii) The answer must specifically admit or deny each finding of fact in the Final Determination or Notification of Breach of Conciliation Agreement. Where the grant applicant or recipient does not have knowledge or information sufficient to form a belief, the answer may so state and the statement will have the effect of a denial. Findings of fact not denied are considered admitted. The answer must separately state and identify matters alleged as affirmative defenses, and must also set forth the matters of fact and law relied on by the grant applicant or recipient.

(3) The grant applicant or recipient must simultaneously serve a copy of its filing on the Office of the Solicitor, Civil Rights and Labor-Management Division,

Room N-2474, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

(4)(i) The failure of a grant applicant or recipient to request a hearing under this paragraph (b), or to appear at a hearing for which a date has been set, waives the right to a hearing; and

(ii) Whenever a hearing is waived, all allegations of fact contained in the Final Determination or Notification of Breach of Conciliation Agreement are considered admitted, and the Final Determination or Notification of Breach of Conciliation Agreement becomes the Final Decision of the Secretary as of the day following the last date by which the grant applicant or recipient was required to request a hearing or was to appear at a hearing.

(c) *Time and place of hearing.* Hearings will be held at a time and place ordered by the Administrative Law Judge upon reasonable notice to all parties and, as appropriate, the complainant. In selecting a place for the hearing, due regard must be given to the convenience of the parties, their counsel, and witnesses, if any.

(d) *Judicial process; evidence.* (1) The Administrative Law Judge may use judicial process to secure the attendance of witnesses and the production of documents authorized by Section 9 of the Federal Trade Commission Act (15 U.S.C. 49).

(2) *Evidence.* In any hearing or administrative review conducted under this part, evidentiary matters will be governed by the standards and principles set forth in the Rules of Evidence issued by the Department of Labor's Office of Administrative Law Judges, 29 CFR part 18.

#### § 38.112 Initial and final decision procedures.

(a) *Initial decision.* After the hearing, the Administrative Law Judge must issue an initial decision and order, containing findings of fact and conclusions of law. The initial decision and order must be served on all parties by certified mail, return receipt requested.

(b) *Exceptions; Final Decision.* (1) Final decision after a hearing. The initial decision and order becomes the Final Decision and Order of the Department unless exceptions are filed by a party or, in the absence of exceptions, the Administrative Review Board serves notice that it will review the decision.

(i) A party dissatisfied with the initial decision and order may, within 45 days of receipt, file with the Administrative Review Board and serve on the other parties to the proceedings and on the

Administrative Law Judge, exceptions to the initial decision and order or any part thereof.

(ii) Upon receipt of exceptions, the Administrative Law Judge must index and forward the record and the initial decision and order to the Administrative Review Board within three days of such receipt.

(iii) A party filing exceptions must specifically identify the finding or conclusion to which exception is taken.

(iv) Within 45 days of the date of filing such exceptions, a reply, which must be limited to the scope of the exceptions, may be filed and served by any other party to the proceeding.

(v) Requests for extensions for the filing of exceptions or replies must be received by the Administrative Review Board no later than 3 days before the exceptions or replies are due.

(vi) If no exceptions are filed, the Administrative Review Board may, within 30 days of the expiration of the time for filing exceptions, on its own motion serve notice on the parties that it will review the decision.

(vii) *Final Decision and Order.* (A) Where exceptions have been filed, the initial decision and order of the Administrative Law Judge becomes the Final Decision and Order unless the Administrative Review Board, within 30 days of the expiration of the time for filing exceptions and replies, has notified the parties that the case is accepted for review.

(B) Where exceptions have not been filed, the initial decision and order of the Administrative Law Judge becomes the Final Decision and Order unless the Administrative Review Board has served notice on the parties that it will review the decision, as provided in paragraph (b)(1)(vi) of this section.

(viii) Any case reviewed by the Administrative Review Board under this paragraph must be decided within 180 days of the notification of such review. If the Administrative Review Board fails to issue a Final Decision and Order within the 180-day period, the initial decision and order of the Administrative Law Judge becomes the Final Decision and Order.

(2) Final Decision where a hearing is waived.

(i) If, after issuance of a Final Determination under § 38.95 or Notification of Breach of Conciliation Agreement under § 38.98, voluntary compliance has not been achieved within the time set by this part and the opportunity for a hearing has been waived as provided for in § 38.111(b)(4), the Final Determination or Notification of Breach of Conciliation Agreement becomes the Final Decision.

(ii) When a Final Determination or Notification of Breach of Conciliation Agreement becomes the Final Decision, the Administrative Review Board may, within 45 days, issue an order terminating or denying the grant or continuation of assistance; or imposing other appropriate sanctions for the grant applicant or recipient's failure to comply with the required corrective and/or remedial actions, or the Secretary may refer the matter to the Attorney General for further enforcement action.

(3) *Final agency action.* A Final Decision and Order issued under § 38.112(b) constitutes final agency action.

**§ 38.113 Suspension, termination, withholding, denial, or discontinuation of financial assistance.**

Any action to suspend, terminate, deny or discontinue WIOA Title I financial assistance must be limited to the particular political entity, or part thereof, or other recipient (or grant applicant) as to which the finding has been made, and must be limited in its effect to the particular program, or part thereof, in which the noncompliance has been found. No order suspending, terminating, denying or discontinuing WIOA Title I financial assistance will become effective until:

(a) The Director has issued a Final Determination under § 38.95 or Notification of Breach of Conciliation Agreement under § 38.98;

(b) There has been an express finding on the record, after opportunity for a hearing, of failure by the grant applicant or recipient to comply with a requirement imposed by or under the nondiscrimination and equal opportunity provisions of WIOA or this part;

(c) A Final Decision has been issued by the Administrative Review Board, the Administrative Law Judge's decision and order has become the Final Agency Decision, or the Final Determination or Notification of Conciliation Agreement has been deemed the Final Agency Decision, under § 38.112(b); and

(d) The expiration of 30 days after the Secretary has filed, with the committees of Congress having legislative jurisdiction over the program involved, a full written report of the circumstances and grounds for such action.

**§ 38.114 Distribution of WIOA Title I financial assistance to an alternate recipient.**

When the Department withholds funds from a recipient or grant applicant under these regulations, the Secretary may disburse the withheld funds directly to an alternate recipient. In such case, the Secretary will require any alternate recipient to demonstrate:

(a) The ability to comply with these regulations; and

(b) The ability to achieve the goals of the nondiscrimination and equal opportunity provisions of WIOA.

**§ 38.115 Post-termination proceedings.**

(a) A grant applicant or recipient adversely affected by a Final Decision and Order issued under § 38.112(b) will be restored, where appropriate, to full eligibility to receive WIOA Title I financial assistance if the grant applicant or recipient satisfies the terms and conditions of the Final Decision and Order and brings itself into compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part.

(b) A grant applicant or recipient adversely affected by a Final Decision

and Order issued under § 38.112(b) may at any time petition the Director to restore its eligibility to receive WIOA Title I financial assistance. A copy of the petition must be served on the parties to the original proceeding that led to the Final Decision and Order. The petition must be supported by information showing the actions taken by the grant applicant or recipient to bring itself into compliance. The grant applicant or recipient has the burden of demonstrating that it has satisfied the requirements of paragraph (a) of this section. While proceedings under this section are pending, sanctions imposed by the Final Decision and Order under §§ 38.112(b)(1) and (2) must remain in effect.

(c) The Director must issue a written decision on the petition for restoration.

(1) If the Director determines that the grant applicant or recipient has not brought itself into compliance, he or she must issue a decision denying the petition.

(2) Within 30 days of its receipt of the Director's decision, the recipient or grant applicant may file a petition for review of the decision by the Administrative Review Board, setting forth the grounds for its objection to the Director's decision.

(3) The petition must be served on the Director and on the Office of the Solicitor, Civil Rights and Labor-Management Division.

(4) The Director may file a response to the petition within 14 days.

(5) The Administrative Review Board must issue the final agency decision denying or granting the recipient's or grant applicant's request for restoration to eligibility.

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