**Final Rule: WIOA Section 188 Nondiscrimination and**

**Equal Opportunity Regulations (29 CFR Part 38)**

**QUESTIONS AND ANSWERS**

**Why is CRC revising its Section 188 nondiscrimination and equal opportunity (EO) regulations?**

The bipartisan Workforce Innovation and Opportunity Act (WIOA) required the Department of Labor to issue regulations to implement Section 188, the provisions that require equal opportunity and nondiscrimination in the workforce development system. These nondiscrimination provisions are administered by the Department’s Civil Rights Center (CRC).

In order to meet WIOA’s statutory deadline for regulations, the Department published a rule in July 2015 creating 29 CFR part 38, which contained only technical amendments to the 1999 regulations that implemented WIOA’s predecessor, the Workforce Investment Act of 1998 (WIA), at 29 CFR part 37 (changing references from “WIA” to “WIOA”).

The final rule now being published at 29 CFR part 38 contains substantive changes necessary to address developments in equal opportunity and nondiscrimination law since CRC first issued regulations implementing WIA in 1999. The revisions also reflect changes in the practices of recipients, including the use of computer-based and internet-based systems.

**When does this rule become effective?**

This rule becomes effective on January 3, 2017.

**Who is protected by this rule?**

The final rule applies to recipients of financial assistance under Title I of WIOA, directly from the Department or through the Governor or another recipient (including any successor, assignee, or transferee of a recipient). For example, the regulation applies to:

* individuals who seek services from American Job Center partners (one-stop partners) listed in section 121(b) of WIOA, to the extent that they participate in the American Job Center system (one-stop delivery system), which includes entities that are on the States’ lists of eligible training providers; and
* employees of recipients of financial assistance, to the extent that the employment is in the administration of or in connection with any WIOA Title I–financially assisted program or activity, or any program or activity operated by an American Job Center partner (one-stop partner), to the extent that the program or activity is being conducted as part of the American Job Center system (one-stop delivery system).

**How do I know if an entity is covered by this rule?**

To best understand the application of this regulation, readers are encouraged to review the Final Rule’s “applicability” language at § 38.2, the definition of “financial assistance” under Title I of WIOA at § 38.4(x) and § 38.4(y), and the definition of “recipient” at § 38.4(zz). Entities connected to the workforce development system may be recipients for purposes of Section 188 and the Final Rule even if they do not receive assistance in the form of money. For example, recipients subject to these regulations include entities with agreements, arrangements, contracts, subcontracts, or other instruments for the provision of assistance or benefits under WIOA Title I.[[1]](#footnote-2) Thus, entities that are selected and/or certified as eligible training providers are considered to receive financial assistance for the purpose of this regulation and Section 188.[[2]](#footnote-3) Additionally, programs and activities operated by one-stop partners (both required partners and additional partners) also receive financial assistance for purposes of this regulation to the extent that these programs and activities are being conducted as part of the one-stop delivery system.[[3]](#footnote-4) We note, however, that whether an entity is an additional one-stop partner subject to Section 188 is based on whether that entity has signed a Memorandum of Understanding as an additional partner per the requirements of Section 121 of WIOA[[4]](#footnote-5) and not merely whether that entity is working with or contributing something to a WIOA Title I program.[[5]](#footnote-6)

**Who else is covered by the final rule?**

Beneficiaries, such as job applicants and training participants, and employees of recipients are protected by the rule. Beneficiaries do not have any obligations under the rule.

**Whom is this final rule intended to benefit?**

The final rule will benefit both recipients and the beneficiaries of the services that recipients provide.

The final rule will provide clarity on specific provisions of nondiscrimination and equal opportunity law that should increase recipients’ understanding and ease compliance, ultimately resulting in improved integration and inclusion of a broader array of program participants.

This regulation will also increase equality of opportunity for millions of job seekers, training participants, program beneficiaries, and recipients’ employees by allowing them to participate or work in programs and activities free from unlawful discrimination. The final rule safeguards access to the system in particular for people with disabilities, people with limited English proficiency, transgender individuals who may face various forms of sex discrimination, and individuals who are pregnant, have had a child, or have related medical conditions.

**What types of discrimination are prohibited under the final rule?**

Section 188 of WIOA prohibits discrimination because of race, color, religion, sex, national origin, age, disability, or political affiliation or belief. In addition, for beneficiaries, applicants, and participants only, WIOA prohibits discrimination because of citizenship status, or because of an individual’s participation in a WIOA Title I–financially assisted program or activity.

**How does the rule modernize the Department’s Section 188 regulation?**

Importantly, while the rule makes many substantive changes since 1999, the final rule does not impose significant new obligations on recipients. The rule’s updated provisions generally reflect obligations already imposed by changes to other nondiscrimination and equal opportunity laws that expanded, for example, protections against unlawful discrimination on the basis of disability, national origin (including limited English proficiency), and sex. This rule will ensure recipients understand how their obligations in this regard have changed over the past 17 years.

The final rule also includes updates reflecting changes in the increased use of online service delivery models in the workforce development system since 1999.

**How does the rule protect individuals with limited English proficiency?**

The final rule makes clear that discrimination against those with limited English proficiency (LEP) individuals based on their LEP status is unlawful discrimination based on national origin. This is consistent with Title VI case law and Department of Justice guidance. This section also outlines a recipient’s obligations to take reasonable steps to provide meaningful access to programs and activities for individuals with LEP by providing written translation or oral interpretation when appropriate. Although previously a section addressing these obligations existed (38.35), the new language (38.9 and Appendix) provides more detail and better guidance for recipients.

Thenew Appendix will help recipients comply with their obligation to provide services for individuals with limited English proficiency. It includes a description of the type of plan that may be implemented to promote meaningful access for persons with limited English proficiency and examples of how to apply the LEP provisions contained in Section 38.9.

**How does the rule protect individuals with disabilities?**

The final rule brings the CRC regulations in accord with the Americans with Disabilities Act Amendments Act of 2008 and the implementing regulations and guidance issued by the Department of Justice, as well as the final implementing regulations and guidance issued by the Equal Employment Opportunity Commission. The rule’s updated language ensures that the definition of “disability” will be interpreted broadly, which will enable more individuals with disabilities to be effectively served within the workforce development system. The rule also addresses accessibility requirements (such as for information and electronic technologies) and service animals.

**How does the rule protect women, LGBT individuals, and those who are pregnant?**

The final rule states that discrimination on the basis of transgender status or gender identity and discrimination on the basis of sex stereotyping are forms of prohibited sex discrimination, in accord with similar developments under civil rights laws. In addition, the rule acknowledges the continuing evolution of the law with regard to discrimination based on sexual orientation and states that Section 188’s prohibition of discrimination on the basis of sex includes, at a minimum, sex discrimination related to an individual’s sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes. CRC anticipates that the law will continue to evolve on this issue, and CRC will continue to monitor legal developments in this area. CRC will enforce Section 188 in light of those developments and will consider issuing further guidance on this subject as appropriate. The rule also makes clear that sex discrimination includes discrimination based on pregnancy, childbirth, and related medical conditions, in accord with Title IX of the Education Amendments of 1972, and the Pregnancy Discrimination Act of 1978, which amended Title VII of the Civil Rights Act of 1964.

**What are recipients’ responsibilities regarding their Equal Opportunity (EO) Officers?**

The rule clarifies that recipients must designate Equal Opportunity Officers with sufficient expertise, authority, staff, and resources to carry out their responsibilities. The final rule explains that Equal Opportunity Officers must be senior-level employees, who report directly to the individual in the highest-level position of authority for the entity that is the recipient, and provides a list of examples of such positions for further clarity.

An Equal Opportunity Officer is responsible for coordinating a recipient’s obligations under this part. Those responsibilities include, but are not limited to:

* 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;
* Reviewing the recipient’s written policies to make sure that those policies are nondiscriminatory;
* Developing and publishing the recipient’s procedures for processing discrimination complaints;
* Conducting outreach and education about equal opportunity and nondiscrimination requirements;
* If applicable, overseeing the development and implementation of the recipient’s Nondiscrimination Plan under § 38.54.

The rule requires recipients’ EO Officers to oversee the collection of EO data and information, including on LEP status and preferred language use.

The rule makes clear that outreach is an essential responsibility of recipients’ EO Officers in order to ensure equal opportunity; the rule clarifies recipients’ obligations to actively conduct affirmative outreach in order to expand access to services.

**What are the Governor’s responsibilities? What is new in the final rule?**

The Governor is responsible for oversight and monitoring of all WIOA Title I–financially assisted State Programs. This responsibility includes:

* 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).
* 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.

The rule changes the title of the tool used by Governors to implement their monitoring and oversight responsibilities from the “Methods of Administration” to “Nondiscrimination Plan.”

The rule also provides more direction on Governors’ responsibilities and the CRC’s procedures for enforcing those responsibilities. The final rule also requires States to conduct monitoring annually instead of periodically and to include copies of the monitoring conducted in the State’s Nondiscrimination Plan submission.

**When must Governors submit their Nondiscrimination Plans?**

The rule provides for a seamless transition from current Methods of Administration to the Nondiscrimination Plan by maintaining the current biennial submission schedule. As an existing MOA expires, Governors will submit a Nondiscrimination Plan. Note that there may be changes to the existing MOA that will need to be submitted in the interim. The Nondiscrimination Plan submission schedule will be posted on CRC’s website at [www.dol.gov/crc](http://www.dol.gov/crc).

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 the Methods of Administration as determined by the schedule in 29 C.F.R. § 37.55, whichever is later, a Governor must:

* Develop and implement a Nondiscrimination Plan consistent with the requirements of this part; and
* Submit a copy of the Nondiscrimination Plan to the Director.

The Governor must also 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.

Every two years from the date on which the initial Nondiscrimination Plan is submitted to the Director under § 38.55(a)(2), 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.

**What changes does the rule make to improve compliance procedures?**

The rule clarifies the process used by Departmental grant-making agencies to ensure that grant applicants are complying with their nondiscrimination and equal opportunity obligations under Section 188. This includes consulting with the Director of CRC to learn whether CRC has issued a Notice to Show Cause or a Final Determination against a grant applicant that has been identified as a probable awardee in Section 38.62(b).

The rule also provides clarifying language to indicate that any person or their representative may file a complaint based on discrimination and/or retaliation.

The rule slightly modifies language to make clear that complainants and recipients may use other forms of alternative dispute resolution, rather than mediation alone, to resolve complaints so as to expand the options available to achieve resolution.

**How does the rule ensure that American Job Centers (one-stop centers) are accessible to people with disabilities?**

All American Job Center (one-stop center) programs and activities were covered by the previous Section 188 rules, and are covered by this updated rule as well. Under this rule, they are required to provide reasonable accommodations for individuals with disabilities; make reasonable modifications to policies, practices, and procedures; administer programs in the most integrated setting appropriate; and provide auxiliary aids and services where necessary. In addition, under the rule, all American Job Centers are required to comply with the applicable Federal physical accessibility standards and cannot deny access to a service, program, or activity because their facilities are inaccessible or unusable by individuals with disabilities. And, the rule provides that American Job Centers must use electronic and information technology which incorporates accessibility features for individuals with disabilities.

**How does this final rule interact with the apprenticeship EEO rules that the Department is in the process of updating?**

Some apprenticeship programs fall under the jurisdiction of the Section 188 regulations, particularly those that are considered recipients because they are American Job Center partners (one-stop partners) or Eligible Training Providers under the law. At the time of this Final Rule publication, the Department is continuing to develop the final Apprenticeship EEO rule. It is important to note, however, that the requirements of the WIOA Section 188 final rule and the Apprenticeship EEO rules may have distinct requirements. CRC and the Department's Employment and Training Administration (ETA) will provide technical assistance to apprenticeship programs to ensure that they are aware of the relevant requirements.

**What are the expectations of a State-level Equal Opportunity (EO) Officer?**

Governors play an essential oversight role in ensuring that the workforce development system is open to all. The rule requires that the Governor designate a State-level EO Officer, who reports directly to the Governor. State-level EO Officers will coordinate State Programs’ compliance[[6]](#footnote-7) with the nondiscrimination and equal opportunity provisions in WIOA under Section 188, including investigating complaints and monitoring nondiscrimination policies.

The final rule also requires that the State-level EO Officers have the authority, requisite skill, and sufficient staff and resources to carry out their responsibilities effectively. These requirements are designed to provide the State-level EO Officer with sufficient ability to fulfill the obligation to coordinate State Program-wide compliance with the nondiscrimination and equal opportunity provisions in WIOA.

1. *See* § 38.4(x)(5), (y)(5). [↑](#footnote-ref-2)
2. Section 38.4(zz)(6) (service providers, including eligible training providers, are recipients); see also § 38.4(ggg) (defining “service provider”). [↑](#footnote-ref-3)
3. Section 38.2(a)(2). [↑](#footnote-ref-4)
4. *See* 29 U.S.C. 3151. [↑](#footnote-ref-5)
5. Please note that this sentence is limited in scope as to whether an entity is a one-stop additional partner subject to this regulation. Even if an entity does not qualify as a one-stop additional partner, that entity might still be subject to the requirements of this regulation if it is otherwise a recipient of financial assistance under Title I of WIOA. [↑](#footnote-ref-6)
6. As defined at 29 CFR § 38.4(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 LWDA 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. [↑](#footnote-ref-7)