

**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:** Final rule.

**SUMMARY:** This final rule revises the U.S. Department of Labor (Department) regulations implementing the nondiscrimination and equal opportunity provisions of Section 188 of the Workforce Innovation and Opportunity Act (WIOA). Signed by President Obama on July 22, 2014, WIOA superseded the Workforce Investment Act of 1998 (WIA) as the Department's primary mechanism for providing financial assistance for a comprehensive system of job training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, or political affiliation or belief, or, for beneficiaries, applicants, and participants only, on the basis of citizenship status, or participation in a program or activity that receives financial assistance under Title I of WIOA. This final rule updates Department regulations consistent with current law and addresses its application to current workforce development and workplace practices and issues.

**DATES:** *Effective Date:* These regulations are effective December 2, 2016.

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**SUPPLEMENTARY INFORMATION:****Executive Summary***Regulatory History*

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 rule was prepared, the Department's Civil Rights Center (CRC) issued a final rule in July 2015 ("2015 rule"), codified at 29 CFR part 38, which applies until this rule takes effect. The 2015 rule retained the provisions in 29 CFR part 37 ("1999 rule") but simply substituted all references to WIA with WIOA to reflect the proper statutory authority. This final rule revises the 2015 rule and generally carries over the policies and procedures found in the 1999 and 2015 rules, which implemented the equal opportunity and nondiscrimination provisions of WIA and WIOA, respectively. Like the 1999 and 2015 rules, this final rule is organized into subparts A through E.

*Purpose of the Regulatory Action*

CRC enforces Section 188 of 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, or political affiliation or belief, or, for beneficiaries, applicants, and participants only, on the basis of 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 (Title VI) (prohibiting discrimination based on race, color, or national origin in programs and activities receiving federal financial assistance),<sup>1</sup> Title IX of the Education Amendments of 1972 (Title IX) (prohibiting discrimination based on sex in education and training programs receiving federal financial assistance),<sup>2</sup> the Age Discrimination Act of 1975 (prohibiting discrimination based on age),<sup>3</sup> and Section 504 of the Rehabilitation Act (Section 504) (prohibiting discrimination based on disability).<sup>4</sup> 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,<sup>8</sup> which are enforced by the Equal Employment Opportunity Commission (EEOC); Executive Order 11246<sup>9</sup> and Section 503 of the Rehabilitation Act,<sup>10</sup> which are enforced by the Department's Office of Federal Contract Compliance Programs (OFCCP); Title VI of the Civil Rights Act, the Age Discrimination Act of 1975, and Section 504 of the Rehabilitation Act, which are enforced by each federal funding agency; and Title IX, which is enforced by each federal funding agency that assists an education or training program.

CRC issued a notice of proposed rulemaking (NPRM) on January 26, 2016, to implement the nondiscrimination and equal opportunity provisions of WIOA, informed by CRC's experience under the 1999 rule implementing WIA. CRC maintains regular contact with the regulated community, and this contact resulted in some of the changes to the 2015 rule that were proposed in the NPRM. During the 60-day public comment period, CRC received 360 comments<sup>11</sup> on the proposed rule. Comments came from a wide variety of stakeholders, including State and local agencies; civil rights and advocacy groups, such as language access organizations, disability rights organizations, and organizations serving lesbian, gay, bisexual, and transgender (LGBT) individuals; religious organizations; and labor organizations. After a full review of the comments, CRC adopts this final rule incorporating many of the provisions proposed in the NPRM, with some modifications that are discussed in the Section-by-Section analysis below.

This rule sets forth the WIOA Section 188 nondiscrimination and equal opportunity requirements and obligations for "recipients" as that term is defined in § 38.4(zz). These requirements and obligations arise in

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

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

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

<sup>9</sup> Executive Order 11246, 30 FR 12319, Sept. 24, 1965, as amended by Executive Order 11375, 32 FR 14303, Oct. 17, 1967; Executive Order 12086, 43 FR 46501, Oct. 10, 1978; Executive Order 13279, 67 FR 77141, Dec. 12, 2002; Executive Order 13665, 79 FR 20749, Apr. 8, 2014; and Executive Order 13672, 79 FR 42971, July 21, 2014.

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

<sup>11</sup> This includes one comment that was withdrawn and reissued without personally identifiable information and one comment documenting contact with an outside party during the comment period.

<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.

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

connection with programs or activities financially assisted under WIOA Title I as explained further below. The final rule describes the enforcement procedures for implementing the nondiscrimination and equal opportunity provisions of WIOA. Although WIOA did not change the nondiscrimination and equal opportunity provisions in Section 188, Congress mandated that the Department issue regulations to implement the section, including standards for determining discrimination and enforcement procedures, as well as procedures to process complaints.<sup>12</sup>

To best understand the application of this regulation, readers are encouraged to review the “applicability” language at § 38.2, the definition of “financial assistance” under Title I of WIOA at § 38.4(x) and (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 this 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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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<sup>16</sup> and not merely whether that entity is working with or contributing something to a WIOA Title I program.<sup>17</sup>

<sup>12</sup> 29 U.S.C. 3248(e).

<sup>13</sup> See § 38.4(x)(5), (y)(5).

<sup>14</sup> Section 38.4(zz)(6) (service providers, including eligible training providers, are recipients); see also § 38.4(egg) (defining “service provider”).

<sup>15</sup> Section 38.2(a)(2).

<sup>16</sup> See 29 U.S.C. 3151.

<sup>17</sup> 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. Since their promulgation in 1999, the regulations implementing Section 188 of WIA or WIOA had not undergone substantial revision. The 2015 rule made only technical revisions to the 1999 rule, changing references from “WIA” to “WIOA.” Thus, the 2015 rule did 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 had 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, or training through WIOA Title I-financially assisted programs and activities.

For these reasons, this final rule revises 29 CFR part 38 to set forth recipients’ nondiscrimination and equal opportunity obligations under WIOA Section 188 in accordance with existing law and policy. This rule updates 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 rule 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 interpretations of Title VII and the Rehabilitation Act into the workforce development system. The final rule reflects current law and legal principles applicable to a recipient’s obligation to refrain from discrimination and to ensure equal opportunity.

#### Major Revisions

First, this final rule improves the overall readability of the 2015 rule through revisions, limited reorganization of sections, and more explicit descriptions of recipient obligations. The final rule 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. The plain language of the regulations is retained for ease of comprehension and application.

Second, this rule updates the nondiscrimination and equal opportunity provisions of the 2015 rule

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>18</sup> During that time, the Department has issued final rules under Section 503 of the Rehabilitation Act and Executive Order 11246.<sup>19</sup>

Third, this final rule improves the effectiveness of CRC’s enforcement program to support compliance with the rule. The compliance review and complaint procedures sections are updated and the changes are intended to increase compliance through clearer descriptions of recipient responsibilities, more effective Equal Opportunity (“EO”) Officers, enhanced data collection, and consistent

<sup>18</sup> See U.S. Dep’t of Justice, Office of the Att’y Gen., Amendment of Americans with Disabilities Act Title II and III Regulations to Implement ADA Amendments Act of 2008; Final Rule, 81 FR 53204, Aug. 11, 2016 (revising 28 CFR parts 35 and 36) (hereinafter “DOJ Final Rule to Implement ADAAA”); U.S. Equal Emp’t Opportunity Comm’n, Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended; Final Rule, 76 FR 16978, Mar. 25, 2011 (29 CFR part 1630) (hereinafter “EEOC Final Rule to Implement ADAAA”); see also U.S. Dep’t of Health & Human Servs., Office for Civil Rights, Nondiscrimination in Health Programs and Activities; Final Rule, 81 FR 31376, May 18, 2016 (implementing Section 1557 of the Affordable Care Act, which prohibits discrimination on the grounds prohibited by Title VI, Title IX, the Age Act, and Section 504) (hereinafter “HHS Nondiscrimination Final Rule”).

<sup>19</sup> U.S. Dep’t of Labor, Office of Fed. Contract Compliance Programs, Discrimination on the Basis of Sex; Final Rule, 81 FR 39108, June 15, 2016 (revising 41 CFR part 60–20) (hereinafter “OFCCP Sex Discrimination Final Rule”); U.S. Dep’t of Labor, Office of Fed. Contract Compliance Programs, Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors; Final Rule, 79 FR 72985, Dec. 9, 2014 (revising 41 CFR parts 60–1, 60–2, 60–4, and 60–50) (hereinafter “OFCCP Executive Order 13672 Final Rule”); U.S. Dep’t of Labor, Office of Fed. Contract Compliance Programs, Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities; Final Rule, 78 FR 58862, Sept. 24, 2013 (revising 41 CFR part 60–741).

monitoring and oversight by Governors. These changes help identify the scope of the nondiscrimination and equal opportunity requirements and obligations with more specificity and inform those who may not otherwise be aware of the developments in the law.

### Statement of Legal Authority

#### Statutory Authority

The statutory authorities for this final rule are: The Workforce Innovation and Opportunity Act, Public Law 113–128, 128 Stat. 1425, including Section 188 of such Act. Section 188 incorporates the prohibitions against discrimination under 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 *et seq.*); and Title IX of the Education Amendments of 1972, as amended, Public Law 92–318, 86 Stat. 373 (20 U.S.C. 1681 *et seq.*).

#### Departmental Authorization

Secretary's Order 04–2000 delegates authority and responsibility to CRC for developing, implementing, and monitoring the Department's civil rights enforcement program under all equal opportunity and nondiscrimination requirements applicable to programs and activities financially assisted and conducted by the Department, including Section 188 of WIA. Section 5 of the Secretary's Order also authorizes 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>20</sup> Section 5(A)(1)(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,<sup>21</sup> is responsible for coordinating federal enforcement of most nondiscrimination laws that apply to federally assisted programs and

activities. Executive Order 12067<sup>22</sup> requires federal departments and agencies to consult with the EEOC about regulations involving equal employment opportunity. The Age Discrimination Act of 1975, as amended, assigns the Secretary of the U.S. Department of Health and Human Services (HHS) the responsibility for coordinating the federal enforcement effort of that Act. Accordingly, the final rule has been developed in coordination with the DOJ, the EEOC, and HHS. In addition, as appropriate, this rule has been developed in coordination with other federal grantmaking agencies, including the U.S. Departments of Education and Housing and Urban Development.

### I. Overview of the Final Rule

This final 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 bases 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 and grant applicants, 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 the Workforce Innovation and Opportunity Act (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 conducting compliance reviews, processing complaints, issuing determinations, and handling breaches of conciliation agreements.

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

The final rule incorporates current jurisprudence under Title VII and other employment nondiscrimination laws, as well as EEOC guidance interpreting those nondiscrimination obligations. We rely on this guidance 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, 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 that require equal employment opportunity. CRC thus generally defers to the EEOC's interpretations of Title VII and other relevant employment laws as they apply to job applicants to and employees of recipients.

Pursuant to Executive Order 12250 and Title VI, the DOJ is the lead federal agency responsible for defining the nature and scope of the nondiscrimination prohibitions based on, among other grounds, race, color, and national origin in programs and activities receiving federal financial assistance. Thus, CRC 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, the DOJ is the lead federal agency responsible for defining the parameters of the nondiscrimination and equal opportunity provisions of Title II of the ADA regarding State and local government entities.

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

Consistent with Title VI case law and the DOJ's 2002 guidance on ensuring equal opportunity and nondiscrimination for individuals who are limited English proficient (LEP),<sup>23</sup> this final rule provides that recipients must not discriminate on the basis of national origin against individuals who are LEP.

<sup>23</sup> U.S. Dep't of Justice, 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 (hereinafter "DOJ 2002 LEP Guidance").

<sup>20</sup> 65 FR 69184, Nov. 15, 2000.

<sup>21</sup> 45 FR 72995, Nov. 4, 1980.

<sup>22</sup> 43 FR 28967, July 5, 1978.

Title VI provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>24</sup> Interpreting Title VI, the Supreme Court in *Lau v. Nichols* 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.<sup>25</sup> Courts have consistently found that a recipient’s failure to provide meaningful access to LEP individuals violates Title VI’s prohibition of national origin discrimination.<sup>26</sup> Consequently, this final rule provides that the definition of national origin discrimination includes discrimination based on limited English proficiency. The final rule sets forth recipients’ compliance obligations for ensuring that LEP individuals have meaningful access to WIOA programs and services.

The final rule is also consistent with CRC guidance issued in 2003, advising all recipients<sup>27</sup> of federal financial assistance from the Department of Labor of the Title VI prohibition against national origin discrimination affecting LEP individuals.<sup>28</sup> This 2003 U.S. Department of Labor (DOL) 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>29</sup> Executive Order 13166 further directs that all such guidance documents be consistent with the compliance standards and framework detailed in LEP Guidance issued by the DOJ.<sup>30</sup> The LEP provisions of this final rule are drawn from Title VI and its implementing regulations, and thus are consistent with, the DOJ 2000 and 2002 LEP Guidance.

#### *Developments in Disability Discrimination Jurisprudence*

The Americans with Disabilities Act Amendments Act of 2008 amended the ADA and the Rehabilitation Act, both of which apply, in distinct ways, to different groups of recipients under this rule. Consistent with Executive Order 13563’s instruction to federal agencies to coordinate rules across agencies and harmonize regulatory requirements where appropriate, the final rule adopts language consistent with the ADAAA and corresponding revisions to the EEOC regulations implementing the ADAAA provisions in Title I of the ADA<sup>31</sup> and the DOJ regulations implementing the ADAAA provisions in Title II and Title III of the ADA.<sup>32</sup> The final rule 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. The NPRM stated that, if the DOJ changed its proposal in its final rule implementing ADA Titles II and III, CRC would review those changes to determine their impact on this rule and take appropriate action. After the NPRM was published, DOJ issued its final rule implementing ADA Titles II and III and accordingly, CRC has reviewed the DOJ rule. The resulting changes are described below in the appropriate portions of the Section-by-Section Analysis.

Title I of the ADA prohibits private employers with fifteen or more employees, State and local governments, employment agencies, and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.<sup>33</sup> WIOA

Section 188 applies to some of these entities in the employment context because it 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>34</sup>

Title II of the ADA applies to State and local government entities, many of which may also be recipients for purposes of this rule, and, like subtitle A of this part, 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>35</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 federal financial assistance<sup>36</sup> and requires compliance with the ADA Standards for Accessible Design.<sup>37</sup> The Department shares responsibility with the Department of Justice for implementing the compliance procedures of Title II of the ADA for components of State and local governments that exercise responsibilities, regulate, or administer services, programs, or activities “relating to labor and the work force.”<sup>38</sup>

Title III of the ADA, enforced by the DOJ, prohibits discrimination on the basis of disability in the full enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by a person who owns, leases, or operates that place of public accommodation.<sup>39</sup> Title III applies to businesses that are generally open to the public and that fall into one of twelve categories listed in the ADA, such as restaurants, day care facilities, and doctors’ offices,<sup>40</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>41</sup> Many recipients are places of public accommodation and thus are subject to

<sup>24</sup> 42 U.S.C. 2000d.

<sup>25</sup> 414 U.S. 563, 568–69 (1974).

<sup>26</sup> 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, 1079–80 (D. Ariz. 2012) (discussing *Lau*); *Faith Action for Cmty. Equity v. Hawaii*, No. 13–00450 SOM/RLP, 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,” allegedly pretextual justifications for the policy, and potentially derogatory comments by a State agency).

<sup>27</sup> In this instance, the term “recipient” is broader than the definition at § 38.4(zz). See notes 13–17 and accompanying text for an explanation of the term “recipient” with respect to WIOA Title I programs and activities.

<sup>28</sup> U.S. Dep’t of Labor, 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, 68 FR 32290, May 29, 2003 (hereinafter “DOL LEP Guidance”).

<sup>29</sup> 65 FR 50121, Aug. 11, 2000.

<sup>30</sup> *Id.*; see U.S. Dep’t of Justice, Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency, 65 FR 50123, Aug. 16, 2000.

<sup>31</sup> See EEOC Final Rule to Implement ADAAA, *supra* note 18.

<sup>32</sup> See DOJ Final Rule to Implement ADAAA, *supra* note 18.

<sup>33</sup> 42 U.S.C. 12101 *et seq.*

<sup>34</sup> See EEOC Final Rule to Implement ADAAA, *supra* note 18.

<sup>35</sup> See 42 U.S.C. 12131–12165.

<sup>36</sup> See 42 U.S.C. 12132.

<sup>37</sup> 42 U.S.C. 12134; see 28 CFR part 35.

<sup>38</sup> 28 CFR 35.190(b)(7).

<sup>39</sup> 42 U.S.C. 12182.

<sup>40</sup> 42 U.S.C. 12181(7).

<sup>41</sup> 42 U.S.C. 12186; see 28 CFR part 36.

Title III of the ADA and its accessible design standards. The DOJ issued regulations in August 2016 which incorporated amendments to its ADA Title II and Title III regulations, consistent with the ADAAA.<sup>42</sup>

This final rule revises the 2015 rule consistent with the ADAAA and the regulations issued by the EEOC, and those proposed by the DOJ. The ADAAA and its implementing and proposed regulations make 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>43</sup> This final rule incorporates 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 recipients 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 final rule also revises 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 regulations and the DOJ’s regulations. For example, consistent with the ADAAA, the final rule expands 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 final rule also includes rules of construction that should be applied when determining whether an impairment substantially limits a major life activity.

### *Developments in Sex Discrimination Jurisprudence*

#### Pregnancy Discrimination

The final rule includes a section that clarifies recipients’ existing obligation to avoid discrimination based on pregnancy, childbirth, and related medical conditions as a form of sex discrimination. Title IX’s prohibition of discrimination on the bases of pregnancy and actual or potential parental status applies to recipients under Title I of WIOA and this part. In addition, the Pregnancy Discrimination Act (PDA),<sup>44</sup> enacted in 1978, governs the nondiscrimination obligations of a program or activity receiving federal

financial assistance in the context of covered employment. Nevertheless, the earlier WIA Section 188 regulations did not refer specifically to pregnancy discrimination as a form of sex discrimination. This final rule corrects that omission and sets out the standards that CRC will apply in enforcing the prohibition against pregnancy discrimination, consistent with Title IX and with Title VII as amended by the PDA, in WIOA Title I-financially assisted programs, activities, training, and services.

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 5,797.<sup>45</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>46</sup> The EEOC’s findings and related research are relevant to this rule because the workforce development system is the pipeline through which many women find employment opportunities in the public and private sectors.

#### Discrimination Based on Sex Stereotyping, Transgender Status, or Gender Identity

Sex stereotyping is one of the most significant barriers to women’s ability to access services, benefits, training, programs, and employment in and through the workforce development system. Decades of social science research have 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 terms and conditions of employment.<sup>47</sup> This final rule adopts

the well-recognized principle that employment decisions made on the basis of stereotypes about how males and females are expected to look, speak, and act are forms of sex-based employment discrimination, and it applies that principle to the provision of any aid, benefit, service, or 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 or act.<sup>48</sup> As the Supreme Court stated in *Price Waterhouse v. Hopkins*, “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”<sup>49</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>50</sup> The principle that sex stereotyping is a form of sex discrimination has been applied consistently in subsequent Supreme Court and lower-court decisions.<sup>51</sup> Research demonstrates that widely held social attitudes and biases can lead to discriminatory decisions, even where

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>48</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>49</sup> *Id.* at 251 (plurality op.).

<sup>50</sup> *Id.* at 235.

<sup>51</sup> See, e.g., *Nev. 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); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009) (harassment based on a man’s effeminacy); *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); *Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014) (hostile work environment based on stereotyped beliefs about the appropriate gender with which an individual should form an intimate relationship). Cf. *United States 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>42</sup> See DOJ Final Rule to Implement ADAAA, *supra* note 18.

<sup>43</sup> See 42 U.S.C. 12102(1).

<sup>44</sup> 42 U.S.C. 2000e(k).

<sup>45</sup> U.S. Equal Emp’t Opportunity Comm’n, Pregnancy Discrimination Charges, EEOC & FEPAs Combined: FY 1997–FY 2011, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm>; see U.S. Equal Emp’t Opportunity Comm’n, *Enforcement Guidance: Pregnancy Discrimination and Related Issues* (June 25, 2015), available at [http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm).

<sup>46</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>.

<sup>47</sup> See, e.g., Susan Fiske et al., *Controlling Other People: The Impact of Power on Stereotyping*, 48 a.m. 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

there is no formal sex-based (or race-based) policy or practice in place.<sup>52</sup>

Transgender applicants and employees, the vast majority of whom report that they have experienced discrimination in the workplace, are particularly vulnerable to sex discrimination, including sex stereotyping and its consequences.<sup>53</sup> The EEOC has recognized that claims of gender identity discrimination, including discrimination grounded in stereotypes about how individuals express their gender, are claims of sex discrimination under Title VII.<sup>54</sup> Courts

<sup>52</sup> See, e.g., Kevin Lang & Jee-Yeon K. Lehmann, *Racial Discrimination in the Labor Market: Theory and Empirics* (NBER Working Paper No. 17450, 2011), available at <http://www.nber.org/papers/w17450>; Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Brendan More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94(4) Am. 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>53</sup> Jaime M. Grant, Lisa M. Mottet & Justin Tanis, National Center for Transgender Equality & National Gay & Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011), available at [http://www.transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf) (hereinafter “Injustice at Every Turn”).

<sup>54</sup> See *Macy v. Dep’t of Justice*, Appeal No. 0120120821, 2012 WL 1435995, at \*10 (EEOC Apr. 20, 2012), available at <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt> (“Although most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one means of proving sex discrimination. . . . Thus, a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations.”). Other federal agencies have issued guidance stating that Title VII’s or Title IX’s prohibition against discrimination on the basis of sex includes claims of sex discrimination related to a person’s gender identity or transgender status. See U.S. Dep’t of Justice & U.S. Dep’t of Educ., *Dear Colleague Letter on Transgender Students* (May 13, 2016), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>; Memorandum from Eric Holder, Attorney General, to U.S. Attorneys and Heads of Department Components, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (Dec. 15, 2014), available at <https://www.justice.gov/file/188671/download>; U.S. Dep’t of Educ., *Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014) (available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>). However, as of the date of publication of this rule, these guidance documents are among the “Guidelines” subject to a preliminary injunction order that prohibits the federal government from “using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of this Order.” *Texas v. United States*, No. 7:16-cv-00054-O, slip op. at 37 (N.D. Tex. Aug. 21, 2016), ECF No. 58; see *id.* at 3 n.4 (identifying the documents referred to in the order as the “Guidelines”).

have also held that disparate treatment of a transgender employee may constitute discrimination because of the individual’s non-conformity to sex stereotypes.<sup>55</sup> Indeed, there has “been a steady stream of district court decisions recognizing that discrimination against transgender individuals on the basis of sex stereotyping constitutes discrimination because of sex.”<sup>56</sup> Further, some courts have held that discrimination on the basis of gender identity constitutes discrimination “because of” sex independent of a showing of discrimination on the basis of failure to comport with sex stereotypes.<sup>57</sup>

As the NPRM noted, federal contractors that operate Job Corps centers, which are covered by Section 188 and this part,<sup>58</sup> may also be covered by the requirements of Executive Order 11246, which expressly requires that contractors meeting certain dollar threshold requirements refrain from discrimination in employment based on sexual orientation and gender identity, as well as race, color, religion, national origin, and sex, and take affirmative action to ensure equal employment opportunity.<sup>59</sup>

<sup>55</sup> *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, 575 (6th Cir. 2004) (“discrimination against a plaintiff who is a transsexual—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).

<sup>56</sup> *Macy*, 2012 WL 1435995, at \*9; see *Michaels v. Akal Security, Inc.*, No. 09-cv-1300, 2010 WL 2573988, at \*4 (D. Colo. June 24, 2010); *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ. 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 1112, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001).

<sup>57</sup> See *Schroer v. Billington*, 577 F. Supp. 2d 293, 305–07 (D.D.C. 2008) (withdrawal of a job offer from a transgender applicant constituted discrimination “because of sex” in violation of Title VII, analogizing to cases involving discrimination based on an employee’s religious conversion, which undeniably constitutes discrimination because of religion under Title VII); see also *Rumble v. Fairview Heath Servs.*, No. 14-cv-2037, 2015 WL 1197415, at \*10 (D. Minn. Mar. 16, 2015) (Section 1557 of the Affordable Care Act).

<sup>58</sup> See § 38.2(b)(4).

<sup>59</sup> Executive Order 13672, issued on July 21, 2014, amended Executive Order 11246 to add sexual orientation and gender identity as expressly protected bases, and applies to government contracts entered into or modified on or after April 8, 2015, the effective date of OFCCP’s implementing

Consistent with the above jurisprudence, the final rule provides that complaints of discrimination based on sex stereotyping, transgender status, or gender identity will be recognized and treated as complaints of sex discrimination.

The NPRM further noted the growing number of federal 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.<sup>60</sup> The EEOC has also concluded that “[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms.”<sup>61</sup> As explained more fully below in the Section-by-Section Analysis of § 38.7(a) and new § 38.7(d)(10), which we now add to the rule, CRC concludes 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.

#### Harassment

This final rule includes a section to provide direction as to a recipient’s existing obligations regarding unlawful harassment. Courts have recognized for many years that harassment based on protected categories may give rise to violations of Title VI, Title VII, Section 504, and Title IX and that unlawful harassment may take many forms.<sup>62</sup> The

regulations promulgated thereunder. See OFCCP Executive Order 13672 Final Rule, *supra* note 19.

<sup>60</sup> See, e.g., *Isaacs v. Felder Servs.*, No. 2:13cv693-MHT, 2015 WL 6560655, at \*3–4 (M.D. Ala. Oct. 29, 2015); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002); *Videckis v. Pepperdine Univ.*, No. CV 15-00298, 2015 WL 8916764 (C.D. Cal. Dec. 15, 2015).

<sup>61</sup> *Baldwin v. Dep’t of Transp.*, Appeal No. 0120133080, 2015 WL 4397641, at \*5 (EEOC July 16, 2015); see also *Complainant v. Dep’t of Homeland Sec.*, Appeal No. 0120110576, 2014 WL 4407422 (EEOC Aug. 20, 2014); *Veretto v. U.S. Postal Serv.*, Appeal No. 0120110873, 2011 WL 2663401 (EEOC July 1, 2011); *Castello v. U.S. Postal Serv.*, Request No. 0520110649, 2011 WL 6960810 (EEOC Dec. 20, 2011).

<sup>62</sup> See, e.g., *Harris v. Forklift Sys.*, 510 U.S. 17 (1993) (sex); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (sex); *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655 (2d Cir. 2012) (race); *Daniels v. Essex Grp., Inc.*, 937 F.2d 1264, 1274 (7th Cir. 1991) (race); *Rogers v. W.-S. Life Ins. Co.*, 792 F. Supp. 628 (E.D. Wis. 1992) (race); *Booth v. Houston*, 58 F. Supp. 3d 1277 (M.D. Ala. 2014) (disability); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (school can be held liable if a teacher sexually harasses a student); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999) (school can be

Continued

rule adds a section that sets out the prohibition against these various forms of unlawful harassment.

The U.S. Department of Education has issued guidance 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>63</sup> Title IX protects individuals from discrimination based on sex in education programs and activities that receive federal financial assistance, including WIOA Title I programs and activities that are education and training programs.<sup>64</sup> The final rule incorporates language in Subpart A that reflects the U.S. Department of Education's 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 consistent with those of another agency that regulates the same recipient community.

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

The increased integration of, and in some instances complete shift to, online service delivery models in the workforce development system since 1999 required that the 1999 and 2015 rules be updated to address the nondiscrimination and equal opportunity implications raised by these changes. As of 2015, approximately 16 percent of American adults did not use the Internet.<sup>65</sup> Moreover, 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>66</sup> Additionally, as of 2015, 19 percent of Hispanic individuals (including those who are proficient in English) and 22 percent of Black, non-Hispanic individuals were not using the

held liable for failing to address a student's sexual harassment of another student).

<sup>63</sup> U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter: Sexual Violence (Apr. 4, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; U.S. Dep't of Educ., Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 FR 5512 (Jan. 19, 2001) (available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>) (hereinafter "Revised Sexual Harassment Guidance").

<sup>64</sup> 20 U.S.C. 1681 *et seq.*

<sup>65</sup> Pew Research Center, Americans' Internet Access: 2000–2015 (June 26, 2015), available at <http://www.pewinternet.org/2015/06/26/americans-internet-access-2000-2015/>.

<sup>66</sup> *Id.*

Internet.<sup>67</sup> Similarly, adults with disabilities were significantly less likely to use the Internet than adults without disabilities.<sup>68</sup>

#### *Subparts B Through E*

Subpart B, Recordkeeping and Other Affirmative Obligations, includes revisions to the 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 EO Officers and recipients' responsibilities to ensure that they designate recipient-level EO Officers with sufficient expertise, authority, staff, and resources to carry out their responsibilities, as well as Governors' additional responsibility to ensure that they designate State-level EO Officers with sufficient expertise, authority, staff and resources to carry out their obligations. The final rule also changes the requirements regarding data, and information collection and maintenance, and revises the section on outreach responsibilities of recipients.

Changes to Subpart C, regarding Governors' 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 final rule provides more direction about Governors' responsibilities and CRC's procedures for enforcing those responsibilities, thus addressing an inadvertent gap in the existing regulations.

Changes to Subpart D regarding compliance procedures include language to strengthen the preapproval compliance review process by requiring Departmental grantmaking agencies to consult with the Director of 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 final rule also expands 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 language to clarify that any person or their representative may file a complaint based on discrimination and retaliation under WIOA and this part.

<sup>67</sup> *Id.*

<sup>68</sup> Pew Research Center, Digital Differences (Apr. 13, 2012), 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).

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 Final Rule*

The final rule will benefit both recipients and beneficiaries in several ways. First, by updating and clearly and accurately stating the existing principles of applicable law, the rule will facilitate recipient understanding and compliance, thereby reducing incidents of noncompliance and associated costs incurred when noncompliant. Second, the rule will 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 federal nondiscrimination laws that these updated regulations incorporate, so many of the new substantive nondiscrimination provisions do not impose new obligations.

Third, this final rule will increase equality of opportunity in the workforce development system, which encompasses thousands of applicants, participants, beneficiaries, and employees of recipients. For example, regarding discrimination on the basis of sex, the final rule clarifies that adverse treatment of applicants to, beneficiaries of, and participants in recipients' WIOA Title I programs and activities and their employees or applicants for employment because of gender identity or gender-based stereotypes constitutes sex discrimination. By expressly recognizing that discrimination against an individual on the basis of gender identity or transgender status is unlawful sex discrimination, the final rule provides much-needed regulatory protection to transgender individuals, the majority of whom report they have experienced discrimination in the workplace.<sup>69</sup> In addition, by providing that pregnant individuals may be entitled to accommodations when such accommodations or modifications are provided to similarly situated individuals, this rule will protect pregnant employees, beneficiaries, applicants, and participants from losing jobs or access to educational and training opportunities.

Regarding discrimination on the basis of national origin affecting LEP individuals, the rule will improve LEP individuals' participation in the workforce development system by

<sup>69</sup> Injustice at Every Turn, *supra* note 53.

making the LEP requirements easier to understand and thus easier to implement. Recipients will find complying with the rule easier using suggestions provided in the new appendix to the LEP regulation.

Finally, the rule will benefit public understanding of the law. This focus on increasing public understanding is consistent with 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.”

#### *Minor Technical Corrections Made Throughout the Rule*

Throughout the final rule, CRC has made the following technical corrections for the sake of accuracy, clarity, and consistency. First, CRC corrects internal numbering and references to other rules, and standardizes the form of internal cross-references. Second, CRC avoids introducing and using abbreviations unnecessarily. Third, CRC uses the serial comma in lists of three or more items. Fourth, CRC adds headings for consistency and standardizes capitalization in text and headings, including lowercasing “one-stop” for consistency with WIOA and capitalizing “State” and “State Program.” Fifth, CRC uses hyphens and en dashes as appropriate to clarify multiword modifiers (for example, “senior-level employee,” “WIOA Title I-financially assisted”). Sixth, where multiple bases are listed in an inclusive context, CRC uses “and” rather than “or” to clarify that all of the listed bases are included (for example, “including pregnancy, childbirth, and related medical conditions”).

Finally, in the proposed rule, CRC at times used the word “any” prior to the list of singular terms “aid, benefit, service, or training” and at other times did not use the word “any,” even though the list of terms was not intended to be specific. In the final rule, where the singular terms “aid, benefit, service, or training” are used in a nonspecific context, CRC adds the word “any.” CRC has made these changes only for correctness and consistency and intends no substantive changes by making them.

These changes are not further addressed in the section-by-section analysis.

#### *Comments on Gender-Neutral Language Usage Throughout the Rule*

The preamble to the proposed rule explained that replaced “he or she”

with “the individual,” “person,” or other appropriate identifier wherever possible.<sup>70</sup> The discussion in the preamble to the proposed rule referred only to the language that CRC used in the NPRM, not to any requirement imposed on recipients. CRC received comments supporting and opposing this language usage.

*Comments:* Eight commenters—a group of ten advocacy organizations and a union, five individual advocacy organizations, and two health organizations—supported CRC’s use of gender-neutral language. Several of these commenters stated that individuals who do not identify as male or female “face pervasive bias and misunderstanding, and often are unable to access benefits and services, including those of WIOA [Title I]-funded programs.” All eight organizational commenters applauded CRC’s decision to avoid gender-specific terminology in the language of the rule to signal that protection from discrimination under WIOA applies to individuals regardless of gender. CRC also received comments from multiple individuals opposing CRC’s decision to avoid using gender-specific language. Many of these commenters’ objections to gender-neutral language focused on the English language’s traditional use of gendered pronouns; some individual commenters also expressed doubt regarding the existence of individuals who do not identify as male or female. The majority of the individual commenters who opposed CRC’s decision to avoid gender-specific terminology interpreted CRC’s decision to be imposing a requirement on recipients to do the same, at a high cost.

*Response:* CRC retains the use of gender-neutral language in the final rule because it agrees with the organizational commenters on this issue that it is appropriate for the final rule to signal that protection from discrimination under WIOA applies to individuals of all genders. CRC clarifies that this rule does not impose any obligation (or cost) on recipients to use gender-neutral language.

*Comments:* In addition to the supportive comments they submitted as described above, five individual advocacy organizations and two health organizations suggested that CRC remove any remaining instances of “he or she,” “him or her,” and “his or her” throughout the rule.

<sup>70</sup> U.S. Dep’t of Labor, Office of the Sec’y, Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act; Proposed Rule, 81 FR 4494, 4495, Jan. 26, 2016 (hereinafter “CRC WIOA NPRM”).

*Response:* For the same reasons as described above, and for the sake of consistency in avoiding gender-specific terminology throughout the final rule, CRC removes gender-specific terminology from the following provisions: §§ 38.4(q)(5)(iii)(C) (replacing “he or she” with “the individual”), 38.4(ff)(3)(ii)(A) (replacing “him or her” with “the individual”), 38.15(a)(4)(ii) (replacing “his or her” with “the individual’s”), 38.16(h) (replacing each instance of “his or her” with “the individual’s”), 38.30 (replacing “he or she” with “the EO Officer”), 38.55(c)(2) (replacing “s/he” with “the Governor”), 38.64(a) (replacing “he or she” with “the Director”), 38.69(a) (replacing “his/her” with “the person’s”), 38.81(d) (replacing “he or she” with “the Director”), 38.83 (replacing “he or she” with “the Director”), 38.91(b)(3) (replacing “he or she” with “the Governor”), and 38.115(c)(1) (replacing “he or she” with “the Director”). These changes are not further addressed in the section-by-section analysis.

## II. Section-by-Section Analysis

This Section-by-Section Analysis describes each section in the proposed rule and identifies and discusses the significant comments received and any changes made.

### *Subpart A—General Provisions*

#### General Comments

*Comment:* A professional association applauded the Department’s recognition of implicit prejudice and stereotyping and encouraged the Department to provide training for WIOA staff to ensure that there is an understanding of these issues when designing vocational training programs.

*Response:* CRC agrees that training WIOA staff to understand implicit prejudice and stereotyping is a best practice, but declines to explicitly mandate a specific level of training in the final rule. Each recipient is responsible for ensuring compliance with its obligations under WIOA and this part, including determining the appropriate types and frequency of staff training.

*Comment:* An advocacy organization encouraged the Department to focus attention on older workers in the workforce development system. The commenter stressed that older workers face significant barriers including skill and technological deficits compared to their younger counterparts.

*Response:* Under WIOA and this part, recipients are required to comply with their equal opportunity and

nondiscrimination obligations on a variety of bases, including age. We understand the commenter's concerns, but decline to emphasize compliance in any one area over other areas.

*Comment:* In a joint comment, two individuals objected to the NPRM's proposal to replace "on the grounds of" with "on the basis of" before listing the protected categories in the rule, such as race, color, religion, or sex. The commenters asserted that "on the grounds of" is a legal term and that use of "on the basis of" is deceptive.

*Response:* CRC disagrees that the term "on the basis of" is deceptive. That phrase is a legal term of art that signals for which categories discrimination is prohibited. It is widely used in regulations and cases addressing antidiscrimination laws, and it is specifically used in WIOA Section 188(a). Therefore, it is appropriate to use in this rule.

#### Purpose § 38.1

Proposed § 38.1 retained the purpose of the 1999 and 2015 rules: "to implement the nondiscrimination and equal opportunity provisions" of WIOA Section 188.<sup>71</sup> CRC made minor revisions, such as replacing "on the grounds of" with "on the basis of" to be consistent with nondiscrimination language in other Department civil rights regulations.

*Comment:* An individual commenter opposed the rule, reasoning that the broad scope of prohibited discrimination would lead to divisions in our society.

*Response:* It is beyond the scope of CRC's authority to refuse to implement Section 188 of WIOA.<sup>72</sup>

CRC finalizes § 38.1 as proposed, with the following technical edits: correcting the statutory reference in footnote 1 and making minor technical modifications to clarify the list of protected bases, as discussed below in connection with § 38.5.

#### Applicability § 38.2

Proposed § 38.2 explained to which entities part 38 applies, including recipients<sup>73</sup> and programs and activities operated by one-stop<sup>74</sup> partners that are part of the one-stop delivery system. Proposed § 38.2(a)(3) revised the 2015 rule to limit covered employment practices to those "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." That limitation tracked the statutory provision in Section 188(a)(2) of WIOA.<sup>75</sup> CRC also proposed deleting § 38.2(b)(5) of the 2015 rule, so that federally operated Job Corps Centers would be included within the requirements of this part. CRC received several comments on this section.

*Comment:* A union asked for clarification of the duties for which it is individually responsible, as a national training contractor, and for which it is jointly responsible with other parties, including Job Corps Outreach and Admissions contractors, Center Directors, and others. The commenter stated that its responsibilities are not clear in light of the oversight and direction by Job Corps Centers, regional offices, and the National office, as well as the responsibilities contractually assigned to other contractors.

*Response:* Each recipient, as defined in § 38.4(zz), is individually responsible for complying with WIOA Section 188 and these implementing regulations. Job Corps national training contractors are recipients, which must designate a recipient-level Equal Opportunity Officer who will ensure that the training contractor and its subrecipients (if any) are not in violation of their equal opportunity and nondiscrimination obligations.<sup>76</sup> Those obligations include outreach and admissions under § 38.5 generally and § 38.40 specifically. While recipients may work cooperatively to ensure equal opportunity and nondiscrimination, each recipient must continue to individually evaluate whether such collaborative efforts are sufficient. All recipients, including Job Corps national training contractors, are ultimately responsible for equal opportunity and nondiscrimination compliance under WIOA regarding all aspects of their own programs, activities, and covered employment.

*Comment:* A State agency asked about partner agencies in the one-stop system, specifically if all sections of the regulations apply to every partner, and whether the partner agencies will be monitored by the Equal Opportunity Officer for compliance with WIOA Section 188. The commenter recommended against requiring all partner agencies to comply with the regulations unless colocated within a one-stop center.

*Response:* Under WIOA and this part, these regulations apply to each recipient. The term "recipient" includes every one-stop partner listed in WIOA section 121(b)<sup>77</sup> whenever the partner operates or conducts programs or activities that are part of the one-stop delivery system.<sup>78</sup> As discussed below,<sup>79</sup> in most cases required and additional partners will be monitored by the State-level EO Officer in addition to their own recipient-level EO Officers for compliance with WIOA and this part.<sup>80</sup>

Regarding the question of colocation, this final rule covers all one-stop partners (both required partners and additional partners) regardless of whether a partner is colocated within a one-stop center. Section 188(b) of WIOA requires the Secretary to enforce the equal opportunity and nondiscrimination provisions of WIOA with respect to all States and other recipients. One-stop partners, other than one-stop partners that are National Programs, are a part of State Programs to which WIOA Section 188 applies.<sup>81</sup> Accordingly, these regulations include one-stop partners as recipients that are subject to the nondiscrimination and equal opportunity requirements of this part, to the extent that they participate in the one-stop delivery system. This result does not change because a partner is not colocated with a one-stop center. One-stop centers are not just a physical location, but may also include a larger electronic network. Regardless of location, recipients, including one-stop partners that operate programs and activities that are part of the one-stop delivery system, are subject to these regulations.

*Comment:* Several advocacy organizations supported deletion of the

<sup>77</sup> Section 38.4(zz) ("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").

<sup>78</sup> See § 38.2(a)(2) (part 38 applies to "[p]rograms and activities that are part of the one-stop delivery system and that are operated by one-stop partners . . . to the extent that the programs and activities are being conducted as part of the one-stop delivery system").

<sup>79</sup> See *infra* discussion of §§ 38.28 and 38.29.

<sup>80</sup> One-stop partners are not required to designate a separate EO Officer if the partner is a service provider under § 38.4(ggg) (in which case the State-level EO Officer and/or the LWDA's grant recipient's EO Officer has this responsibility under § 38.33); if the partner is a small recipient (in which case the partner designates a responsible individual under § 38.32); or if, under the structure of the Governor's § 38.54 Nondiscrimination Plan, the State-Level EO Officer is the partner's EO Officer.

<sup>81</sup> National Programs are otherwise covered by WIOA Section 188 and this part. See §§ 38.4(ji) (defining "National Programs") and 38.4(zz)(12) (defining "recipients" to include National Programs).

<sup>71</sup> Previously WIA Section 188.

<sup>72</sup> See 29 U.S.C. 3248(e).

<sup>73</sup> See § 38.4(zz).

<sup>74</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>75</sup> 29 U.S.C. 3248(a)(2).

<sup>76</sup> See §§ 38.4(zz)(9), 38.28(b), and 38.31.

current exclusion of federally operated Job Corps Centers from the application of the provisions of part 38. The commenters stated that this change is important to ensure the uniform applicability of nondiscrimination and equal opportunity requirements throughout the Job Corps system and to provide a mechanism to address complaints that arise in federally operated Job Corps Centers.

*Response:* CRC agrees with the commenter and believes that adopting the NPRM's proposed change from the 1999 and 2015 rules will ensure equal opportunity and nondiscrimination in the entire Job Corps program. As explained in the NPRM, this change is consistent with WIOA Section 188(d), which does not distinguish between federally operated and privately operated Job Corps centers, as well as with the Department of Agriculture's approach for a number of years to nondiscrimination and equal opportunity in the Job Corps centers it operates.<sup>82</sup> The change also makes our rule consistent with another of the Department's final rules implementing WIOA, which requires that, when the Secretary of Labor enters into an agreement with the Secretary of Agriculture for the funding, establishment, and operation of federally operated Job Corps centers, provisions are included to ensure that the Department of Agriculture complies with the regulations under 20 CFR 686, including nondiscrimination obligations under Section 188 of WIOA.<sup>83</sup>

In § 38.2(b)(1), CRC clarifies that "Department" means the U.S. Department of Labor. **Effect on Other Obligations § 38.3**

Proposed § 38.3 described the relationship between this rule and other laws that may apply to recipients. To establish parity with parallel provisions in other federal nondiscrimination regulations,<sup>84</sup> proposed § 38.3 added a proviso that "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 equal or greater protection for the rights of persons as compared to this part." In addition, § 38.3 proposed adding Executive Order 13160<sup>85</sup> to the

additional obligations that compliance with this part does not affect.

Several advocacy organizations supported the clarification that these regulations do not limit the remedies, rights, and procedures under federal, State, or local law that provide equal or greater protection than the regulations. The commenters appreciated federal recognition of States' and localities' interests in promoting nondiscrimination and equal employment opportunity.

CRC finalizes the provisions in § 38.3 as proposed, with the exception of one technical change, replacing "incorporated into this part by reference" with "adopted by this part" in paragraph (b).

#### Definitions § 38.4

The proposed rule retained the majority of the definitions contained in the 1999 and 2015 rules. Revisions in proposed § 38.4 included updating existing definitions consistent with applicable law and adding new definitions, as discussed in the preamble to the proposed rule. The discussion below addresses only those proposed definitions on which CRC received substantive comments. For the reasons discussed in the NPRM, CRC adopts without modification all of the proposed definitions not addressed below.

#### Aid, Benefit, Service, or Training

CRC received no comments on the definition of "aid, benefit, service, or training" in § 38.4(b) but is reorganizing the definition to clarify its parts. No substantive changes are intended by the reorganization.

#### Auxiliary Aids or Services

Proposed § 38.4(h) revised the definition of "auxiliary aids or services" to include new technology alternatives that have become available since the 1999 rule, such as video remote interpreting (VRI) services and real-time computer-aided transcription services. This provision mirrors the definition of "auxiliary aids and services" in the DOJ regulations implementing Title II of the ADA.<sup>86</sup> CRC received three comments supporting the new definition, with one commenter noting that the rule provides guidance for personnel not familiar in working with individuals with sensory disabilities. Accordingly, CRC adopts § 38.4(h) as proposed.

sexual orientation, or status as a parent in federally conducted education and training programs and activities.

<sup>86</sup> See 28 CFR 35.104.

#### Babel Notice

The proposed rule added a definition for "Babel notice" in § 38.4(i). A Babel notice is a short notice in multiple languages informing the reader that the document (e.g., application form, consent form, notice of rights and responsibilities) or electronic media (e.g., Web site, "app," email) contains vital information, and explaining how to access language services to have the contents of the document or electronic media provided in other languages. CRC proposed 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. In the proposed rule, CRC sought comment on this definition.

Several advocacy organizations expressed support for the inclusion of a definition for "Babel notice" to codify and clarify the intention of these notices, specifically with respect to individuals who are limited English proficient.

*Comment:* An advocacy organization recommended that the definition of "Babel notice" be revised to specify that alternate formats are available as an accommodation through the recipient at no cost to the beneficiary.

*Response:* We appreciate the commenter's concern; however, the Babel notice is a safeguard against national origin discrimination against LEP individuals. Alternate formats are addressed in § 38.15 regarding communications with individuals with disabilities. Nevertheless, we agree with the commenter that it is important to notify individuals with disabilities of their right to request materials in accessible formats, and of their right to equally effective communication with recipients. For this reason, CRC amends the equal opportunity notice in § 38.35 to add two sentences alerting individuals with disabilities of their right to request auxiliary aids and services at no cost.

For the reasons described in the proposed rule and considering the comments received, we are finalizing the definition proposed in § 38.4(i) without modification, except for minor technical corrections to capitalization.

#### Disability

Proposed § 38.4(q) updated the definition of "disability" to reflect the changes made by the ADA Amendments Act of 2008<sup>87</sup> and to make the

<sup>87</sup> 42 U.S.C. 12101 *et seq.*, Public Law 110-325, 122 Stat. 3553 (2008).

<sup>82</sup> U.S. Dep't of Agric., Forest Service, WO/Civil Rights Staff, Reference Guide, Key EEO and Civil Rights Laws, Statutes, and Regulations (April 2010).

<sup>83</sup> U.S. Dep't of Labor, Emp't & Training Admin., Workforce Innovation and Opportunity Act; Final Rule, 81 FR 56072, Aug. 19, 2016.

<sup>84</sup> See, e.g., 41 CFR 60-741.1(c)(3).

<sup>85</sup> 65 FR 39775, June 27, 2000. Executive Order 13160 prohibits discrimination on the basis of race, sex, color, national origin, disability, religion, age,

definition consistent with subsequent EEOC regulations<sup>88</sup> and proposed DOJ regulations<sup>89</sup> to implement the ADAAA. CRC received two general comments supporting these changes and adopts them as proposed, with minor technical revisions. In addition, as we proposed to do in the NPRM,<sup>90</sup> the final rule makes numbering and minor editing and wording changes to § 38.4(q) to conform in most instances to DOJ's August 2016 regulations to implement the ADAAA.<sup>91</sup> We address the changes the final rule makes to each proposed paragraph of § 38.4(q) in turn.

Consistent with the ADAAA, the EEOC regulations implementing the ADAAA, and now with DOJ's ADA Title II regulations implementing the ADAAA, proposed § 38.4(q)(1)(ii) (renumbered § 38.4(q)(2) in the final rule) set forth rules of construction that provided the standards for application of the definition of disability. CRC received a comment from a State agency under a related definition, § 38.4(yy) (reasonable accommodation), that using the term "covered entity" rather than "recipient" was confusing. CRC agrees and, as discussed below, replaces "covered entity" with "recipient" throughout the final rule.<sup>92</sup> Since the term "covered entity" appeared here in proposed § 38.4(q)(1)(ii)(B) (renumbered § 38.4(q)(2)(iii) in the final rule) and § 38.4(q)(5)(i)(C) (renumbered § 38.4(q)(5)(i)(B) in the final rule), CRC is replacing that term with "recipient" to ensure consistency.

Consistent with the ADAAA, the EEOC regulations implementing the ADAAA, and now with DOJ's ADA Title II regulations to implement the ADAAA, proposed § 38.4(q)(2) (renumbered § 38.4(q)(2)(i) in the final rule) required that the definition of disability be construed in favor of broad coverage of individuals with disabilities. CRC received no comments on this provision and adopts it without change in the final rule, except for minor technical changes to conform with DOJ's ADA

Title II regulations to implement the ADAAA.

Proposed § 38.4(q)(3) revised the definition of "physical or mental impairment," in the definition of disability, to add "immune, circulatory" to the body systems listed in proposed § 38.4(q)(3)(A) (renumbered § 38.4(q)(3)(i)(A) in the final rule); to add "pregnancy-related medical conditions" to § 38.4(q)(3)(ii);<sup>93</sup> to add "intellectual disability" (formerly termed "mental retardation" in the 1999 and 2015 rules) to § 38.4(q)(3)(i)(B); and to add dyslexia to "specific learning disabilities" in § 38.4(q)(3)(ii). In addition, this final rule adds "Attention Deficit Hyperactivity Disorder" (ADHD) in § 38.4(q)(3)(ii). This update to the definition of "physical or mental impairment" substantially conforms to the definition in DOJ's ADA Title II regulations to implement the ADAAA.<sup>94</sup> CRC received one comment from a coalition of disability advocacy organizations supporting this provision and adopts it without change in the final rule, except for the addition of ADHD and minor technical changes to conform with DOJ's ADA Title II regulations to implement the ADAAA.

Proposed § 38.4(q)(4) added to the definition of disability a new definition for "major life activities" that is consistent with the provisions in the ADAAA,<sup>95</sup> and regulations promulgated by the EEOC<sup>96</sup> and now with the DOJ regulations to implement the ADAAA.<sup>97</sup> CRC received two comments supporting this provision and adopts it without change in the final rule, except to add "writing" to the list of major life activities to conform with DOJ's ADA Title II regulations to implement the ADAAA, and to make minor technical changes consistent with those DOJ regulations.

Proposed § 38.4(q)(5) added rules of construction when determining whether an impairment "substantially limits" an individual in a major life activity. CRC received two supportive comments from

disability advocacy organizations supporting this provision and adopts it without change in the final rule, with the exception of replacing "covered entity" with "recipient" in proposed § 38.4(q)(5)(i)(C) (renumbered § 38.4(q)(5)(i)(B) in the final rule), replacing "entities" with "recipients" in § 38.4(q)(5)(ii), and making minor technical changes to conform with DOJ's ADA Title II regulations to implement the ADAAA. The order of the paragraphs within § 38.4(q)(5) in the final rule was changed to be consistent with the paragraph order in DOJ's ADA Title II regulations to implement the ADAAA, and to minimize any confusion.

Proposed § 38.4(q)(6) updated the definition of an individual with "[a] record of such an impairment" to include an individual that 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 its implementing regulations.<sup>98</sup> The DOJ regulations have identical language.<sup>99</sup> CRC received no comments on this provision and adopts it without change in the final rule, except for minor technical changes to conform with DOJ's ADA Title II regulations to implement the ADAAA.

Proposed § 38.4(q)(7) revised the term "is regarded as having such an impairment" to conform to the ADAAA.<sup>100</sup> The new definition clarifies that illegal disability discrimination includes discrimination "because of an actual or perceived physical or mental impairment." CRC received one comment from a coalition of disability advocacy groups supporting this provision. In accordance with the other changes noted earlier, the term "covered entity" is replaced with "recipient" in § 38.4(q)(7)(ii) and (iii). The final rule also makes minor technical changes in the text to conform with DOJ's ADA Title II regulations to implement the ADAAA. Additionally, the final rule makes substantive conforming changes to § 38.4(q)(7)(i) (adding the qualifier "even if the recipient asserts, or may or ultimately does establish, a defense to the action prohibited by WIOA Section 188 and this part"), and to § 38.4(q)(7)(ii) (adding an explanatory sentence regarding the "transitory and minor" exception). This new language in the final rule is modeled on the language in DOJ's ADA Title II

<sup>88</sup> 29 CFR part 1630.

<sup>89</sup> U.S. Dep't of Justice, Office of the Attorney General, Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008; Proposed Rule, 79 FR 4839, Jan. 30, 2014. The Department of Justice has since issued its final rule. See DOJ Final Rule to Implement ADAAA, *supra* note 18.

<sup>90</sup> CRC WIOA NPRM, *supra* note 70, at 4497.

<sup>91</sup> See DOJ Final Rule to Implement ADAAA, *supra* note 18, at 53223–53225.

<sup>92</sup> CRC is replacing "covered entity" with "recipient" in two sections: In the definition of "disability" in § 38.4(q) and in the definition of "reasonable accommodation" in § 38.4(yy). CRC is also replacing "entities" with "recipients" in § 38.4(q)(5)(ii).

<sup>93</sup> See DOJ Final Rule to Implement ADAAA, *supra* note 18, at 53227.

<sup>94</sup> 28 CFR 35.108(b). Although DOJ did not include the example "pregnancy-related medical conditions" in its regulatory definition of "physical or mental impairment," its inclusion in this final rule is consistent with DOJ's explanation that pregnancy-related medical impairments may be disabilities. See DOJ Final Rule to Implement ADAAA, *supra* note 18, at 53227 (while pregnancy itself is not an impairment, a pregnancy-related impairment may meet the definition of "disability" under any prong—"actual," "record of," or "regarded as"). CRC notes that no example on this list will be a disability unless it meets all the definitional criteria.

<sup>95</sup> 42 U.S.C. 12102(2).

<sup>96</sup> 29 CFR 1630.2(i).

<sup>97</sup> 28 CFR 35.108(c).

<sup>98</sup> 29 CFR 1630.2(k)(1).

<sup>99</sup> 28 CFR 35.108(e)(1).

<sup>100</sup> 42 U.S.C.12102(3).

regulations to implement the ADAAA.<sup>101</sup>

#### Employment Practices

The NPRM made no substantive changes to the definition of “employment practices” in § 38.4(s).

*Comment:* A coalition of eighty-six women’s, workers’, and civil rights organizations commended CRC for recognizing, in proposed § 38.4(s)(6), that covered employment practices include “deciding rates of pay or other forms of compensation.” Focusing on discrimination based on sex, the organizations observed that “women are still paid less than men in nearly every occupation.” The organizations recommended that CRC adopt provisions similar to those in the section devoted to compensation in OFCCP’s proposed rule *Discrimination on the Basis of Sex*.<sup>102</sup> In addition, the organizations asked CRC to explain that “factors other than sex relied upon in determining compensation must be job-related, consistent with business necessity, and account for the entire pay differential”; to “advise that prior pay matching should be a rare occurrence”; and to “clarify that punitive pay secrecy policies that interfere with enforcement of wage discrimination protections violate antidiscrimination law.” Finally, they suggested that the rule state that nondiscrimination in compensation based on sex is required with regard not only to employees employed in the administration of WIOA programs but also to any participants and applicants who receive remuneration.

*Response:* CRC believes that the organizations’ suggestions do not comport with the structure of this rule. Proposed § 38.4(s) is intended only to define “employment practices” for the purposes of this rule, not to impose substantive nondiscrimination obligations. Accordingly, § 38.4(s) is a nonexhaustive list of employment practices defining the term as it is used elsewhere in the rule, for example, in the enunciation of the employment nondiscrimination principle in § 38.18. None of the eight employment practices listed in § 38.4(s) are elaborated on in the way the organizations suggested CRC do with regard to paragraph (s)(6). Moreover, to the extent that the organizations’ suggestions are specific to sex discrimination, CRC notes that the definition of “employment practices” proposed in § 38.4(s) is intended to

apply throughout the rule and is not limited to any particular basis of discrimination. Furthermore, where appropriate, the section that focuses on discrimination based on sex encompasses the organizations’ suggestions in the WIOA context, such as § 38.7(c)’s prohibition against policies and practices that have a discriminatory effect. Finally, CRC reiterates that the scope of this rule regarding employment practices is limited to any program or activity that is operated by a recipient, including a one-stop partner, to the extent that the employment is in the administration of or in connection with programs and activities that are financially assisted under WIOA Title I, including those that are part of the one-stop delivery system.<sup>103</sup> For these reasons, CRC declines to make the suggested changes to proposed § 38.4(s)(6).

#### Governor

Proposed § 38.4(aa) defined the term “Governor” as “the chief elected official of any State, or the Governor’s designee.” CRC received one comment on this definition.

*Comment:* A State employment agency commented that the proposed definition of “Governor” is in direct conflict with the WIOA statutory definition and therefore in violation of Section 5 of Title 5 of the United States Code. The commenter recommended that the proposed definition be revised to match the statutory definition.

*Response:* In response to that comment, CRC revises the regulatory definition of Governor to more closely track the parallel portion of the statutory definition. This modification is also consistent with ETA’s definition of “Governor” in its final rule implementing WIOA.<sup>104</sup>

CRC, however, retains the language from its definition in the 1999 and 2015 rules that the term “Governor” includes “the Governor’s designee.” This departure from the statutory definition is appropriate as the term relates to the nondiscrimination and equal opportunity provisions found at 29 CFR part 38. Governors should continue to have flexibility to designate an individual to carry out the Governor’s obligations to ensure all State Programs’ compliance with the nondiscrimination and equal opportunity obligations of WIOA and this part. Accordingly, CRC adopts the definition proposed in

§ 38.4(aa) with the modification noted above.

#### Individual With a Disability

Proposed § 38.4(ff) made minor changes to the definition of “individual with a disability.” That provision, consistent with the 1999 and 2015 rules, mostly defined the term by listing examples of conditions that the ADA excludes from the definition of “individual with a disability.” CRC proposed changes to be consistent with the ADAAA and the implementing regulations issued by the EEOC<sup>105</sup> and now with regulations issued by the DOJ.<sup>106</sup>

*Comment:* Two commenters expressed general support for the proposed rule’s definition of an “individual with a disability.” However, several commenters, in nearly identical comments, encouraged CRC to remove the explicit proposed exclusion of “transvestism, transsexualism, or gender dysphoria not resulting from physical impairments.” Their comments were particularly focused on the gender dysphoria exclusion. One professional association reasoned that current, mental health nomenclature includes these conditions as part of the spectrum of valid mental health conditions and their exclusion is a legacy of misunderstanding of gender-related concerns. Several advocacy organizations recognized the language as consistent with the ADA but nonetheless recommended the deletion of this language to reflect the evolving scientific evidence suggesting that gender dysphoria may have a physical basis and that the terms “disability” and “physical impairment” should be read broadly.

*Response:* The exclusion of transvestism and transsexualism from the definition of disability is a statutory exclusion under the ADA<sup>107</sup> and Section 504,<sup>108</sup> and it is beyond CRC’s scope of authority to remove this exclusion.<sup>109</sup> With respect to gender dysphoria, CRC notes that it proposed to use that term because the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders replaced the diagnostic term “gender identity disorder” with the term “gender dysphoria.” However, CRC notes that the precise term used in the ADA and Section 504 is “gender identity

<sup>105</sup> 29 CFR 1630.3.

<sup>106</sup> 28 CFR 35.108(g).

<sup>107</sup> 42 U.S.C. 12211(b)(1).

<sup>108</sup> 29 U.S.C. 705(20)(F)(i).

<sup>109</sup> However, as discussed in other sections of this rule, Section 188’s prohibition of discrimination on the basis of sex includes discrimination because of transgender status or gender identity. See § 38.7(a).

<sup>101</sup> 28 CFR 35.108(f).

<sup>102</sup> U.S. Dep’t of Labor, Office of Fed. Contract Compliance Programs, *Discrimination on the Basis of Sex*; Proposed Rule, 80 FR 5246, 5278, Jan. 30, 2015 (hereinafter “OFCCP Sex Discrimination NPRM”); see 41 CFR 60–20.4.

<sup>103</sup> This limitation is spelled out in § 38.18 of this final rule and tracks the provision in Section 188(a)(2) of WIOA, 29 U.S.C. 3248(a)(2).

<sup>104</sup> 29 CFR 651.10.

disorders not resulting from physical impairments.”<sup>110</sup> The commenters’ reasoning for objecting to the exclusion of gender dysphoria was that modern medical consensus considers gender dysphoria as resulting from physical impairments. In response to these comments and in accordance with the ADA and Section 504, CRC revises § 38.4(ff) in the final rule to use the exact statutory term<sup>111</sup> rather than “gender dysphoria.” Individuals with gender identity disorders resulting from physical impairments may be covered under the definition of an individual with a disability (assuming they meet the other definitional criteria).

#### Limited English Proficient (LEP) Individual

In § 38.4(hh), the final rule includes a definition for “limited English proficient (LEP) individual.” The proposed definition of “limited English proficient (LEP) individual” was “an individual whose primary language for communication is not English and who has a limited ability to read, speak, write and/or understand English.” As set forth in the proposed rule, this definition was added because failure to provide language assistance to limited English proficient individuals may be a form of unlawful national origin discrimination.<sup>112</sup> The term is used elsewhere in the final 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>113</sup> and regulations interpreting national origin-based discrimination,<sup>114</sup> and has been adopted from those DOJ regulations

<sup>110</sup> 42 U.S.C. 12211(b)(1) (ADA); 29 U.S.C. 705(20)(F)(i) (Section 504).

<sup>111</sup> See 42 U.S.C. 12211(b)(1) (ADA); 29 U.S.C. 705(20)(F)(i) (Section 504).

<sup>112</sup> *Lau v. Nichols*, 414 U.S. 563 (1974) (Supreme Court found recipient’s denial of equal education opportunities to a group of non-English speakers was national origin discrimination in violation of Title VI and its regulations); see also sources cited *supra* note 26.

<sup>113</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 failure to ensure bilingual services in a food stamp program could constitute a violation of Title VI); *Pabon v. Levine*, 70 FRD. 674, 677 (S.D.N.Y. 1976) (citing *Lau*, denying summary judgment when LEP unemployment benefits claimants alleged a state labor agency failed to provide language assistance services in violation of Title VI and its implementing regulations).

<sup>114</sup> 28 CFR 42.104 (discrimination prohibited by DOJ Title VI regulations); 10 CFR 1040.1 (Department of Energy regulations mirroring DOJ Title VI regulations).

implementing Title VI to ensure consistency.

Several advocacy organizations expressed support for the proposed definition of “limited English proficient (LEP) individual” to ensure that it is consistent with legal decisions interpreting the scope of national origin discrimination under Title VI of the Civil Rights Act of 1964 and the DOJ regulations implementing Title VI. Further, the commenters stated that the proposed definition will help maximize access to WIOA Title I employment and training programs for job seekers and workers that are LEP. CRC’s response to one comment is addressed below.

*Comment:* One advocacy organization commented that it is not clear from the definition of LEP whether this includes individuals with sensory impairments, who are Deaf or hard of hearing and communicate using American Sign Language, have speech impairments, or who are blind or have visual impairments.

*Response:* Proposed § 38.4(hh) was not intended to apply to individuals with sensory impairments, who are Deaf or hard of hearing and communicate using American Sign Language, have speech impairments, or who are blind or have visual impairments, and such individuals are not included in the definition of an LEP individual. The requirements for ensuring effective communication with individuals with disabilities are explained in § 38.15.

#### On-the-Job Training (OJT)

Proposed § 38.4(mm) retained the language from the 1999 and 2015 rules, which defined “on-the-job training” and received no comments regarding its definition. In the definition of OJT in § 38.4(mm), CRC makes a technical correction to match the maximum wage rate reimbursement specified by WIOA.

#### Other Power-Driven Mobility Device

Proposed § 38.4(nn) added a definition for “other power-driven mobility device.” This definition mirrors the definition in the DOJ ADA Title II regulations<sup>115</sup> and encompasses additional mobility devices, such as self-balancing scooters, which are increasingly used by individuals with mobility impairments.

*Comment:* CRC received two comments regarding this new definition. One comment was from a coalition of disability advocacy groups that expressed general support for the definition. The second comment was from a state-based disability organization that recommended a

revision in the proposed definition to accommodate future technology advances. Specifically, the commenter suggested that CRC add “motors, or methods of propulsion,” so that the first part of the definition reads: “Other power-driven mobility device means any mobility device powered by batteries, fuel, or other engines, *motors, or methods of propulsion . . .*”

*Response:* CRC agrees with the second commenter that the definition should be revised to allow for future technology advances, but believes that the language suggested by the commenter may be too limiting. Therefore, CRC has revised the proposed definition in the final rule to add “or by other similar means” after the list of power sources for the devices.

#### Programmatic Accessibility

Since WIOA requires recipients to comply with this rule and the applicable provisions of the ADA regarding the physical and programmatic accessibility of facilities, programs, services, technology, and materials, proposed § 38.4(tt) added a definition for “programmatic accessibility.”

*Comment:* A local workforce agency commented that the distinction between physical and programmatic accessibility is well-defined and specific, providing a clear foundation that will strengthen recipients’ ability to guarantee that their programs and services are both physically and programmatically accessible for individuals with disabilities. CRC received a comment from a coalition of disability advocacy organizations that requested adding the words “fully” and “equally” in the proposed definition of “programmatic accessibility” to emphasize that the requirement should direct recipients to “put program beneficiaries and participants with disabilities in the position they would be in if they did not have disabilities,” rather than just being “helpful.”

*Response:* The definition of “programmatic accessibility” in § 38.4(tt) is sufficient as proposed. It is taken from the 2005 Senate Health, Education, Labor, and Pensions Committee Report on WIA reauthorization.<sup>116</sup> It is not necessary to add “equally” or “fully,” because § 38.12(a) explains the opportunities recipients must provide to individuals with disabilities, including any aid, benefit, service, or training that is equal to, or as effective as, that provided to others (e.g., the opportunity to obtain the same result, benefit, or level of

<sup>115</sup> 28 CFR 35.104.

<sup>116</sup> S. Rep. No. 109–134, 2005 WL 2250857, at \*11 (2005).

achievement). For these reasons, CRC declines to make the suggested changes to proposed § 38.4(tt).

#### Qualified Individual With a Disability

Proposed § 38.4(ww) revised a portion of the definition of “qualified individual with a disability” to match the definition in the EEOC regulations implementing the ADAAA.<sup>117</sup> CRC received one comment from a coalition of disability organizations supporting the proposed definition, and § 38.4(ww) is adopted as proposed.

#### Qualified Interpreter

Proposed § 38.4(xx) amended the existing definition of “qualified interpreter” to reflect the availability of new technologies, stating 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.” The revision also delineated the skills and abilities that an individual must possess in order to provide interpreter services for an individual with a disability.

*Comment:* CRC received one comment from a coalition of disability advocacy organizations concerned that interpreters should “have a particular level of expertise in the specific jargon being used.” The commenter requested that the definition of qualified interpreter take into consideration both “applicable state law governing licensure of interpreters,” as well as “the qualification of the interpreter for the particular field of employment in any given situation.”

*Response:* A qualified interpreter is defined as an interpreter who is able to interpret “effectively, accurately, and impartially.” The interpreter must also be able to interpret “both receptively and expressively, using any necessary specialized vocabulary.” Accordingly, § 38.4(xx) already addresses the commenters’ concern about an interpreter’s ability to use relevant jargon or to otherwise effectively and accurately understand and interpret communications regarding a particular field of employment. On the other hand, possessing State certification may or may not indicate that an individual meets the regulatory criteria. We therefore decline to incorporate State standards into the regulation. The most important factor is whether the interpreter can facilitate effective, accurate, and impartial communication and therefore meets the requirements outlined in the regulation. For these

reasons, CRC declines to make the suggested changes.

In § 38.4(xx)(2), CRC proposed a definition of “qualified interpreter for an individual who is limited English proficient.” The proposed § 38.4(xx)(2) was 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 (into which English is being interpreted) and to identify and employ the appropriate mode of interpreting, such as consecutive, simultaneous, or sight translation.<sup>118</sup>

Several advocacy organizations expressed support for the proposed definition of “qualified interpreter” and the definition of “qualified interpreter for an individual who is LEP” within § 38.4(xx)(2). The commenters stated that the proposed definitions properly acknowledge that new technology has expanded the availability of interpretation services, providing a range of methods for regulated entities to use to meet their responsibilities under the regulations. Furthermore, the commenters noted that the definitions help ensure that job seekers and workers who are LEP have access to quality interpretation by describing the quality of the interpreter as effective, accurate, impartial, expressive, and using necessary vocabulary. The commenters stated that this characterization of quality was necessary to disallow the use of Web sites or services that only provide online translation services (which may be inaccurate), and to discourage the use of children or family members or other untrained individuals as interpreters.

#### Reasonable Accommodation

Proposed § 38.4(yy) revised the definition of “reasonable accommodation” to add a new paragraph stating that the provision of reasonable accommodations is not required for individuals who are only “regarded as” having a disability. This provision is consistent with the ADAAA<sup>119</sup> and regulations issued by the EEOC<sup>120</sup> and by the DOJ<sup>121</sup> implementing the ADAAA.

*Comment:* CRC received a few comments generally supporting this provision from a coalition of disability advocacy organizations. CRC received one comment from a State agency asking that the term “regarded as having a disability” be defined or that examples

be provided to add clarification to the meaning of the phrase. The commenter requested that the term “covered entity” be defined. The commenter also suggested that the term “covered entity” be replaced with the term “recipient.”

*Response:* We agree that it is preferable to use the term “recipient,” defined in § 38.4(zz), instead of “covered entity,” for which there is no definition in this part, and have adopted that change throughout the rule.<sup>122</sup> Regarding the commenter’s request that we define “regarded as having a disability,” or provide examples, we note that the definition of the term “disability” includes “being regarded as having such an impairment,” and that the phrase “is regarded as having such an impairment” is defined in § 38.4(q)(7). CRC revises § 38.4(yy)(4) of the rule consistent with that wording to refer to the applicable definitions for the “actual disability,” “record of,” and “regarded as” prongs. Therefore, examples are unnecessary.

For the sake of consistency, CRC places quotation marks around the term “reasonable accommodation” in § 38.4(yy)(2).

#### Recipient

Proposed § 38.4(zz) defined the term “recipient” as any one-stop partner listed in section 121(b) of WIOA and any “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).” Section 38.4(zz) also proposed a non-exhaustive list of examples of recipients.

*Comment:* A State labor agency commented that the proposed definition of “recipient” significantly expands the existing definition and will cause confusion because it is not in accordance with current OMB guidance. The commenter recommended that the Department continue to rely on the Office of Management and Budget (OMB) definition.

*Response:* Although the definition of “recipient” in this rule differs from the definition of “recipient” in the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards at 2 CFR part 200 (“Uniform Guidance”), the definition of recipient in this rule does not expand upon or adopt the definition of “recipient” in the Uniform Guidance

<sup>118</sup> DOL LEP Guidance, *supra* note 28, at 32296.

<sup>119</sup> 42 U.S.C. 12101 *et seq.*

<sup>120</sup> 29 CFR 1630.9(e).

<sup>121</sup> 28 CFR 35.108(f)(7)(ii).

<sup>122</sup> CRC is replacing “covered entity” with “recipient” in two sections: in the definition of “disability” in § 38.4(q) and in the definition of “reasonable accommodation” in § 38.4(yy).

<sup>117</sup> 29 CFR 1630.2(m).

because this rule and the Uniform Guidance are two different rules with different applicability and different purposes. CRC chooses to retain its definition of “recipient” because CRC has a statutory duty to enforce WIOA Section 188 with respect to “programs and activities financially assisted in whole or in part under” WIOA. Coverage under Section 188 and this regulation is not dependent on whether an entity is a “pass-through entity” as defined in 2 CFR 200.74, a “recipient” as defined in 2 CFR 200.86, or a “subrecipient” as defined in 2 CFR 200.93. Instead, coverage under Section 188 and this regulation depends on whether an entity is a “recipient,” as defined in § 38.4(zz), that receives financial assistance under Title I of WIOA, as defined in § 38.4(x) and (y). Moreover, the definition of “recipient” in § 38.4(zz) is consistent with the definition of “recipient” in the 1999 and 2015 rules. Therefore we decline to amend the definition of “recipient” as suggested.

#### Service Animal

Proposed § 38.4(fff) added a definition for “service animal.” This provision is based on the DOJ ADA Title II regulations.<sup>123</sup>

*Comment:* Two disability advocacy organizations expressed support for the proposed definition of “service animal,” reasoning that it is consistent with ADA definitions that exclude exotic animals from protected coverage. The commenter noted that the organization has received complaints about individuals who identify exotic animals as service animals, which the commenters believe draws unnecessary attention to the individual rather than performing an actual service.

However, a few commenters requested revisions to the definition. An advocacy organization recommended that the definition of “service animal” be expanded to include emotional support animals to be consistent with language in the Pennsylvania Human Relations Act and the Federal Fair Housing Act. Another advocacy organization suggested that CRC eliminate or explain the differences between CRC’s and DOJ’s language regarding emotional support and the exclusion of miniature horses as service animals. Similarly, a state-based organization serving individuals with developmental disabilities recommended that the definition of

“service animal” be revised to include miniature horses. The commenter noted that, even though current ADA requirements recognize dogs only as service animals, it also permits the use of a miniature horse as a service animal in certain circumstances.

*Response:* In the interest of uniformity, our definition of a service animal under § 38.4(fff) is limited to dogs, consistent with the Department of Justice’s 2010 ADA Title II regulations.<sup>124</sup> While another section of the DOJ Title II regulations sets out standards for the reasonable modification of policies, practices, and procedures to permit miniature horses to be utilized in certain circumstances and under specific criteria, this is different from including miniature horses in the definition of a “service animal.”

Our definition of a service animal, consistent with the DOJ 2010 ADA Title II regulations, excludes animals that are only used to provide emotional support, well-being, comfort, or companionship, but does include dogs that can perform work or tasks that are directly related to an individual’s disability, including helping persons with psychiatric and neurological disabilities. We believe that it is appropriate to follow the DOJ Title II regulations in restricting service animals to dogs that can perform specific assistive tasks; many of the same entities subject to this rule are also subject to the DOJ regulations. However, not all of those entities are subject to the Pennsylvania Human Relations Act or the federal Fair Housing Act. We believe permitting emotional support animals under a single State statute,<sup>125</sup> or under the Fair Housing Act as a reasonable accommodation,<sup>126</sup> is fundamentally different than classifying such animals as service animals. Accordingly, those laws are not used as the basis for the definition of “service animal” in the final rule.

#### Video Remote Interpreting (VRI) Service

Proposed § 38.4(sss) added a definition for “video remote interpreting (VRI) service” that mirrors the

definition used by DOJ in its regulations implementing Title II of the ADA.<sup>127</sup>

*Comment:* A coalition of organizations representing the interests of individuals with disabilities commented that the proposed definition of “video remote interpreting” (VRI) is inadequate and vague because it could ostensibly allow for a smartphone to be used to Skype the interpreter, reasoning that such a scenario is problematic as the effectiveness of video remote interpreting depends greatly on the deaf individual’s ability to view the VRI interpreter on a sufficient size screen and the clarity of the signing on the screen being affected by signal strength. The coalition recommended that all covered entities prioritize the use of on-site interpreters, and that use of VRI be limited to brief interactions or where a qualified interpreter is not available.

*Response:* The current language, which mirrors the DOJ ADA Title II regulations, is sufficient. As stated in § 38.15, which parallels the language of the ADA, a recipient must take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others. A recipient must furnish appropriate auxiliary aids and services where necessary to accomplish this. The type of auxiliary aid or service necessary to ensure effective communication varies 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 type of auxiliary aid and service is necessary, a recipient must give primary consideration to the request of an individual with a disability. In addition, with respect to video remote interpreting, there are particular requirements under § 38.15(a)(4) that address the speed, size, and quality of the service, which would in many cases limit the use of a smart phone for VRI. For these reasons, CRC declines to make the suggested changes to proposed § 38.4(sss).

#### Vital Information

In § 38.4(tt), the proposed rule included a definition for “vital information.” The proposed rule used the term “vital information” to describe the type of information that recipients must: (1) Translate in advance of encountering any specific LEP individual, pursuant to § 38.9(g)(1); or (2) translate (in writing) or interpret (verbally) when specific LEP

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

<sup>125</sup> The Pennsylvania Human Relations Act does not use the term “service animal” but uses the term “guide or support animals,” without further definition. See 43 Pa. Cons. Stat. sections 952, 955.

<sup>126</sup> See U.S. Dep’t of Housing & Urban Dev., Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs (FHEO–2013–01, Apr. 25, 2013), available at [http://portal.hud.gov/hudportal/documents/huddoc?id=servanimals\\_ntcfheo2013-01.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf) (classifying requests for emotional support animals as reasonable accommodation requests, rather than a service animal).

<sup>127</sup> See 28 CFR 35.104.

<sup>123</sup> See 28 CFR 35.104. The EEOC has not addressed whether this definition applies to employers and employment agencies covered under Title I of the ADA or Section 501 of the Rehabilitation Act.

individuals are encountered, pursuant to § 38.9(g) and (h). The proposed rule gave a nonexhaustive list of examples of documents containing vital information. CRC sought comments on this definition. The comments and our responses regarding the definition of “vital information” are set forth below:

*Comment:* Several advocacy organizations supported the proposed definition of “vital information” specifically because the increased usage of Web sites or other virtual services to provide employment and training information should not preclude job seekers or workers who are LEP from accessing those services. A local workforce agency supported the proposed definition of “vital information,” reasoning that it “is precise [and] provides a clear description of the importance of providing program information in various formats thereby enabling recipients to comply with WIOA regulations.” A State labor agency did not support including this definition. The commenter stated that it would increase the burden of one-stop centers and partners to translate materials into multiple languages and would constitute an unfunded mandate.

*Response:* We acknowledge that compliance with § 38.9 may impose some limited burdens on recipients. Moreover, these burdens are outweighed by the benefits that § 38.9 will generate for individuals with limited English proficiency by making them aware, in their preferred languages, of information they need to understand in order to obtain, and to understand how to obtain, the aid, benefits, services, and training offered by WIOA Title I programs and activities.<sup>128</sup> We believe including the definition of vital information provides clear direction for recipients so that they can determine what information must be translated or orally interpreted for LEP individuals in order 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>129</sup> For these reasons, CRC declines to make any modifications to the definition of vital information.

#### Wheelchair

In § 38.4(uuu), the proposed rule added a definition for “wheelchair” to

distinguish it from other power driven mobility devices. The new definition mirrors the definition in the DOJ ADA Title II regulations.<sup>130</sup> CRC received one comment in support of this provision from a coalition of disability advocacy organizations and adopts it as proposed.

#### Summary of Regulatory Changes

For the reasons set forth above and in the NPRM, and considering the comments received, CRC adopts the definitions proposed in § 38.4 with the following modifications: reorganizing paragraph (b); numerous edits in paragraph (g) to conform with DOJ’s ADA Title II regulations to implement the ADAAA; in paragraphs (q) and (yy), changing all instances of “covered entity” (or “covered entities”) to “recipient” (or “recipients”); in paragraph (aa), revising the definition of “Governor” to track the statutory definition more closely; in paragraph (hh), revising the definition of “limited English proficient (LEP) individual” to clarify its connection to national origin discrimination; in paragraph (mm), revising the maximum wage rate reimbursement to match that in WIOA; in paragraph (nn), adding “by other similar means”; and in paragraph (yy)(4), adding references to the applicable definitions for the “actual disability,” “record of,” and “regarded as” prongs.

#### General Prohibitions on Discrimination § 38.5

Proposed § 38.5 set forth generally the discrimination prohibited by WIOA Section 188 and this part: “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 [subjected to certain adverse actions].”

*Comment:* An individual commenter cited the regulatory language “because of race, color, religion, sex, national origin, age, disability, political affiliation or belief . . .” and recommended that the word “belief” be removed because it can be misunderstood in context with the other words.

*Response:* CRC appreciates the commenter’s concern that the regulation text be clearly understood. We believe the word “and” after the word “belief” is inconsistent with the intended meaning of the text, and may have made

it unclear that the word “belief” is not an independent protected category, such as race, but is part of the protected basis of “political affiliation or belief.” CRC declines the commenter’s suggestion to delete the word “belief” from § 38.5, because the language “political affiliation or belief” is derived directly from WIOA Section 188. However, to clarify that “belief” is not an independent basis, and to more clearly and consistently identify all of the bases on which discrimination is prohibited, CRC makes the following technical changes as appropriate in this section and in §§ 38.1, 38.4(uu), 38.6, 38.10, 38.25(a)(1)(i)(A), and 38.42(a): Adding both a comma and the words “applicants, and participants” following “beneficiaries”; repeating “on the basis of” or “based on” before “citizenship”; and making minor technical changes to the punctuation and conjunctions in the list of bases. For the same reasons, CRC intends no substantive changes by making these revisions.

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

Proposed § 38.6 discussed the types of discriminatory actions prohibited by WIOA and this part whenever those actions are taken because of the protected bases listed in Section 188, with the exception of disability. In addition, this section replaced the term “ground” with the term “basis.”

*Comment:* An advocacy organization pointed out that the proposed prohibitions on sex discrimination include a prohibition on job postings that seek individuals of a particular sex. The commenter urged a similar prohibition on job postings that seek individuals of a particular age, or contain age-related parameters such as “recent graduates.” The commenter also expressed concern that older workers have been systematically shortchanged in the workforce development system. The commenter warned that older workers are often diverted or referred to other programs, relegated to self-service because of understaffing, not served because the performance criteria discourage helping the hard-to-serve, or otherwise denied equal access to meaningful engagement that would qualify them to be “participants.” The commenter concluded that disparate impact discrimination based on age is a “new” legal development that should be considered as bolstering the case for increased attention to disparate impact based on age in the delivery of career services to older jobseekers.

*Response:* As discussed below in connection with § 38.7(b)(5), CRC is

<sup>128</sup> Cf. HHS Nondiscrimination Final Rule, *supra* note 18, at 31401 (recognizing that in the health context the benefits of translating information for LEP individuals outweigh the burdens on covered entities).

<sup>129</sup> DOL LEP Guidance, *supra* note 28, at 32298.

<sup>130</sup> 28 CFR 35.104.

removing the across-the-board prohibition on “the use of gender-specific terms for jobs (such as ‘waitress’)” because the EEOC permits gender-specific job titles in advertisements in the rare instance in which sex is a bona fide occupational qualification. The use of such language in employment opportunity advertisements and other recruitment practices is suspect, but is not a per se violation, and no violation should be found when it is accompanied by prominent language that clearly indicates the intent to include applicants or prospective applicants of both sexes. Age discrimination cases are also fact specific. Language that is age referential, or that would discourage older workers, can be legal if based on a bona fide occupational qualification or a reasonable factor other than age. Accordingly, CRC declines to prohibit outright the use of all potentially age-related parameters.

While the rule does not have a separate section devoted to addressing age discrimination only, age is a covered basis for prohibited discrimination. For example, the provisions of § 38.6 would prohibit, on a case-by-case basis, job postings shown to be discriminatory due to age, as well as the other scenarios raised by the commenter, whenever they are the result of age discrimination. We disagree with the commenter’s suggestion that CRC should give increased attention to any particular type of discrimination. Therefore CRC declines to adopt the commenter’s recommendation.

*Comment:* An advocacy organization suggested that there should be “[n]o discrimination or preference on the basis of race, ethnicity, sex, etc.,” including “any use of goals and timetables to remedy underrepresentation and the like.” The commenter also opposed the disparate impact approach to civil rights enforcement and favored only prohibition of disparate treatment.

*Response:* With respect to the issue of “goals and timetables to remedy underrepresentation and the like,” CRC believes that the commenter is requesting that the final rule include neither specific numerical goals for hiring persons because of protected categories, nor specific numerical goals for offering any aid, benefit, service, or training on the basis of protected categories. The rule contains no such requirements. Instead, the final rule addresses underrepresentation by requiring, among other things, recipients to designate an Equal

Opportunity Officer,<sup>131</sup> collect and monitor equal opportunity data to ensure compliance with this part,<sup>132</sup> and conduct affirmative outreach to certain targeted groups.<sup>133</sup>

Regarding the question of disparate impact discrimination, CRC disagrees that the final rule should only prohibit intentional discrimination—that is, disparate treatment discrimination. WIOA authorizes the Secretary to promulgate nondiscrimination regulations “that are consistent with the Acts referred to in subsection (a)(1)” of Section 188.<sup>134</sup> Under federal statutes that prohibit discrimination, federal agencies have the authority to issue and enforce regulations prohibiting policies and practices that have disparate impacts on protected classes.<sup>135</sup> It is particularly important that federal agencies such as CRC enforce prohibitions against disparate impact discrimination because victims themselves may be unable to enforce agencies’ disparate impact regulations.<sup>136</sup> CRC emphasizes that it will not deem unlawful a neutral policy or practice that has a disparate impact on a protected class if the recipient demonstrates that the policy or practice has a substantial legitimate justification and CRC cannot identify an alternative policy or practice that may be comparably effective with less disparate impact.<sup>137</sup>

#### Discrimination Prohibited Based on Sex § 38.7

Proposed § 38.7(a) stated that discrimination in WIOA Title I-financially assisted programs and

activities based on pregnancy, childbirth, and related medical conditions is a form of unlawful sex discrimination. CRC received only supportive comments on this inclusion and adopts it as proposed in the final rule.

Proposed § 38.7(a) further stated that discrimination based on transgender status or gender identity<sup>138</sup> is a form of unlawful sex discrimination. CRC received comments supporting and opposing this inclusion.

*Comments:* CRC received eleven comments in support of the express inclusion of transgender status and gender identity in the definition of “sex.” The commenters were one coalition of eighty-six women’s, workers’, and civil rights organizations; a group of ten advocacy organizations and a union; six individual advocacy organizations; two health organizations; and one individual. The organizational commenters emphasized that the principle that discrimination on the basis of gender identity or transgender status constitutes discrimination on the basis of sex is well supported by Title VII and Title IX case law.

CRC also received comments opposing the recognition of discrimination based on transgender status or gender identity as a form of unlawful sex discrimination. These comments were submitted by one group of nine religious organizations, one employer, one State department of labor, and numerous individuals.

The religious organizations asserted that “the inclusion of transgender status and gender identity in the proposed regulations is an erroneous interpretation of the law.” They stated that Section 188 does not provide a textual basis for including transgender status and gender identity in CRC’s rule because the statute uses the term “sex,” which they stated is ordinarily defined as “being male or female.” They further asserted that most courts have held that discrimination on the basis of transgender status or gender identity is not covered by federal statutes prohibiting sex discrimination. The religious organizations also pointed to congressional efforts to enact legislation that would prohibit federally financially assisted programs and activities from discriminating on the basis of gender identity, portraying such efforts as

<sup>131</sup> See §§ 38.28 and 38.29.

<sup>132</sup> See §§ 38.31 and 38.41.

<sup>133</sup> See § 38.40.

<sup>134</sup> 29 U.S.C. 3248(e).

<sup>135</sup> See, e.g., *Alexander v. Choate*, 469 U.S. 287, 293–94 (1985) (explaining that the Court had previously held, in *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582 (1983), “that Title VI [which does not itself contain a disparate impact provision] had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts”).

<sup>136</sup> *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (Title VI); see Memorandum from Loretta King, Acting Assistant Attorney General, U.S. Dep’t of Justice, Civil Rights Div., to Federal Agency Civil Rights Directors and General Counsels, Strengthening of Enforcement of Title VI of the Civil Rights Act of 1964 (July 10, 2009), available at [http://www.lep.gov/titlevi\\_enforcement\\_memo.pdf](http://www.lep.gov/titlevi_enforcement_memo.pdf).

<sup>137</sup> *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *Ga. State Conf. of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985); see generally *Texas Dep’t of Housing & Cmty. Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507, 2522–23 (2015).

<sup>138</sup> A transgender individual is an individual whose gender identity is different from the sex assigned to that person at birth. Throughout this final rule, the term “transgender status” does not exclude gender identity, and the term “gender identity” does not exclude transgender status.

evidence that federal law does not already forbid such discrimination.<sup>139</sup>

The State department of labor that opposed this portion of proposed § 38.7(a) asserted that “there is no clear legal consensus as to whether Title VII’s prohibition against sex discrimination applies to discrimination on the basis of gender orientation or gender identity.” The employer and numerous individual commenters asserted that this provision of CRC’s rule would undermine traditional values and grant special protections to LGBT people. Many individual commenters further expressed skepticism or derision regarding the existence of transgender individuals and individuals who do not identify as male or female.

*Response:* As discussed above in the main preamble and as supported by numerous commenters, CRC finds the prohibition of discrimination on the basis of gender identity or transgender status as a form of sex discrimination to be consistent with case law under Title VII and Title IX.<sup>140</sup>

Likewise, CRC does not find the rule’s inclusion of gender identity or transgender status to be inconsistent with congressional efforts to ban gender identity discrimination in programs and activities receiving federal financial assistance. Enactment of subsequent legislation may simply codify and clarify interpretations of existing laws to provide additional guidance. In addition, as the Supreme Court has held, several equally tenable inferences may be drawn from congressional inaction, including the inference that existing legislation already incorporates a proposed change, and therefore congressional inaction lacks persuasive

significance in the interpretation of existing statutes.<sup>141</sup>

Therefore, CRC retains the terms “transgender status” and “gender identity” in the definition of “sex” in § 38.7(a) in the final rule.

*Comment:* The religious organizations further asserted that Section 188’s prohibition on sex discrimination is subject to the exception for religious organizations contained in Title IX.<sup>142</sup> They asserted that Title IX’s religious exception applies to CRC’s rule because WIOA Section 188 forbids sex discrimination “except as otherwise permitted under title IX” and requires the Secretary to promulgate nondiscrimination regulations that are “consistent with the Acts referred to in subsection (a)(1)” of Section 188, including Title IX.<sup>143</sup> The religious organizations further asserted that, even if WIOA did not incorporate Title IX’s religious exception, the Religious Freedom Restoration Act (RFRA) could support a religious exemption from any nondiscrimination obligation the final rule imposed with regard to gender identity, transgender status, or sexual orientation. The religious organizations stated that they were not suggesting that any person eligible to participate in job training and placement programs should be excluded from the programs. They asserted that RFRA would support an exemption from any interference “with the ability of a religious organization to require adherence to religiously-grounded employee conduct standards” or “to hire and retain staff whose beliefs and practices are consistent with those of the organization.”

*Response:* CRC agrees that WIOA incorporates the exceptions contained in Title IX. As the religious organizations noted, WIOA Section 188 forbids sex discrimination “except as otherwise permitted under title IX.”<sup>144</sup> Title IX’s prohibition on sex discrimination applies, with certain exceptions, to “any education program or activity receiving Federal financial assistance.”<sup>145</sup> In addition to the exception provision cited by the religious organizations, Title IX provides that the term “program or activity” “does not include any operation of an entity which is

controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization.”<sup>146</sup> Accordingly, the Department’s Title IX regulation already contains an exemption provision and a mechanism for receiving exemption claims at 29 CFR 36.205.

The Title IX religious exception is available to recipients if they meet the criteria for the exception. The exception applies to any recipient that is an educational institution controlled by a religious organization if the application of this part’s prohibition against sex discrimination would not be consistent with the organization’s religious tenets.<sup>147</sup> It also applies to the educational operation of any recipient that is an entity controlled by a religious organization if the application of this part’s prohibition against sex discrimination to that operation would not be consistent with the organization’s religious tenets.<sup>148</sup> Recipients that meet either set of criteria may follow the process established by the Department’s Title IX regulation at 29 CFR 36.205(b) to submit exemption claims.<sup>149</sup> The Department of Education has published information that CRC finds instructive in determining whether a recipient is “controlled by a religious organization.”<sup>150</sup> If a recipient has

<sup>146</sup> 20 U.S.C. 1687.

<sup>147</sup> See 20 U.S.C. 1681(a)(3).

<sup>148</sup> See 20 U.S.C. 1687.

<sup>149</sup> The Department’s Title IX exemption provision and process are as follows:

Educational institutions and other entities controlled by religious organizations.

- *Exemption:* These Title IX regulations do not apply to any operation of an educational institution or other entity that is controlled by a religious organization to the extent that application of these Title IX regulations would not be consistent with the religious tenets of such organization.

- *Exemption claims:* An educational institution or other entity that wishes to claim the exemption set forth in the paragraph above shall do so by submitting in writing to the Director, Civil Rights Center, a statement by the highest-ranking official of the institution, identifying the provisions of these Title IX regulations that conflict with a specific tenet of the religious organization.

See 29 CFR 36.205.

<sup>150</sup> The Department of Education normally considers an institution to be controlled by a religious organization if it falls into one of the following categories:

- (1) It is a school or department of divinity, defined as an institution or a department or branch of an institution whose program is specifically for the education of students to prepare them to become ministers of religion or to enter upon some other religious vocation, or to prepare them to teach theological subjects; or

- (2) It requires its faculty, students or employees to be members of, or otherwise espouse a personal belief in, the religion of the organization by which it claims to be controlled; or

- (3) Its charter and catalog, or other official publication, contains explicit statement that it is

Continued

<sup>139</sup> In the 114th Congress (2015–2016), identical “Equality Act” bills were introduced in the Senate (S. 1858) and House (H.R. 3185) on July 23, 2015. The bills would, *inter alia*, prohibit programs and activities receiving federal financial assistance from discriminating against persons based on sex, sexual orientation, or gender identity. U.S. Library of Congress, Congress.gov, available at <https://www.congress.gov/bill/114th-congress/senate-bill/1858>, <https://www.congress.gov/bill/114th-congress/house-bill/3185>.

<sup>140</sup> See, e.g., *Barnes v. Cincinnati*, 401 F.3d 729, 739 (6th Cir. 2005); *Smith v. Salem*, 378 F.3d 566, 574 (6th Cir. 2004); *Doe v. Univ. of Mass.-Amherst*, No. CV 14–30143–MGM, 2015 WL 4306521, at \*6 n.2 (D. Mass. July 14, 2015); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Miles v. N.Y. Univ.*, 979 F. Supp. 248, 249–50 (S.D.N.Y. 1997); see also *Macy v. Dep’t of Justice*, Appeal No. 0120120821, 2012 WL 1435995, at \*7 (EEOC Apr. 20, 2012), available at <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>. The contrary approach taken in the older cases cited by opposing commenters “has been eviscerated by *Price Waterhouse*.” *Smith*, 378 F.3d at 573; see also *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000).

<sup>141</sup> *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).

<sup>142</sup> The religious organizations referred to the exception that provides that the prohibition on sex discrimination “shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.” 20 U.S.C. 1681(a)(3).

<sup>143</sup> 29 U.S.C. 3248(a)(2), (e).

<sup>144</sup> 29 U.S.C. 3248(a)(2).

<sup>145</sup> 20 U.S.C. 1681(a).

already obtained a Title IX religious exemption from the Department of Education, such exemption may be submitted to CRC as a basis for an exemption from the Department of Labor.<sup>151</sup>

CRC also acknowledges that RFRA applies to all federal laws, including WIOA. CRC declines, however, to implement a blanket RFRA exemption from the final rule's nondiscrimination obligations because claims under RFRA are inherently individualized and fact specific.<sup>152</sup> Insofar as the application of any requirement under this part would violate RFRA, such application shall not be required.

The preamble to the proposed rule asked for public comment on the question of whether the final rule should add sexual orientation discrimination to § 38.7(a) as a form of unlawful sex discrimination. CRC received numerous responsive comments.

*Comments:* Many commenters requested that CRC explicitly state in the rule that Section 188's prohibition of discrimination on the basis of sex includes discrimination on the basis of sexual orientation. They cited EEOC decisions and recent case law supporting this interpretation under Title VII, Title IX, and other laws. Some commenters supporting the inclusion of sexual orientation in this rule described the Department's policy as deferring to the EEOC's interpretation of Title VII law and pointed out that the Department has failed to defer to the EEOC's clear interpretation that sexual orientation discrimination is a form of sex discrimination. Many of these commenters urged CRC to incorporate the "modern legal standard rather than adopting an outmoded interpretation based on decades-old precedent."

controlled by a religious organization or an organ thereof or is committed to the doctrines of a particular religion, and the members of its governing body are appointed by the controlling religious organization or an organ thereof, and it receives a significant amount of financial support from the controlling religious organization or an organ thereof.

U.S. Dep't of Educ., Office for Civil Rights, Religious Exemption (2016), <http://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/rel-exempt-pr.html>.

<sup>151</sup> See Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving Federal Financial Assistance; Proposed Common Rule, 64 FR 58568, 58570, Oct. 29, 1999.

<sup>152</sup> The RFRA analysis evaluates whether a legal requirement imposed by the federal government substantially burdens a person's exercise of religion; if it does, the government must demonstrate that application of the legal requirement to the person furthers a compelling governmental interest and is the least restrictive means to further that interest. See 42 U.S.C. 2000bb-1(b).

Other commenters asserted that Section 188 was not intended to protect against sexual orientation discrimination, that no federal appellate court has interpreted Title IX's or Title VII's ban on sex discrimination to prohibit sexual orientation discrimination, and that CRC therefore does not have authority to include this basis.

*Response:* As noted above, as well as in the preamble to the proposed rule, as a matter of policy, CRC supports banning discrimination on the basis of sexual orientation. Ensuring equal access to aid, benefit, service, and training opportunities is critical to meeting the objectives of Section 188 and, more broadly, WIOA. This policy goal is reflected in executive actions such as Executive Order 13672, issued on July 21, 2014, adding sexual orientation and gender identity to the expressly protected bases under Executive Order 11246, which applies to the employment practices of covered federal contractors, including covered Job Corps contractors.<sup>153</sup> Supreme Court decisions have, moreover, repeatedly made clear that individuals and couples deserve equal rights regardless of their sexual orientation.<sup>154</sup> The preamble to the proposed rule acknowledged, however, that "[c]urrent 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."<sup>155</sup> The preamble stated CRC's policy position, noted that "[t]he final rule should reflect the current state of nondiscrimination law, including with respect to prohibited bases of discrimination," and sought comment on the issue.<sup>156</sup>

In *Price Waterhouse v. Hopkins*, the Supreme Court held that an 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>157</sup> Though *Price Waterhouse* did not involve an allegation of discrimination based on an individual's sexual orientation, the Supreme Court recognized in that case that unlawful sex discrimination occurs when an individual is treated differently based on a failure to conform to gender-based stereotypes about how individuals should present themselves or behave.<sup>158</sup> The Department of Justice has therefore taken the position that a well-pled complaint alleging discrimination against a gay employee because of failure to conform to sex stereotypes states a viable sex discrimination claim under Title VII.<sup>159</sup> When a recipient discriminates against an individual based on sexual orientation, the entity may well rely on stereotypical notions or expectations of how members of a certain sex should act or behave. These stereotypes are precisely the types of gender-based assumptions prohibited by *Price Waterhouse*.<sup>160</sup>

Based on this understanding, some courts have recognized in the wake of *Price Waterhouse* that discrimination "because of sex" includes discrimination based on sex stereotypes about sexual attraction and sexual behavior<sup>161</sup> or about deviations from "heterosexually defined gender norms."<sup>162</sup> For example, a recent district court decision in the Ninth Circuit held that the distinction between discrimination based on gender stereotyping and discrimination based on sexual orientation is artificial and that claims based on sexual orientation are covered by Title VII and Title IX as a form of sex discrimination.<sup>163</sup>

<sup>157</sup> 490 U.S. 228, 235 (1989) (plurality op.).

<sup>158</sup> *Id.* at 250–51.

<sup>159</sup> See Def.'s Renewed Mot. to Dismiss at 17–18, *Terveer v. Billington*, No. 1:12-cv-1290 (D.D.C. Mar. 21, 2013), ECF No. 27.

<sup>160</sup> *Price Waterhouse*, 490 U.S. at 288; see, e.g., *Deneffe v. SkyWest, Inc.*, No. 14-cv-00348, 2015 WL 2265373, at \*6 (D. Colo. May 11, 2015); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014); *Boutillier v. Hartford Pub. Schs.*, 2014 WL 4794527 (D. Conn. 2014); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1037–38 (N.D. Ohio 2012); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224, *adopted*, 195 F. Supp. 2d 1216 (D. Or. 2002); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002).

<sup>161</sup> See *Videckis v. Pepperdine Univ.*, No. CV 15–00298, 2015 WL 8916764 (C.D. Cal. Dec. 15, 2015).

<sup>162</sup> *Isaacs v. Felder Servs.*, No. 2:13cv693–MHT, 2015 WL 6560655, at \*4 (M.D. Ala. Oct. 29, 2015).

<sup>163</sup> *Videckis*, 2015 WL 8916764, at \*5–6; see also *U.S. Equal Emp't Opportunity Comm'n v. Scott Med. Health Ctr.*, No. 16–225, 2016 WL 6569233, at \*6 (W.D. Pa. Nov. 4, 2016). Prior circuit court

<sup>153</sup> See OFCCP Executive Order 13672 Final Rule, *supra* note 19.

<sup>154</sup> For example, in 1996, the Supreme Court struck down an amendment to the Colorado constitution that prohibited the State government from providing any legal protections to gay, lesbian, and bisexual individuals. *Romer v. Evans*, 517 U.S. 620 (1996). In 2015, 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. 2584 (2015). See also *United States v. Windsor*, 133 S. Ct. 2675 (2013) (declaring unconstitutional the federal Defense of Marriage Act's definition of "marriage" as only a legal union between a man and a woman); *Lawrence v. Texas*, 539 U.S. 558 (2003) (declaring unconstitutional a state statute criminalizing consensual same-sex sexual conduct).

<sup>155</sup> CRC WIOA NPRM, *supra* note 70, at 4509.

<sup>156</sup> *Id.* at 4509–10.

In addition, in *Baldwin v. Department of Transportation*, the EEOC concluded that Title VII's prohibition of discrimination "because of sex" includes sexual orientation discrimination because discrimination on the basis of sexual orientation necessarily involves sex-based considerations.<sup>164</sup> The EEOC relied on several theories to reach this conclusion: A plain reading 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>165</sup>

For all of these reasons, CRC concludes 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. Accordingly, CRC will evaluate complaints alleging sex discrimination related to an individual's sexual orientation to determine whether they can be addressed under § 38.7(d) of the final rule as discrimination on the basis of sex stereotypes.<sup>166</sup>

CRC has decided not to resolve in this rule whether discrimination on the basis of an individual's sexual orientation alone is a form of sex discrimination under Section 188. 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.

Proposed § 38.7(b) stated that 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 and provided a nonexhaustive list of such distinctions to assist recipients in meeting their nondiscrimination and equal opportunity responsibilities under this section. CRC addresses each example below.

decisions have drawn such a distinction. *See, e.g., Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006).

<sup>164</sup> *Baldwin v. Dep't of Transp.*, Appeal No. 0120133080, 2015 WL 4397641, at \*5 (EEOC July 16, 2015).

<sup>165</sup> *Id.* at \*4–8.

<sup>166</sup> As discussed at the end of the section-by-section analysis of § 38.7(d), CRC adds to that section of the final rule an example addressing adverse treatment of an individual based on sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes.

Proposed § 38.7(b)(1) addressed making a distinction between married and unmarried persons that is not applied equally to individuals of both sexes. CRC received no comments on this provision and adopts it without change in the final rule.

Proposed § 38.7(b)(2) addressed denying individuals of one sex who have children access to aid, benefit, service, or training opportunities that are available to individuals of another sex who have children.

Proposed § 38.7(b)(3) addressed adversely treating unmarried individuals of one sex, but not unmarried individuals of another sex, who become parents. CRC received only supportive comments on these provisions and adopts both as proposed.

Proposed § 38.7(b)(4) addressed distinctions on the basis of sex in formal or informal job training programs, educational programs, or other opportunities such as networking, mentoring, individual development plans, or on the job training opportunities. CRC received no comments on this provision and adopts it without change in the final rule.

Proposed § 38.7(b)(5) addressed 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 for jobs, such as "waitress." CRC received no comments on this provision of its proposed rule. However, on the nearly identical provision in the proposed Discrimination on the Basis of Sex rule, OFCCP received a comment stating that the EEOC permits gender-specific job titles in advertisements if they are clearly used as terms of art rather than as a means for deterring applicants on the basis of sex.<sup>167</sup> In response to that comment and comments asserting that removal of gender-specific job titles would impose costs on federal contractors, including those associated with negotiating new job titles with unions, OFCCP amended its proposed rule by deleting the clause "including through use of gender-specific terms for jobs (such as 'lineman')." OFCCP stated that it would follow EEOC's policy guidance on Use of Sex-Referent Language in Employment Opportunity Advertising and Recruitment, which provides that use of sex-referent language in employment opportunity advertisements and other recruitment practices "is suspect but is not a *per se* violation of Title VII" and that "[w]here sex-referent language is used in

conjunction with prominent language that clearly indicates the employer's intent to include applicants or prospective applicants of both sexes, no violation of Title VII will be found."<sup>168</sup>

For the sake of consistency across the Department's regulations, CRC removes the proposed phrase "including through the use of gender-specific terms for jobs (such as 'waitress')." from § 38.7(b)(5) in the final rule. Like OFCCP, CRC will follow EEOC's policy guidance on Use of Sex-Referent Language in Employment Opportunity Advertising and Recruitment. CRC similarly recommends as a best practice incorporating the use of gender-neutral terms where such alternatives exist.

Proposed § 38.7(b)(6) addressed treating an individual adversely because the individual identifies with a gender different from the sex assigned at birth or the individual has undergone, is undergoing, or is planning to undergo processes or procedures designed to facilitate the individual's transition to a sex other than the individual's assigned sex at birth. In addition to the comments CRC received supporting and opposing the inclusion of transgender status and gender identity, already discussed in connection with § 38.7(a), CRC also received supportive comments suggesting modifications of § 38.7(b)(6).

*Comments:* Six individual advocacy organizations, the coalition of eighty-six organizations, and a health organization submitted similar comments on this provision. They commended CRC for including this example of an unlawful sex-based discriminatory practice but urged CRC to elaborate that refusing to treat an individual according to the individual's gender identity constitutes sex discrimination. Citing EEOC federal sector decisions,<sup>169</sup> these commenters

<sup>168</sup> EEOC Notice No. 915–051, at 2 (Apr. 16, 1990). While this document is not available on EEOC's Web site, a hard copy of it is available for public viewing in EEOC's library. A copy of the notice is also available for public viewing in CRC's office.

<sup>169</sup> *See, e.g., Lusardi v. Dep't of the Army*, Appeal No. 0120133395, 2015 WL 1607756, at \*11 (EEOC Apr. 1, 2015) ("Persistent failure to use the employee's correct name and pronoun may constitute unlawful, sex-based harassment if such conduct is either severe or pervasive enough to create a hostile work environment when 'judged from the perspective of a reasonable person in the [individual's] position.'") (quoting *Oncala v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998)); *Eric S. v. Dep't of Veterans Affairs*, Appeal No. 0120133123, 2014 WL 1653484, at \*2 (EEOC Apr. 16, 2014) (recognizing a claim of sex-based harassment in violation of Title VII where "Complainant has explained how he was harmed by the ongoing refusal to change his name in the [the employer's computer] system, as well as the alleged hostility and threats from the Information Security Officer . . . because he changed his gender identity from female to male"); *Jameson v. U.S.*

Continued

<sup>167</sup> OFCCP Sex Discrimination Final Rule, *supra* note 19, at 39121.

suggested adding one or more examples to § 38.7(b) addressing deliberate and repeated use of names and pronouns that are inconsistent with an individual's gender identity; refusing to process a name change for a transgender individual; and prohibiting transgender individuals from dressing in a manner consistent with their gender.

*Response:* CRC agrees that refusing to treat an individual according to the individual's gender identity may constitute unlawful sex discrimination if the underlying facts establish a hostile environment or other adverse treatment on the basis of transgender status or gender identity, consistent with the EEOC federal sector cases cited by the commenters. However, CRC declines to insert the specific examples suggested by the commenters because the determination of whether any such action constitutes unlawful sex discrimination is highly fact specific, making a categorical prohibition in regulatory text inappropriate. With respect to the principle itself—that refusing to treat an individual according to the individual's gender identity may constitute unlawful sex discrimination—CRC believes that the principle is adequately expressed in the rule as proposed, not only here in § 38.7(b)(6) but also in § 38.7(a), prohibiting discrimination on the basis of transgender status or gender identity; in § 38.7(d)(3), prohibiting adverse treatment because of an individual's actual or perceived gender identity; and in § 38.10(b), prohibiting harassment based on gender identity and failure to comport with sex stereotypes.

For these reasons, and for the reasons discussed above in the main preamble and in connection with the inclusion of transgender status and gender identity in § 38.7(a), CRC adopts § 38.7(b)(6) as proposed.

Proposed § 38.7(b)(7) addressed denying individuals who are pregnant, who become pregnant, or who plan to become pregnant opportunities for or access to any aid, benefit, service, or training on the basis of pregnancy. CRC received two supportive comments suggesting modifications of § 38.7(b)(7).

*Comments:* The coalition of eighty-six organizations, as well as an individual advocacy organization, commended CRC for including this example but asserted that the example is incomplete. They recommended that it be revised to expressly include individuals who are

of childbearing capacity and to refer not only to pregnancy but also to childbirth and related medical conditions, including childbearing capacity. Both commenters further recommended that an example be added to § 38.7(b) to require that pregnant individuals be provided reasonable accommodations related to pregnancy or pregnancy-related medical conditions where such accommodations are provided, or required to be provided, to other program participants similar in their ability or inability to work.

*Response:* CRC does not find it necessary to alter the proposed example in § 38.7(b)(7) or to add the suggested example to the final rule. The list of examples provided in § 38.7(b) is not exhaustive. Moreover, the proposed regulatory text encompasses the commenters' suggestions. Specifically, the principle of nondiscrimination based on pregnancy established in § 38.8 includes the references to childbirth, related medical conditions, and childbearing capacity that the commenters requested be added to § 38.7. Furthermore, the example of discrimination in § 38.8(a) encompasses the commenters' first suggestion (regarding denying any aid, benefit, service, or training to individuals of childbearing capacity), and the example of discrimination in § 38.8(d) encompasses the commenters' second suggestion (regarding denying reasonable accommodations to pregnant individuals). However, based on the commenters' suggestions, CRC believes it would be helpful to add to § 38.7(b)(7) a cross-reference to the section devoted to discrimination based on pregnancy. Therefore, CRC adopts § 38.7(b)(7) as proposed in the final rule, with the addition of a cross-reference to § 38.8.

Proposed § 38.7(b)(8) provided that it is an unlawful sex-based discriminatory practice to make any facilities associated with WIOA Title I-financially assisted programs or activities available only to members of one sex, with the exception that if the recipient provides restrooms or changing facilities, the recipient must provide separate or single-user restrooms or changing facilities to assure privacy. CRC received comments requesting a specific clarification of this proposed provision.

*Comments:* Eight commenters—the coalition of eighty-six women's, workers', and civil rights organizations; six individual advocacy organizations; and one health organization—encouraged CRC to clarify that, while recipients are authorized to provide sex-segregated locker rooms and bathrooms, they are not required to do so. These commenters explained that the revision

is necessary to provide programs with control and flexibility to determine the best layout for each facility on a case-by-case basis and to offer unisex facilities in appropriate contexts.

*Response:* CRC agrees with the commenters that neither WIOA nor Title IX imposes a legal requirement on recipients to provide sex-segregated restrooms or changing facilities. In addition, CRC notes that OFCCP, in its Discrimination on the Basis of Sex final rule, recognized the role that providing sex-neutral single-user facilities could play in preventing harassment of transgender employees, and OFCCP therefore included, as a best practice, the recommendation that federal contractors designate single-user facilities as sex-neutral.<sup>170</sup> Title IX authorizes institutions, if they so choose, to maintain "separate living facilities for the different sexes."<sup>171</sup> The U.S. Department of Education's regulations implementing Title IX provide that a "recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."<sup>172</sup> Therefore, CRC accepts the commenters' suggestion to change "must" to "may" in § 38.7(b)(8) of the final rule.

Proposed § 38.7(b)(9) addressed denying individuals access to the bathrooms used by the gender with which they identify. In addition to the comments CRC received supporting and opposing the inclusion of transgender status and gender identity, already discussed in connection with § 38.7(a), CRC also received comments specifically supporting, opposing, and suggesting modifications to this proposed example of an unlawful sex-based discriminatory practice.

*Comments:* Nine commenters—the coalition of eighty-six women's, workers', and civil rights organizations; a group of ten advocacy organizations and a union; six individual advocacy organizations; and a health organization—applauded CRC's inclusion of this example. They stated that requiring nondiscriminatory access to bathroom facilities is consistent with the position of numerous other federal agencies, as well as thirteen States and the District of Columbia. Many of these commenters asserted that proposed § 38.7(b)(9) provided essential protection for transgender individuals

<sup>170</sup> OFCCP Sex Discrimination Final Rule, *supra* note 19, at 39122.

<sup>171</sup> 20 U.S.C. 1686; *see also* 34 CFR 106.32.

<sup>172</sup> 34 CFR 106.33 (emphasis added).

*Postal Serv.*, Appeal No. 0120130992, 2013 WL 2368729, at \*2 (EEOC May 21, 2013) ("Intentional misuse of the employee's new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment.").

because “employers and training program staff continue to misinterpret their obligations under sex discrimination laws, and frequently deny transgender people access to appropriate restrooms.”<sup>173</sup>

CRC also received comments opposing the inclusion of this example from the group of religious organizations and seven individuals. The religious organizations stated that WIOA incorporates Title IX’s “separate living facilities” exception and that institutions are therefore permitted to maintain separate bathrooms based on biological sex. The religious organizations further asserted that interpreting Section 188’s prohibition on sex discrimination in this way “would violate basic and legitimate expectations of bodily privacy.” The individual commenters cited privacy and safety concerns, asserting that “unintended consequences,” such as assault or abuse of children, would result from the inclusion of this example.

**Response:** CRC believes that the example proposed in § 38.7(b)(9) is consistent with Title VII and Title IX case law,<sup>174</sup> as well as other agencies’ approaches, including that of the Department’s OFCCP.<sup>175</sup> Thus, CRC disagrees with the religious organizations’ assertion that Title IX contains “an exemption permitting the maintenance of separate bathrooms based on *biological sex*” (emphasis added). Indeed, after the comment

<sup>173</sup> The commenters cited a national study of transgender individuals finding that 22 percent of respondents reported being denied access to restrooms consistent with their gender identity in the workplace. Injustice at Every Turn, *supra* note 53, at 56.

<sup>174</sup> *G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016) (upholding the Department of Education’s interpretation of its Title IX regulation as requiring schools to permit transgender students to access sex-segregated facilities consistent with their gender identity), *cert. granted*, No. 16–273, 2016 WL 4565643 (U.S. Oct. 28, 2016); *Highland Bd. of Ed. v. U.S. Dep’t of Ed.*, 2016 WL 5372349, at \*11 (S.D. Ohio Sept. 26, 2016); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 2:16–cv–00943–PP (E.D. Wis. Sept. 22, 2016), ECF No. 33; *Carcaño v. McCrory*, 2016 WL 4508192, at \*11–16 (M.D.N.C. Aug. 26, 2016); *Hart v. Lew*, 973 F. Supp. 2d 561, 581–82 (D. Md. 2013). *But see Texas v. United States*, No. 7:16–cv–54, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016).

<sup>175</sup> *Lusardi v. Dep’t of Army*, Appeal No. 0120133395, 2015 WL 1607756, at \*8 (EEOC Apr. 1, 2015); Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant, *G.G.* (4th Cir. Oct. 28, 2015); OFCCP Sex Discrimination Final Rule, *supra* note 19, at 39122–23; Office of Personnel Mgmt., Diversity and Inclusion Reference Materials: 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/>.

period for this rule closed, a federal appellate court overturned one of the district court cases cited by the religious organizations.<sup>176</sup> Further, the example in § 38.7(b)(9) is the logical outgrowth of the rulings that discrimination on the basis of gender identity is discrimination on the basis of sex, as discussed earlier in this preamble and in connection with § 38.7(a).<sup>177</sup>

CRC also does not agree that allowing individuals to access the bathrooms used by the gender with which they identify will threaten other individuals’ safety or privacy. Significantly, the commenters cited no evidence that such policies compromise the safety of other bathroom users, and CRC has identified no such evidence.<sup>178</sup> With regard to alleged privacy threats, such comments assume that non-transgender individuals will react to the presence of transgender individuals based on the transgender individuals’ sex assigned at birth, rather than on the gender with which they identify in their daily interactions. Additionally, it is well established that private bias, prejudice, or discomfort “is not a legitimate basis for retaining the status quo.”<sup>179</sup> CRC agrees with the EEOC that:

[S]upervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people’s prejudices or discomfort. . . . Allowing the preferences of co-workers to determine whether sex discrimination is valid reinforces the very stereotypes and prejudices that Title VII is intended to overcome.<sup>180</sup>

<sup>176</sup> *G.G.*, 822 F.3d at 723.

<sup>177</sup> See also OFCCP Sex Discrimination Final Rule, *supra* note 19, at 39118–19 (discrimination on the basis of gender identity is discrimination on the basis of sex); HHS Nondiscrimination Final Rule, *supra* note 18, at 31387–89 (same).

<sup>178</sup> Cf. Nat’l Task Force to End Sexual and Domestic Violence Against Women, National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community (Apr. 21, 2016), available at <http://endsexualviolence.org/files/NTFNationalConsensusStmntTransAccessWithSignatories.pdf> (asserting that state and local nondiscrimination laws protecting transgender people’s access to facilities consistent with their gender identity have not increased sexual violence or other public safety issues).

<sup>179</sup> *Latta v. Otter*, 771 F.3d 456, 470–71 (9th Cir. 2014); see also *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”); *Cruzan v. Special Sch. Dist.*, 294 F.3d 981, 984 (8th Cir. 2002) (concluding that “a reasonable person would not have found the work environment hostile or abusive” where a school district had a policy allowing a transgender woman to use the women’s faculty restroom).

<sup>180</sup> *Lusardi v. Dep’t of the Army*, Appeal No. 0120133395, 2015 WL 1607756, at \*9 (EEOC Apr.

CRC therefore retains the example of sex discrimination proposed in § 38.7(b)(9).

**Comments:** Most of the commenters that supported inclusion of the example in § 38.7(b)(9) recommended that clarifying changes be made. They noted that there was no principled basis for restricting the example of equal access to bathrooms, and they requested clarification that the example applies to other sex-segregated facilities as well. Many of the commenters also recommended that the example refer to facilities that are “consistent with,” rather than “used by,” the gender with which individuals identify. They explained that it is important to ensure that all individuals are able to access the facilities that are most consistent with their gender identity.

**Response:** CRC agrees that the legal principle of equality and non-stigmatization underlying the example proposed in § 38.7(b)(9) applies to all types of sex-segregated facilities. The proposed example was not intended to limit transgender individuals’ access to other facilities that may be separated by sex. CRC further agrees that referring to the facilities that are “consistent with the gender with which [individuals] identify” more clearly communicates its intent to include individuals of all genders in the regulatory language.

Accordingly, CRC revises the example of sex discrimination proposed in § 38.7(b)(9) to read “Denying individuals access to the *restrooms, locker rooms, showers, or similar facilities consistent with the gender with which they identify*” (emphasis added).

Finally, CRC received one comment suggesting an addition to § 38.7(b).

**Comment:** The coalition of eighty-six women’s, workers’, and civil rights organizations recommended adding the following example: “[D]iscussing current and future plans about family during the interview or career counseling process may be evidence of sex discrimination.” The organizations asserted that adding such an example would align the rule with EEOC guidance under the ADA regarding pre-offer disability-related inquiries and under Title VII regarding inquiries about individuals’ intentions to become pregnant.

**Response:** CRC agrees that recipients should, as a best practice, refrain from

1, 2015) (citing, among others, *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276–77 (9th Cir. 1981) (female employee could not lawfully be fired because employer’s foreign clients would only work with males); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (rejecting customer preference for female flight attendants as justification for discrimination against male applicants)).

discussing family plans during the interview or career counseling process. However, such discussions serve as evidence of unlawful sex discrimination only when combined with other facts that support an inference of discrimination. Accordingly, the EEOC Title VII guidance cited by the commenters states that the EEOC typically regards inquiries into whether applicants or employees intend to become pregnant “as evidence of pregnancy discrimination where the employer subsequently makes an unfavorable job decision affecting a pregnant worker.”<sup>181</sup> Because the determination of whether such discussions support an inference of unlawful sex discrimination is highly fact specific, a categorical prohibition in regulatory text is inappropriate. CRC also finds inapposite the analogy to the ADA rule regarding pre-offer disability-related inquiries because pregnancy is not in itself a disability.<sup>182</sup> For these reasons, CRC declines to include this additional example in proposed § 38.7(b).

Proposed § 38.7(c) provided 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. CRC received comments supporting, opposing, and suggesting modifications to this proposed provision.

*Comments:* Two commenters, a think tank and a State agency, opposed CRC’s disparate impact regulations in general, though they did not refer specifically to this provision.

*Response:* For the same reasons as discussed in connection with § 38.6, CRC has authority to promulgate disparate impact regulations, and it disagrees that this rule in general or § 38.7 in particular should prohibit only intentional discrimination, that is, disparate treatment discrimination.

CRC does, however, make two technical changes to the language proposed in § 38.7(c). First, under Title IX, as under Title VI, the disparate impact analysis examines whether the regulated entity’s policy or practice has a disparate impact on a protected class and, if so, whether the entity can demonstrate that there is “a substantial legitimate justification” and the Department or complainant is not able

to identify a less discriminatory alternative for the allegedly discriminatory practice.<sup>183</sup> CRC notes that that language is more closely applicable to the WIOA context than the proposed language—“are not program-related and consistent with program necessity”—which CRC adapted from Title VII.<sup>184</sup> In the final rule, to match the wording of the legal standard that applies to disparate impact discrimination under Title IX, CRC changes that clause to “that lack a substantial legitimate justification.” Second, for the sake of consistency with the other disparate impact provisions in the final rule, which refer to practices that have the “effect” of discriminating on a protected basis,<sup>185</sup> CRC replaces “an adverse impact” with “the effect of discriminating.” CRC intends no substantive changes by making these technical revisions.

*Comments:* The coalition of eighty-six organizations, along with an organization representing tradeswomen, commended CRC for including § 38.7(c), observing that it is particularly important for addressing gender-based occupational segregation. The commenters stated that many obstacles women face in fields considered “nontraditional” for women are related to requirements or criteria that are not job related or required as a business necessity. These commenters recommended that CRC include specific examples of policies and practices that may have a disparate impact on the basis of sex and therefore constitute unlawful sex discrimination if they are not job related and consistent with business necessity, such as height, weight, and strength requirements. The commenters also recommended that, where physical tests are required due to the demands of the job, accommodations that are available on job sites should also be provided during the tests. Finally, the commenters urged CRC to state that there should be

uniform interview procedures and questions, such that interviews cannot be used as the basis for excluding individuals who have met other program requirements without some objective and uniform basis for making such determinations.

*Response:* CRC agrees that providing a short, nonexhaustive list of examples in § 38.7(c), as in the other paragraphs in this section, would assist recipients in meeting their nondiscrimination and equal opportunity responsibilities under § 38.7. As noted above, this provision is only one of several disparate impact provisions in the final rule, but CRC believes it is particularly helpful to provide examples in § 38.7(c) because there may be unique disparate impact issues in the sex discrimination context.

In the NPRM, CRC cited Title VII cases addressing the same employment practices the commenters suggested as examples of neutral practices that had disparate impacts on women and were not shown to be job related and consistent with business necessity.<sup>186</sup> Therefore, in the final rule, CRC adds an introductory sentence to § 38.7(c) followed by two new examples: “Height or weight qualifications that lack a substantial legitimate justification and that negatively affect women substantially more than men” and “Strength, agility, or other physical requirements that lack a substantial legitimate justification and that negatively affect women substantially more than men.” As CRC noted in the preamble to the NPRM, the disparate impact analysis may also apply to policies and practices that are unrelated to selection procedures. For instance, as discussed below in connection with § 38.8(d), denials of pregnancy accommodations may be analyzed under both disparate treatment and disparate impact analyses. The principle in § 38.7(c) is intended to encompass all such practices that have the effect of discriminating on the basis of sex and that lack a substantial legitimate justification.

CRC declines to implement the commenters’ other suggestions. CRC agrees that, when selection procedures require physical tests because of the demands of the job, accommodations that are available on job sites should be provided to applicants. Such a practice would help ensure that the required physical tests do not have the effect of

<sup>183</sup> *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *Ga. State Conf. of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985); see also U.S. Dep’t of Justice, Title IX Legal Manual IV.A.2, available at <https://www.justice.gov/crt/title-ix>.

<sup>184</sup> 42 U.S.C. 2000e–2(k)(1)(A)(i) (requiring a defendant to demonstrate that a challenged employment practice that causes a disparate impact on a protected basis is “job related for the position in question and consistent with business necessity”).

<sup>185</sup> See, e.g., §§ 38.6(d), (e), (f); 38.10(a)(3); 38.11; 38.12(e). Discriminatory “effect” may be more readily understood in the regulatory text than “adverse impact” or “disparate impact.” See, e.g., *Young v. United Parcel Serv.*, 135 S. Ct. 1338, 1345 (2015) (explaining that, “[i]n evaluating a disparate-impact claim, courts focus on the effects of an employment practice, determining whether they are unlawful irrespective of motivation or intent”).

<sup>186</sup> CRC WIOA NPRM, *supra* note 70, at 4508 (citing *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979) (height requirement); *Equal Emp’t Opportunity Comm’n v. Dial Corp.*, 469 F.3d 735 (8th Cir. 2006) (strength test); *Johnson v. AK Steel Corp.*, No. 1:07–cv–291, 2008 WL 2184230, at \*8 (S.D. Ohio May 23, 2008) (no-restroom policy)).

<sup>181</sup> U.S. Equal Emp’t Opportunity Comm’n, Enforcement Guidance on Pregnancy Discrimination and Related Issues I.A.3.b (2015), available at [http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm) (emphasis added) (hereinafter “EEOC Pregnancy Guidance”).

<sup>182</sup> *Id.* at II.A.

discriminating on the basis of sex. However, CRC does not believe it is necessary to impose that categorical requirement in regulatory text. For similar reasons, CRC does not adopt the suggestion to require all recipients to use uniform interview procedures and questions. However, CRC does note that § 38.18(b) requires recipients, in their covered employment practices, to comply with the Uniform Guidelines on Employee Selection Procedures, 41 CFR part 60–3, where applicable.

Proposed § 38.7(d) clarified 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. It provided a nonexhaustive list of examples of sex stereotyping to assist recipients in preventing, identifying, and remedying such examples of sex discrimination in their programs. CRC received comments supporting and opposing its recognition that sex-based stereotyping may constitute sex discrimination.

*Comments:* The coalition of eighty-six organizations, the women in trades organization, a health organization, and an individual supported CRC's explicit recognition of discriminatory sex stereotyping. An employer opposed the inclusion of § 38.7(d) in the rule. The employer asserted that CRC was discriminating against employers with traditional values, who should be permitted to impose gender-stereotyped expectations on their employees if those expectations reflect the employers' traditional values.

*Response:* As discussed previously in this preamble, the principle laid out in § 38.7(d) is well supported by case law<sup>187</sup> and is consistent with other agencies' approaches, particularly with the Department of Education's interpretation of Title IX.<sup>188</sup> CRC does not agree that, by including examples of unlawful sex stereotyping in this rule, it is discriminating against employers with traditional values. As the Supreme Court stated in *Price Waterhouse v. Hopkins*, with respect to "the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their

group."<sup>189</sup> Therefore, CRC retains in the final rule the principle stated in proposed § 38.7(d).

Proposed § 38.7(d)(1) addressed denial of access or other adverse treatment based on an 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. CRC received two comments opposing this example.

*Comments:* The group of religious organizations asserted that the proposed example is contrary to case law establishing that dress and grooming standards based on biological sex do not violate Title VII. In addition, the same employer commenter that raised the objection to § 38.7(d) in general, based on the perceived need to protect the rights of employers with traditional values, specifically commented that employers should be allowed to impose dress and appearance requirements on employees consistent with the employers' traditional values.

*Response:* CRC acknowledges that courts have found gender-specific dress and grooming codes not to constitute sex discrimination in violation of Title VII, but CRC emphasizes that most such decisions have focused on whether the codes disparately impact one sex or impose an unequal burden.<sup>190</sup> The proposed example, by contrast, focuses specifically on discrimination on the basis of sex stereotypes. When dress and grooming codes have been shown to be motivated by discriminatory sex-based stereotypes, courts have found the codes to violate Title VII.<sup>191</sup> With this clarification, CRC adopts the example in § 38.7(d)(1) as proposed.

Proposed § 38.7(d)(2) addressed harassment or other adverse treatment of a male because he is considered effeminate or insufficiently masculine. CRC received no comments on this provision and adopts it in the final rule, with a technical edit to clarify that harassment is a type of adverse treatment.

Proposed § 38.7(d)(3) addressed adverse treatment of an individual because of the individual's actual or perceived gender identity. CRC received no unique comments on this example apart from comments on paragraphs (a)

and (b)(6), and for the same reasons as discussed above in the main preamble and in connection with those paragraphs, CRC adopts § 38.7(d)(3) as proposed.

The rule proposed three examples of sex stereotypes stemming from caregiving responsibilities. Proposed § 38.7(d)(4) addressed adverse treatment based on sex stereotypes about caregiver responsibilities in general. It further provided the example of assuming that a female applicant has (or will have) family caretaking responsibilities and that those responsibilities will interfere with her ability to access any aid, benefit, service, or training. Proposed § 38.7(d)(5) addressed adverse treatment of a male because he has taken, or is planning to take, care of his newborn or recently adopted or foster child, based on the sex-stereotyped belief that women, and not men, should care for children. Proposed § 38.7(d)(6) addressed denial of access or other adverse treatment of a woman with children 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. CRC received comments supporting all three examples and recommending modifications to paragraphs (d)(4) and (5).

*Comments:* The coalition of eighty-six organizations and an individual membership organization supported the recognition of sex stereotypes stemming from caregiver responsibilities. The coalition of organizations noted that such stereotypes contribute to gender-based occupational segregation. However, both commenters asserted that the rule should acknowledge that these stereotypes are not limited to caregivers of children and that caregiving stereotypes also include assumptions such as that men do not have caregiving responsibilities or that women with caregiving responsibilities are less capable, successful, or committed to their jobs than men without such responsibilities.

*Response:* CRC agrees that the examples of discrimination based on stereotypes mentioned by the commenters may constitute unlawful sex discrimination. However, CRC does not find it necessary to alter the proposed examples or to add further examples to the final rule. The examples of sex-based caregiving stereotypes provided in paragraphs (d)(4), (5), and (6) are illustrative, not exhaustive. The nondiscrimination principle spelled out in § 38.7(d)—that discrimination on the basis of sex stereotypes is a form of

<sup>187</sup> See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009); *Chadwick v. Wellpoint, Inc.*, 561 F.3d 38 (1st Cir. 2009); *Termeer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014).

<sup>188</sup> See Revised Sexual Harassment Guidance, *supra* note 63.

<sup>189</sup> *Price Waterhouse*, 490 U.S. at 251 (plurality op.).

<sup>190</sup> See, e.g., *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076 (9th Cir. 2004); *Nichols v. Azteca Rest. Enters.*, 256 F.2d 864 (9th Cir. 2001).

<sup>191</sup> See, e.g., *Lewis v. Heartland Inns*, 591 F.3d 1033, 1035, 1038–1042 (8th Cir. 2010); *Carroll v. Talman Fed. Sav. & Loan Ass'n*, 604 F.2d 1028, 1031 (7th Cir. 1979); see also *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 577–78, 583 (7th Cir. 2014).

unlawful sex discrimination—reasonably covers all of the commenters' suggestions. Further, § 38.7(d)(4) establishes the application of that general principle to the particular category of "sex stereotypes about caregiver responsibilities," with no limitation on the gender of the caregiver or the age or identity of the individual being cared for. Therefore, CRC adopts § 38.7(d)(4), (5), and (6) as proposed in the final rule, except that it makes a technical correction to § 38.7(d)(4) to change "sex assumption" to "sex-based assumption." CRC intends no substantive change by making this technical revision.

Proposed § 38.7(d)(7) addressed denial of access or other adverse treatment based on sex stereotyping, including the belief that a victim of domestic violence would disrupt the program or activity or be unable to access any aid, benefit, service, or training. CRC received comments supporting this example and recommending modifications.

*Comments:* The coalition of eighty-six women's, workers', and civil rights organizations; a group of ten advocacy organizations and a union; and an individual advocacy organization welcomed the addition of this example, which commenters noted would enhance survivors' safety and economic security. The coalition of organizations and the individual advocacy organization recommended that CRC provide additional illustrative examples and further discussion of the effects of this discrimination, specifically "examples of how sex discrimination or sex stereotyping can manifest when both the victim and the abusive partner access or participate in the same program or activity."

*Response:* CRC does not find it necessary to alter the proposed example in § 38.7(d)(7) or to add examples to the final rule. The list of examples provided in § 38.7(d) is not exhaustive. Moreover, the proposed regulatory text encompasses the commenters' suggestions. Section 38.7(d) states the overall principle that discrimination on the basis of sex stereotypes is a form of unlawful sex discrimination. Section 38.7(d)(7) offers just one example of the application of that principle to sex stereotyping of victims of domestic violence. CRC believes that the statement of the principle and the provision of this example provide adequate guidance to recipients regarding their obligation to refrain from discriminating against victims of domestic violence on the basis of sex stereotypes. Therefore, CRC adopts § 38.7(d)(7) as proposed in the final rule.

Proposed § 38.7(d)(8) addressed adverse treatment of a woman because she does not dress or talk in a feminine manner. CRC received no comments on this provision and adopts it in the final rule.

Proposed § 38.7(d)(9) addressed denial of access or other adverse treatment because an individual does not conform to stereotypes about individuals of a certain sex working in a particular job, sector, or industry. CRC received comments supporting and recommending modifications to this example.

*Comments:* Several commenters began by noting that gender-based occupational segregation and wage disparities remain widespread, and they asserted that the federal workforce development system reinforces these problems. For example, comments submitted by the coalition of eighty-six organizations, a group of ten organizations and a union, an individual advocacy organization, and an organization representing tradeswomen cited a research study finding that women are often trained for occupations considered traditionally "female" while men are trained for occupations considered traditionally "male" and that, as a result, women's earnings are substantially lower than men's once they exit federal workforce training services.<sup>192</sup> These commenters commended CRC for including the example of sex-based stereotyping in § 38.7(d)(9) because they identified such stereotypes as contributing to these obstacles. However, the coalition of organizations and the two individual organizations requested that CRC include further examples of the ways in which occupational segregation is perpetuated in training programs and workplaces, "such as the isolation of women within training programs; the tracking of women and men into certain positions within a training program based on assumptions about their capabilities and skills because of their sex; denial of, or unequal access to, networking, mentoring, and/or other individual development opportunities for women; unequal on-the-job training and/or job rotations; and applying nonuniform performance appraisals that may lead to subsequent opportunities for advancement." Noting the importance of sharing information about "nontraditional" training opportunities,

all three of these commenters recommended that CRC add an example addressing the failure "to provide information about services or training opportunities in the full range of services and opportunities offered by the recipient."

*Response:* CRC agrees that gender-based occupational segregation remains widespread:

In 2012, nontraditional occupations for women employed only six percent of all women, but 44 percent of all men. The same imbalance holds for occupations that are nontraditional for men; these employ only 5 percent of men, but 40 percent of women. Gender segregation is also substantial in terms of the broad sectors where men and women work: three in four workers in education and health services are women, nine in ten workers in the construction industry and seven in ten workers in manufacturing are men.<sup>193</sup>

CRC is aware of the research studies cited by the commenters indicating that the federal workforce development system contributes to gender-based occupational segregation and the wage gap. With this final rule, CRC aims to enforce the WIOA nondiscrimination and equal opportunity provisions to combat these problems whenever they are the result of discrimination. CRC agrees with a commenter that job training programs "can help end the occupational segregation that has kept women in lower paying fields by providing them training to enter nontraditional jobs that will increase their earnings and employability."

CRC also agrees that the examples of recipient practices identified by the commenters may exacerbate gender-based occupational segregation, which may in turn contribute to pay disparities. In particular, because it is key that recipients share information about any aid, benefit, service, or training without regard to stereotypes about individuals of a particular sex working in a specific job, sector, or industry, CRC adds to § 38.7(d)(9) the phrase "failing to provide information about" any aid, benefit, service, or training based on such stereotypes. With regard to the other examples suggested by the commenters, the rule adequately addresses such practices when they constitute sex discrimination. For example, to the extent that such practices constitute adverse treatment based on sex stereotypes, § 38.7(d)(9) as

<sup>192</sup> The commenters cited Institute for Women's Policy Research, Workforce Investment System Reinforces Occupational Gender Segregation and the Gender Wage Gap (2013), available at <http://www.iwpr.org/publications/pubs/workforce-investment-system-reinforces-occupational-gender-segregation-and-the-gender-wage-gap>.

<sup>193</sup> Ariane Hegewisch & Heidi Hartmann, Institute for Women's Policy Research, *Occupational Segregation and the Gender Wage Gap: A Job Half Done* (2014), available at <http://www.iwpr.org/publications/pubs/occupational-segregation-and-the-gender-wage-gap-a-job-half-done> (citations omitted).

revised encompasses them. Similarly, to the extent that such practices reflect distinctions based on sex, they are prohibited by § 38.7(b), and some are specifically addressed by the example in § 38.7(b)(4).

Additionally, for State Programs, including providers of services and benefits as part of a State Program such as one stops and eligible training providers,<sup>194</sup> the Governor is required by § 38.51 to monitor annually recipients' compliance with WIOA Section 188 and this rule to ensure equal opportunity, including investigating any significant differences in participation in the programs, activities, or employment provided by the recipients to determine whether the differences appear to be caused by discrimination.

CRC further notes that the prohibition on sex discrimination is not the only tool available to combat gender-based occupational segregation. For example, the affirmative outreach provision in § 38.40 requires that recipients take appropriate steps to ensure they are providing equal access to programs and activities, including reasonable efforts to include persons of different sexes.

For these reasons, CRC adopts the example in § 38.7(d)(9) but modifies it to include a recipient's failure to provide information about any aid, benefit, service, or training based on sex stereotypes.

Finally, CRC received comments proposing additions to § 38.7(d) addressing sex stereotyping based on sexual orientation.

*Comment:* Eight commenters—the coalition of eighty-six women's, workers', and civil rights organizations; six individual advocacy organizations; and one health organization—urged CRC to address sex stereotyping based on sexual orientation in § 38.7(d). Specifically, they recommended that CRC incorporate an example from OFCCP's proposed rule on Discrimination on the Basis of Sex addressing “adverse treatment of an individual because the individual does not conform to sex-role expectations by being in a relationship with a person of the same sex.”<sup>195</sup> Commenters reasoned that inclusion of such language would not only reflect federal case law and EEOC policy but would also provide consistency and clarity across the Department's programs.

<sup>194</sup> Please note there is a definition of “State Programs” specific to this regulation at § 38.4(kkk).

<sup>195</sup> U.S. Dep't of Labor, Office of Fed. Contract Compliance Programs, *Discrimination on the Basis of Sex*; Proposed Rule, 80 FR 5246, 5279, Jan. 30, 2015 (proposed 40 CFR 60–20.7(a)(3)).

*Response:* CRC notes that, in its final rule, OFCCP did not adopt the example suggested by the commenters. Rather, OFCCP amended the proposed example to cover adverse treatment of employees or applicants based on their sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes.<sup>196</sup> OFCCP explained that it made this change in light of the legal framework following from *Price Waterhouse*, discussed above with regard to sexual orientation and sex-based stereotypes in connection with § 38.7(a), as well as for consistency with the position taken by the U.S. Department of Health and Human Services in its rule implementing Section 1557 of the Affordable Care Act.<sup>197</sup> For the same reasons, CRC adopts in the final rule § 38.7(d)(10), a new example addressing adverse treatment of an applicant, participant, or beneficiary based on sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes.

#### Summary of Regulatory Changes

For the reasons set forth above and in the NPRM, and considering the comments received, CRC finalizes § 38.7 as follows: CRC adopts § 38.7(a) as proposed, without modification. CRC adopts § 38.7(b) as proposed, with the following modifications: In paragraph (b)(5), removing a phrase stating that the use of gender-specific terms for jobs always constitutes discrimination; in paragraph (b)(7), adding a cross-reference to § 38.8, on pregnancy-based discrimination; in paragraph (b)(8), replacing “must” with “may” to reflect that recipients are permitted but not required to provide separate or single-user restrooms or changing facilities; and in paragraph (b)(9), clarifying that the access requirement applies not just to restrooms but also to locker rooms, showers, and similar facilities. CRC adopts § 38.7(c) as proposed, with the following modifications: Making technical corrections to align the wording of the standard with Title IX case law and to use the same disparate impact language that is used elsewhere in the rule; adding a sentence introducing a nonexhaustive list of examples; and adding new paragraph (c)(1), an example addressing height or weight qualifications, and new paragraph (c)(2), an example addressing strength, agility, or other physical requirements. CRC adopts § 38.7(d) as

<sup>196</sup> See 40 CFR 60–20.7(a)(3).

<sup>197</sup> OFCCP Sex Discrimination Final Rule, *supra* note 19, at 39138; see HHS Nondiscrimination Final Rule, *supra* note 18, at 31389–90.

proposed, with the following modifications: Making a technical correction in paragraph (d)(2) to clarify that harassment is a form of adverse treatment; making a technical correction in paragraph (d)(4) to insert the word “based” in “sex-based assumption”; adding failure to provide information about any aid, benefit, service, or training to the example in paragraph (d)(9) of adverse treatment on the basis of stereotypes about individuals of a particular sex working in a specific job, sector, or industry; and adding new paragraph (d)(10), an example addressing adverse treatment of an individual based on sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes.

#### Discrimination Prohibited Based on Pregnancy § 38.8

Proposed § 38.8 addressed discrimination on the basis of pregnancy. Two commenters—the coalition of eighty-six women's, workers', and civil rights organizations and the group of ten advocacy organizations and a union—praised CRC's inclusion of this section devoted to pregnancy discrimination. One commenter noted that the proposed section “provides clarity as to recipients' legal obligations toward pregnant WIOA applicants, participants, and employees . . . and is in line with current law.”

The proposed introductory paragraph to § 38.8 stated the general principle that adverse treatment based on pregnancy, childbirth, and related medical conditions, including childbearing capacity, in a WIOA Title I-financially assisted program or activity is sex discrimination and is thus prohibited. CRC received one comment suggesting an addition to this statement.

*Comment:* The coalition of eighty-six women's, workers', and civil rights organizations recommended that CRC state the full PDA nondiscrimination standard in the first paragraph of § 38.8, “including that recipients are required to treat applicants, program participants, and employees 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.”

*Response:* As explained previously in this preamble, the PDA governs the nondiscrimination obligations of a program or activity receiving federal financial assistance only in the employment context. However, within that context, CRC agrees with the

commenters that the nondiscrimination standard of the PDA applies, and indeed, CRC's intention was to incorporate that standard in proposed § 38.8.<sup>198</sup> Therefore, CRC adds, to the introductory paragraph of § 38.8 in the final rule, a sentence stating the PDA's nondiscrimination standard regarding the employment context. The introductory paragraph should therefore be understood to state that CRC applies, in all circumstances, the general principle that adverse treatment based on pregnancy, childbirth, and related medical conditions, including childbearing capacity, is prohibited sex discrimination and that CRC applies the nondiscrimination standard of the PDA (which specifically considers individuals' "ability or inability to work") to recipients' covered employment practices.

The introductory paragraph to proposed § 38.8 also provided a nonexhaustive list of related medical conditions.<sup>199</sup> CRC received one comment suggesting additions to this list.

*Comment:* The coalition of eighty-six organizations requested that CRC include the following additional examples of pregnancy-related medical conditions to provide recipients with greater clarity: "impairments of the reproductive system that require a cesarean section, cervical insufficiency, pregnancy-related anemia, pregnancy-related sciatica, pregnancy-related carpal tunnel syndrome, gestational diabetes, nausea that can cause severe dehydration, abnormal heart rhythms, swelling due to limited circulation, pelvic inflammation, symphysis pubis dysfunction, breech presentation, pregnancies characterized as 'high-risk,' and depression (including but not limited to post-partum depression)."

*Response:* CRC declines to include additional examples in the list of related medical conditions. As the commenters acknowledged, the list in proposed § 38.8 is illustrative rather than exhaustive. When any of the suggested conditions are related to pregnancy or childbirth, the rule will encompass them.

Proposed paragraphs (a)–(d) of § 38.8 provided a nonexhaustive list of examples of unlawful pregnancy discrimination.

Proposed § 38.8(a) addressed refusing to provide any aid, benefit, service, or

training on the basis of pregnancy or childbearing capacity. Proposed § 38.8(b) addressed limiting an individual's access to any aid, benefit, service, or training based on that individual's pregnancy, or requiring a doctor's note for a pregnant individual to begin or continue participation when a doctor's note is not required for similarly situated nonpregnant individuals. Proposed § 38.8(c) addressed denying access to any aid, benefit, service, or training, or requiring termination of participation in a program or activity, when an individual becomes pregnant or has a child. CRC received no comments on these three examples, and it adopts them in the final rule without change.

Proposed § 38.8(d) addressed denial of accommodations or modifications to a pregnant applicant or participant who is temporarily unable to participate in some portions of a program or activity because of pregnancy, childbirth, and/or related medical conditions, when such accommodations or modifications are provided, or required to be provided, to other participants not so affected but similar in their ability or inability to participate. CRC received two comments supporting the inclusion of this example and agreeing with CRC that the example aligns the rule with the Supreme Court's decision in *Young v. United Parcel Service*.<sup>200</sup>

According to *Young*, it is a violation of Title VII for an employer to deny alternative job assignments, modified duties, or other accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions when (1) the employer provides such accommodations to other employees whose abilities or inability to perform their job duties are similarly affected, (2) the denial of accommodations "impose[s] a significant burden" on employees affected by pregnancy, childbirth, or related medical conditions, and (3) the employer's asserted reasons for denying accommodations to such employees "are not sufficiently strong to justify the burden."<sup>201</sup> The Court explained as follows the evidence required to prove that the employer's proffered reason is pretextual:

We believe that the plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not

sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.

The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers. Here, for example, if the facts are as *Young* says they are, she can show that UPS accommodates most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations. *Young* might also add that the fact that UPS has multiple policies that accommodate nonpregnant employees with lifting restrictions suggests that its reasons for failing to accommodate pregnant employees with lifting restrictions are not sufficiently strong—to the point that a jury could find that its reasons for failing to accommodate pregnant employees give rise to an inference of intentional discrimination.<sup>202</sup>

CRC will apply this framework when analyzing pregnancy-based sex discrimination allegations that seek to show disparate treatment related to accommodation requests by using indirect evidence in the employment context. CRC solicited public comments on operationalizing the pretext analysis described in *Young* and received one responsive comment.

*Comment:* The coalition of eighty-six organizations stated that "the rule proposed in § 38.8 appropriately reflects the *Young* standard." Nevertheless, the organizations suggested that CRC clarify several points about the pretext analysis: Evidence that an employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers is relevant to the determination of whether an employer's policy or practice imposes a significant burden on pregnant workers. The commenters cautioned that the Court's language focused on a "large percentage," not a "majority." The commenters further noted that other evidence could also be relevant to the determination of a significant burden, such as whether the employer has multiple policies accommodating nonpregnant workers but not accommodating pregnant workers, or whether an employer's policies would reasonably be expected to result in accommodating a large percentage of nonpregnant workers and denying accommodations for a large percentage of pregnant workers.

*Response:* CRC agrees that the commenters' statements as characterized above are consistent with

<sup>198</sup> See 85 FR 4494, 4511, Jan. 26, 2016.

<sup>199</sup> The proposed paragraph also provided that a pregnancy-related medical condition may be a disability, cross-referencing § 38.4(q)(3)(ii). Comments on this provision are discussed *supra* in connection with that paragraph's definition of disability.

<sup>200</sup> 135 S. Ct. 1338 (2015).

<sup>201</sup> *Id.* at 1354.

<sup>202</sup> *Id.* at 1354–55.

the Court's decision. CRC will consider these points when analyzing pregnancy-based sex discrimination allegations in the employment context that seek to show disparate treatment related to accommodation requests by using indirect evidence.

CRC also received one comment suggesting modifications to the example in proposed § 38.8(d).

*Comments:* The coalition of eighty-six organizations pointed to the possible interaction between the ADAAA and the analysis in *Young*, which, as discussed above, compares the coverage and effects of accommodations policies and practices on pregnant individuals and similarly situated nonpregnant individuals. The organizations urged CRC to amend § 38.8(d) to require accommodations or modifications for pregnant individuals “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.” The organizations asserted that the ADAAA requires recipients to accommodate many nonpregnant individuals who have the very same limitations typically experienced by pregnant individuals and that, combined with the standard articulated by the Court in *Young*, recipients are therefore required to provide these accommodations to many more pregnant individuals. The organizations specifically requested that CRC include, in § 38.8(d), an example “explaining that the ADAAA’s expansive coverage means that most nonpregnant individuals similar in ability to work to pregnant individuals with physical limitations will be accommodated and recipients who refuse to also accommodate pregnant workers in this situation are at significant risk of liability.”

*Response:* The EEOC has observed, and CRC agrees, that the ADAAA’s definition of “disability” may not only “make it much easier for pregnant workers with pregnancy-related impairments to demonstrate that they have disabilities for which they may be entitled to a reasonable accommodation under the ADA”<sup>203</sup> but may also “expand[] the number of non-pregnant employees who could serve as comparators where disparate treatment under the PDA is alleged.”<sup>204</sup> However, neither of those possible effects alters the pregnancy discrimination analysis

itself, which CRC believes is adequately explained by the nondiscrimination standard laid out in the revised introductory paragraph of § 38.8 and in the proposed example in § 38.8(d). Thus, CRC declines to add the example requested by the commenters. Furthermore, CRC notes that the related language the commenters suggested (“or are required to be provided by a recipient’s policy or by other relevant laws”) already appears in the proposed regulatory text.

CRC does, however, make one technical change to § 38.8(d) for the sake of consistency with other parts of § 38.8. As explained above, the introductory paragraph to § 38.8 now contains both the general principle of nondiscrimination on the basis of pregnancy, which applies in all circumstances, and the nondiscrimination standard of the PDA, which applies to recipients’ covered employment practices. The specific incorporation of the PDA standard in proposed § 38.8(d) is therefore unnecessary, and CRC revises the language to refer generally to similarly situated individuals, consistent with the general nondiscrimination principle and the language in § 38.8(b).

Finally, CRC received comments suggesting additional examples in § 38.8.

*Comment:* The coalition of eighty-six organizations recommended that the final rule reiterate that an accommodation policy that disproportionately excludes employees who need accommodations because of pregnancy may constitute disparate impact discrimination. The organizations recommended that CRC provide additional examples of this form of discrimination in the area of accommodations and cross-reference the obligation to avoid disparate impact discrimination throughout the rule.

*Response:* CRC agrees that denials of pregnancy accommodations may be analyzed under a disparate impact analysis as well as a disparate treatment analysis.<sup>205</sup> As discussed previously in connection with § 38.7(c), if a recipient’s accommodation policy or practice has the effect of discriminating on the basis of sex (and lacks a substantial legitimate justification), then that policy or practice constitutes unlawful sex discrimination under § 38.7(c) of the final rule. CRC therefore does not find it necessary to provide additional examples of disparate impact discrimination related to pregnancy accommodations. CRC further notes that the final rule refers in numerous

sections to recipients’ obligations to avoid policies, procedures, or practices that have the purpose *or effect* of discriminating on a prohibited basis—that is, to avoid both disparate treatment and disparate impact discrimination.<sup>206</sup> CRC does not believe it is necessary to provide further cross-references to the obligation to avoid disparate impact discrimination in the final rule.

*Comment:* The coalition of eighty-six organizations commended CRC for identifying lactation as a pregnancy-related medical condition and further requested an example addressing adverse treatment of individuals because they are breastfeeding or because they request accommodations to express breast milk.

*Response:* CRC declines to include an additional example related to breastfeeding. Lactation—which is inclusive of breastfeeding—is listed as a “related medical condition” in § 38.8. Moreover, the list of examples of unlawful pregnancy discrimination is merely illustrative; the fact that it does not include lactation examples does not mean that adverse treatment associated with lactation is not discriminatory. To the contrary, as lactation is a pregnancy-related medical condition,<sup>207</sup> adverse action against individuals because they are breastfeeding or because they request accommodations to express breast milk will be considered unlawful sex discrimination under this rule.

*Comment:* One individual commenter stated that “women must have explicit guarantees of maternity leave, at least within the WIOA financially assisted program.”

*Response:* CRC agrees that recipients should, as a best practice, provide appropriate leave policies. Furthermore, CRC has jurisdiction to consider, on a case-by-case basis, whether a recipient’s covered leave policies are discriminatory and whether the provision of leave is required as a form of reasonable accommodation. Separately, CRC notes that employees may be entitled to unpaid leave under the Family and Medical Leave Act and to paid and/or unpaid leave under State law. However, it is outside the scope of CRC’s authority to institute a general maternity leave requirement in this rule. CRC therefore declines to add this requirement to § 38.8.

<sup>206</sup> See, e.g., §§ 38.6(d), (e), (f); 38.10(a)(3); 38.11; 38.12(e).

<sup>207</sup> *Equal Emp’t Opportunity Comm’n v. Houston Funding II, Ltd.*, 717 F.3d 425, 430 (5th Cir. 2013) (discrimination on the basis of lactation is covered under Title VII generally and as a “related medical condition” under the PDA); EEOC Pregnancy Guidance, *supra* note 181, I.A.4.b.

<sup>203</sup> EEOC Pregnancy Guidance, *supra* note 181, Overview of Statutory Protections; see also *Young*, 135 S. Ct. at 1348.

<sup>204</sup> EEOC Pregnancy Guidance, *supra* note 181, at 11.

<sup>205</sup> See *Young*, 135 S. Ct. at 1345.

### Summary of Regulatory Changes

For the reasons set forth above and in the NPRM, and considering the comments received, CRC is finalizing § 38.8 as proposed, with the following modifications: CRC is adding to the introductory paragraph a sentence stating that the nondiscrimination standard of the PDA applies to recipients' covered employment practices, and CRC is revising paragraph (d) to encompass the general pregnancy nondiscrimination standard rather than the specific PDA standard.

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

The proposed rule added a section on national origin discrimination. Proposed § 38.9(a) stated 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 explained that 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 group, even if they are not."

*Comment:* Several commenters, including advocacy organizations and a professional association, expressed general support for the provisions prohibiting discrimination on the basis of national origin, including limited English proficiency. However, several advocacy organizations recommended that the proposed rule be revised to explicitly state that denial of services based on an individual's limited English proficiency may constitute impermissible national origin discrimination. These commenters argued that this change to the regulatory text was necessary to clarify that recipients are subject to Title VI's prohibitions against national origin discrimination affecting LEP individuals, as reflected in current Title VI case law, as well as guidance from CRC and from the Department of Justice. Furthermore, these commenters stated that their proposed revision is particularly important in light of the current severe underrepresentation of

LEP individuals in Title I job training programs and the significant language access violations that CRC's compliance reviews have revealed.

*Response:* CRC agrees with the commenters' recommendation that, in addition to CRC's statement in the preamble, § 38.9(a) should explicitly include the legal prohibition of national origin discrimination affecting LEP individuals. Consistent with Title VI case law and the DOL and DOJ guidance on ensuring equal opportunity and nondiscrimination for individuals who are LEP<sup>208</sup> § 38.9(a) now more clearly provides that discrimination against individuals based on their limited English proficiency may be unlawful national origin discrimination. As the proposed rule set forth, 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 Federal financial assistance."<sup>209</sup> Indeed, the Supreme Court in *Lau v. Nichols* 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 and its regulations.<sup>210</sup> 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.<sup>211</sup> As a result, the proposed rule indicated that the definition of national origin discrimination includes discrimination

<sup>208</sup> See DOJ LEP Guidance, *supra* note 23; DOL LEP Guidance, *supra* note 28, at 32291.

<sup>209</sup> 42 U.S.C. 2000d.

<sup>210</sup> 414 U.S. 563, 568–69 (1974).

<sup>211</sup> See, e.g., *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1116–17 (9th Cir. 2009) (recognizing a long history of interpreting discrimination against LEP individuals as discrimination on the basis of nation origin); *United States v. Maricopa Cnty.*, 915 F. Supp. 2d 1073, 1079 (D. Ariz. 2012) ("[L]ongstanding case law, federal regulations and agency interpretation of those regulations hold language-based discrimination constitutes a form of national origin discrimination under Title VI."); *Faith Action for Cmty. Equity v. Hawaii*, No. 13–00450 SOM/RLP, 2014 WL 1691622, at \*14 (D. Haw. Apr. 28, 2014) ("The foreseeable disparate impact of the English-only policy, the allegedly pretextual justifications for the English-only policy, and the potentially derogatory comments made and the attitude allegedly shown by HDOT officials suffice to make Plaintiffs' claims plausible."); *Nat'l Multi Hous. Council v. Jackson*, 539 F. Supp. 2d 425, 430 (D.D.C. 2008) ("Longstanding Justice Department regulations also expressly require communication between funding recipients and program beneficiaries in languages other than English to ensure Title VI compliance.").

based on limited English proficiency but failed to make that explicit in § 38.9(a).

CRC now adds "including limited English proficiency" to § 38.9(a), consistent with guidance issued by CRC in 2003 advising all recipients of federal financial assistance from the Department of Labor<sup>212</sup> of the Title VI prohibition against national origin discrimination affecting LEP individuals.<sup>213</sup> This 2003 DOL 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.<sup>214</sup> Executive Order 13166 further directs that all such guidance documents be consistent with the compliance standards and framework detailed in the DOJ Policy Guidance titled "Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency."<sup>215</sup> Thus, for the reasons stated in the preamble to the proposed rule, and in consideration of the comment, we have added "including limited English proficiency" at the end of the first sentence of § 38.9(a).

*Comment:* In contrast, one State labor agency opposed including limited English proficiency in the description of what constitutes national origin discrimination, and objected that the proposed rule appeared to create a new category of national origin discrimination based on an individual's language of choice. The commenter asserted that *Lau v. Nichols*,<sup>216</sup> the principal case upon which CRC relies to justify these changes, is of questionable validity because it was abrogated in part by *Alexander v. Sandoval*.<sup>217</sup> Additionally, the commenter asserted that the proposed insertion of the phrase "including limited English proficiency" would be an inappropriate use of rulemaking authority because it would elevate to a statutory level language that does not exist in the United States Code.

*Response:* We disagree with the commenter's assertion calling into question the precedential value of *Lau* in light of *Sandoval*. CRC has already addressed this very issue in its 2003 DOL LEP Guidance.<sup>218</sup> There, we agreed

<sup>212</sup> In this instance, the term "recipient" is broader than the definition at § 38.4(zz). See notes 13–17 and accompanying text for an explanation of the term "recipient" with respect to WIOA Title I programs and activities.

<sup>213</sup> DOL LEP Guidance, *supra* note 28, at 32290.

<sup>214</sup> 65 FR 50121, Aug. 16, 2000.

<sup>215</sup> 65 FR 50123, Aug. 16, 2000.

<sup>216</sup> 414 U.S. 563 (1974).

<sup>217</sup> 532 U.S. 275 (2001).

<sup>218</sup> DOL LEP Guidance, *supra* note 28, at 32292.

with DOJ's determination that *Sandoval* did not overturn *Lau* with respect to the Title VI obligation to provide meaningful access to LEP individuals.<sup>219</sup> Instead, *Sandoval* principally held that there is no private right of action to enforce Title VI disparate impact regulations.<sup>220</sup> We stated in our DOL LEP Guidance that, in consideration of *Sandoval*'s impact, we would continue to strive to ensure that federally assisted programs and activities work in a way that is effective for all eligible beneficiaries, including those with limited English proficiency.<sup>221</sup> The same conclusion applies here.

The sole question in *Sandoval* was "whether private individuals may sue to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964."<sup>222</sup> The Supreme Court concluded that "private parties may not invoke Title VI regulations to obtain redress for disparate-impact discrimination because Title VI itself prohibits only intentional discrimination."<sup>223</sup> The decision in *Sandoval* specifically declined to address "whether the DOJ regulation was authorized by § 602, or whether the courts below were correct to hold that the English-only policy had the effect of discriminating on the basis of national origin."<sup>224</sup> *Sandoval* did not address DOJ's authority to enforce the Title VI disparate impact regulations or the lower court decisions that an English-only policy had the effect of discriminating on the basis of national origin.<sup>225</sup> *Sandoval* did not overturn *Lau*'s holding that "[l]anguage-based discrimination can constitute a form of national-origin discrimination under Title VI."<sup>226</sup>

CRC also disagrees with the commenter's assertion that including limited English proficiency in the rule would be an inappropriate use of rulemaking. It is well established that policies and practices that deny LEP individuals meaningful access to federally funded programs and activities

may constitute unlawful national origin discrimination.<sup>227</sup> Agencies must ensure that recipients of their federal financial assistance do not directly or indirectly discriminate against LEP individuals. To ensure they do not discriminate against LEP individuals, recipients must identify the appropriate language in which to provide language access services for each LEP individual. Therefore, CRC believes the term "preferred language" captures information that is relevant to serving LEP individuals, and notes that term is also used by States with language access laws.<sup>228</sup> The commenter did not suggest an alternative term, but objected based upon the commenter's reading of *Lau* and *Sandoval*. As explained already, we disagree with the commenter's view of the case law on this issue. Thus, CRC declines to make any regulatory modifications based on the commenter's assertions.

Proposed § 38.9(b) adopted a well-established principle under Title VI of the Civil Rights Act of 1964 by requiring that recipients of federal financial assistance take reasonable steps to provide meaningful access to each LEP individual whom they serve or encounter. CRC acknowledged in the preamble to the proposed rule that its LEP guidance long has employed "four factors" when assessing the effectiveness of a recipient's steps to ensure meaningful access: (1) The number or proportion of LEP persons served or encountered in the eligible service population; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the recipient; and (4) the resources available to the recipient and costs.<sup>229</sup> CRC invited

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 comments and our responses regarding § 38.9(b) are set forth below.

*Comment:* One State labor agency recommended that, rather than leaving it to CRC to decide on appropriate factors on a case-by-case basis, the "four factors" test should be retained for purposes of assessing a recipient's LEP compliance. The commenter asserted that the "four factors" test should be retained because it has been the rule for more than two decades and discarding it would create ambiguity leading to unnecessary legal disputes between recipients and CRC.

*Response:* We disagree with the commenter's characterization that declining to list the "four factors" analysis in § 38.9 will create ambiguity and lead to unnecessary legal disputes between recipients and CRC. Thus, this final rule does not include the four factors in regulatory text, instead outlining the general rule that the obligation of a recipient is to provide meaningful access in the form of language assistance of some type. We believe a formulaic analysis detracts from the application of the general rule, as well as from the primary weight to be placed on the nature and importance of the program or activity. Recipients should, and CRC will, review each situation based on the facts presented. The principle that recipients must take reasonable steps to provide meaningful access for each LEP individual to Title I programs and activities also existed under WIA.

In consideration of this comment, CRC reviewed its LEP enforcement cases and determined that CRC has never found a recipient in violation for failing to perform the four factors analysis. Rather, recipients have been found in violation only when they fail to take reasonable steps to provide meaningful access. Additionally, while we recognize that the decision not to incorporate the four factors into the regulatory text may suggest a change from DOL LEP Guidance, the four factors and the DOL LEP Guidance may still be used as relevant guidelines for recipients. In Title VI, Congress delegated "to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant

<sup>219</sup> *Id.* at 32292–93.

<sup>220</sup> *Id.* at 32293 and note 1; *Sandoval*, 532 U.S. at 278.

<sup>221</sup> DOL LEP Guidance, *supra* note 28, at 32292.

<sup>222</sup> *Sandoval*, 532 U.S. at 278.

<sup>223</sup> *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005).

<sup>224</sup> *Id.* at 279.

<sup>225</sup> *Id.*

<sup>226</sup> *J.D.H. v. Las Vegas Metro. Police Dep't*, No. 2:13–CV–01300–APG, 2014 WL 3809131, at \*4 (D. Nev. Aug. 1, 2014), citing *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1116–17 (9th Cir. 2009), *abrogated on other grounds by Sandoval*, 532 U.S. 275 (2001) ("discrimination against LEP individuals was discrimination based on national origin in violation of Title VI").

<sup>227</sup> See *supra* notes 24–26 and accompanying text.

<sup>228</sup> For example, 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, Sept. 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?" DC Government Employment Intake Questionnaire Form, available at <http://dcforms.dc.gov/webform/employment-intake-questionnaire-form>. 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. Cal. Dep't of Human Res., Bilingual Services Program, available at <http://www.calhr.ca.gov/state-hr-professionals/Pages/Bilingual-Services.aspx>. See also Haw. Rev. Stat. sections 371–31 to –37.

<sup>229</sup> See DOL LEP Guidance, *supra* note 28, at 32293–95.

altering the practices of the federal grantees that had produced those impacts.”<sup>230</sup> Despite the four factors’ absence from the rule, CRC will consider a number of relevant factors, including the “four factors,” based upon the facts presented in each case.

To provide guidance to recipients on our intended interpretation of § 38.9(b), the following preamble discussion sets forth a range of factors that may be relevant in any given case, regarding the requirement to take reasonable steps to provide meaningful access to services provided. Recipients must take reasonable steps to provide meaningful language access service to each LEP individual encountered. Based upon CRC’s experience reviewing and enforcing compliance with LEP language access requirements, factors that CRC may consider in determining compliance regarding the appropriate level of LEP services include, but are not limited to: The nature and importance of the program, activity, or service provided by the recipient, including the nature and importance of the particular communication at issue (this factor is to be given primary weight); the length, complexity, and context of the communication; the number or proportion of LEP persons served or encountered in the eligible service population; the frequency with which LEP individuals come in contact with the program; the prevalence of the language in which the individual communicates among those eligible to be served or likely to be encountered by the program or activity; the frequency with which a recipient encounters the language in which the individual communicates; whether a recipient has explored the individual’s preference, if any, for a type of language assistance service, as not all types of language assistance services may work as well as others in providing an individual meaningful access to the recipient’s program or activity; the cost of language assistance services and whether a recipient has availed itself of cost-saving opportunities; all resources available to the recipient, including its capacity to leverage resources within and without its organizational structure, or to use its negotiating power to lower the costs at which language assistance services could be obtained; and whether the recipient has taken the voluntary measure of developing a language access plan.<sup>231</sup> With the exception of the

nature and importance of the program or activity, we decline to assign a particular weight to any specific relevant factor. Instead, recipients should, and CRC will, consider and weigh all relevant factors, on a case-by-case basis, when determining whether recipients have taken reasonable steps to provide meaningful access to LEP individuals.

Thus, as proposed, CRC will not include the “four factor” analysis in the regulatory text of the final rule.<sup>232</sup>

*Comment:* A few commenters requested clarification of the requirements proposed in § 38.9(b). A State agency asked what specific actions recipients will be required to take to satisfy the requirement to take “reasonable steps” to ensure meaningful access to LEP individuals. The commenter also asserted that the proposed rule fails to provide the necessary detail clarifying how many LEP individuals must be “served and encountered” to trigger the requirement that the recipient take these reasonable steps, and stated that the final rule should set a reasonable number of “encounters” or percentage of population served that communicate in a certain manner before requiring a recipient to have procedures in place to satisfy that population’s specific needs.

*Response:* We recognize the commenters’ concerns that the proposed rule does not provide detail with respect to “served or encountered” but we decline to modify this provision. Recipients must take reasonable steps to provide meaningful access to *each* LEP individual. CRC recognizes that providing a specific number to trigger certain translation obligations, or detailing specific actions to take in all cases, could appear to benefit some recipients in meeting their obligations under this part, but it could also make compliance difficult for a small recipient or be wholly inapplicable to another.

This provision is intended to be a flexible standard specific to the facts of each situation. Providing additional specificity, at least in the final rule, would apply rigid standards across-the-board to all recipients and thus jeopardize that very goal. As discussed above, in evaluating the scope of a recipient’s obligations to provide meaningful access, recipients should, and CRC intends to, give substantial

similar factors that may be relevant in any given LEP language access case).

<sup>232</sup> This is consistent with HHS’s approach in its recent final rule. See HHS Nondiscrimination Final Rule, *supra* note 18, at 31415–16 (listing range of relevant factors in preamble that may be considered although not listed in regulatory text).

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. CRC will also consider any other relevant factors on a case-by-case basis, as described above. CRC intends to provide technical assistance to the workforce system on the requirement to take reasonable steps to provide meaningful access for LEP individuals and will update and/or issue tools to assist recipients to facilitate compliance.

For all of the foregoing reasons, and in consideration of the comments, regulatory modifications are unnecessary to address the commenters’ concerns.

*Comment:* A State labor agency asked for clarification on the meaning of “appropriate non-English language” within § 38.9(b)(2)(i) and (ii), including specification of whether it means something other than a threshold. The commenter asserted that if it meant something other than languages meeting the threshold of 5 percent or 1,000 individuals, then the requirements of these sections are cost prohibitive and unreasonable.

*Response:* The text “appropriate non-English” language in § 38.9(b)(2)(i) and (ii) does not, as the commenter asks, mean a threshold. The use of “appropriate” here is not meant to be a test by which recipients determine whether to provide meaningful access; it simply refers to the language, other than English, that is being translated.

*Comment:* Several advocacy organizations commented that the draft regulations do not provide sufficient direction to recipients to ensure that they are not only effectively providing information to LEP individuals but also providing meaningful access to LEP individuals to participate in programs or activities under Title I. These commenters recommended that the “and/or” in § 38.9(b) be replaced with “and” to ensure that recipients are required to take reasonable steps to inform LEP individuals about Title I programs and activities and to facilitate their participation in such programs and activities. These advocacy organizations also recommended that the final regulations be expanded to include additional guidance on the reasonable steps that recipients must take to ensure that LEP individuals are afforded meaningful access to Title I programs and activities, including adding the following examples of a reasonable method to § 38.9(b)(2): “Programming that simultaneously provides English language training with vocational or

<sup>230</sup> *Alexander v. Choate*, 469 U.S. 287, 293–94 (1985) (discussing *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582 (1983)).

<sup>231</sup> See also HHS Nondiscrimination Final Rule, *supra* note 18, at 31415–16 (listing a range of

other workforce training to limited English proficient individuals (integrated education and training).”

*Response:* CRC believes that regulatory modifications are unnecessary to address the commenters’ concerns because the use of “and/or” does not relieve a recipient of its obligation to provide meaningful access to individuals who are LEP. We also believe § 38.9 does provide sufficient direction to recipients regarding the provision of meaningful access to LEP individuals to participate in Title I programs and activities, and that no further examples of reasonable steps to ensure meaningful access need be provided in the regulatory text. However, as noted above, CRC intends to provide technical assistance to the workforce system on the requirement to take reasonable steps to provide meaningful access for LEP individuals and will update and/or issue tools to assist recipients to facilitate compliance. Recipients may submit technical assistance requests to CRC at [civilrightscenter@dol.gov](mailto:civilrightscenter@dol.gov).

We note that § 38.9(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; section 38.9(d) specifies that any language assistance services, whether oral interpretation or written translation, must be provided free of charge and in a timely manner; and § 38.9(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. Moreover, we decline to add the suggested example from the commenter to the regulation text: “Programming that simultaneously provides English language training with vocational or other workforce training to limited English proficient individuals (integrated education and training).” The appendix to § 38.9 (Illustrative Applications in Recipient Programs and Activities, Ex. 3) already provides an example that explains that, depending upon the circumstances, an English language class could be offered before, or at the same time as, a training program, but should not be offered instead of the training program.

Proposed § 38.9(c) made 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 ensures that, as recipients convert to online delivery systems, language access is not lost in the transition. CRC received no comments on this provision and adopts it without change in the final rule.

Proposed § 38.9(d) specified that any language assistance services, whether oral interpretation or written translation, must be provided free of charge and in a timely manner. CRC received no comments on this provision and adopts it without change in the final rule.

Proposed § 38.9(e) stated that 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. The provision would ensure that LEP individuals are aware that they do not have to navigate WIOA Title I programs and activities unassisted, or at their own expense. CRC received no comments on this provision and adopts it without change in the final rule.

Proposed § 38.9(f) stated that a recipient will not require LEP individuals to provide their own interpreters and identified restrictions on the use of certain persons to provide language assistance services for an LEP individual. Proposed paragraphs (f)(1) and (2) identified the narrow and finite situations in which a recipient may rely on an adult or a minor child accompanying an LEP individual to interpret. CRC received one comment on § 38.9(f). The comment and response are set forth below.

*Comment:* An advocacy organization asserted that it is never appropriate for an “accompanying adult” to be asked to provide communication access for LEP individuals and recommended that § 38.9 be revised to include an affirmative obligation to provide interpreters. Furthermore, the commenter recommended that a provision be added to § 38.9 creating an obligation to provide for a qualified sign language (ASL) interpreter or other reasonable accommodation for individuals who are deaf.

*Response:* CRC believes that § 38.9(f) provides sufficient guidance to allow recipients to strike the proper balance between the many situations where the use of informal interpreters is inappropriate and the few situations where the limited use of “an accompanying adult” is necessary and appropriate in light of the nature of a service or benefit being provided and

the factual context in which the interpretation is being provided. This provision allows the LEP individual to rely on an adult of their own choosing, but requires the recipient, after offering an interpreter, to document that choice so that there can be no question regarding the voluntariness of the choice of interpreter. Proposed paragraph (f)(3) outlines that, 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 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 the individual’s own interpreter as well. Thus, CRC declines to make any modification to § 38.9(f).

Regarding the comment suggesting the ASL interpreter, providing a sign language interpreter is specifically covered under the obligation to provide auxiliary aids and services to individuals with disabilities (§ 38.15), not the obligation to provide services to individuals with limited English proficiency. For this reason, CRC declines to make the suggested changes.

In the proposed rule, § 38.9(g) addressed recipients’ LEP requirements as to vital information. Section 38.9(g)(1) provided 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 vital information these training materials contain can be provided to LEP participants by oral interpretation, summarization during the training program itself, or other reasonable steps. However, recipients must still take reasonable steps to ensure meaningful access to training programs as stated in paragraph (b) of this section.

In the proposed rule, § 38.9(g)(2) required that, “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 encountering any specific LEP individual. Recipients are, however, required to take reasonable steps, including oral translation, to provide access to vital information, once an LEP individual seeks to learn about, participate in, and/or access a WIOA Title I program or activity.

Proposed § 38.9(g)(3) stated 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.

The comments and our responses regarding § 38.9(g)(1)–(3) are set forth below.

*Comment:* Although eliminating the requirement to translate vital information was the commenter’s preference, a State government agency urged CRC to, at the very least, add more flexibility for recipients to provide vital information through means other than hard copy and electronic written forms. This commenter directed CRC to existing guidance, which the commenter described as sufficient and as providing flexibility to recipients who do not have the means to keep and create both hard copy and electronic translations of vital information contained in written form. Furthermore, the commenter asserted that the translation requirements would divert funding currently being used to meet other modernization efforts (*e.g.*, the move to online automated systems).

*Response:* Contrary to the commenter’s belief, recipients do in fact have flexibility to translate into either hard copy or electronic form. CRC believes that proposed § 38.9(g) does provide that flexibility. The rule requires recipients to translate vital information in written materials into certain languages and make the translations readily available in hard copy, upon request, or electronically such as on a Web site. The intentional use of the word “or” allows recipients flexibility. CRC expects, however, that the availability and/or provision of translated vital information to LEP individuals will be comparable to that afforded to non-LEP individuals. CRC also cautions that the use of a Web site and web-based technology as the sole or primary way for individuals to obtain information may have the effect of denying or limiting access to LEP individuals and members of other protected groups, apart from LEP

individuals, in violation of federal nondiscrimination law.<sup>233</sup>

With respect to the commenter’s concern that the requirement would divert funds from other modernization efforts, CRC is sensitive to the budgetary demands on recipients. CRC recommends that readers consult longstanding guidance about taking reasonable steps to ensure meaningful access to vital information and other aspects of programs and activities.

In 2002, the DOJ LEP Guidance explained that determining “[w]hether or not a document (or the information it solicits) is ‘vital’ may depend upon the importance of the program, information, encounter, or service involved, and the consequence to the LEP person if the information in question is not provided accurately or in a timely manner.”<sup>234</sup> Similarly, the DOL LEP Guidance tracked the DOJ Guidance as to vital document translation.<sup>235</sup> To facilitate the process, “recipients are encouraged to create a plan for consistently determining, over time and across its various activities, what documents are ‘vital’ to the meaningful access of the LEP populations they serve.”<sup>236</sup> The 2002 DOJ LEP Guidance also explained the importance of “pooling resources and standardizing documents to reduce translation needs, using qualified translators and interpreters to ensure that documents need not be ‘fixed’ later and that inaccurate interpretations do not cause delay or other costs, [as well as] centralizing interpreter and translator services to achieve economies of scale . . . [which] may help reduce costs.”<sup>237</sup> Recipients were directed to “carefully explore the most cost-effective means of delivering competent and accurate language services before limiting services due to resource concerns. Large entities and those entities serving a significant number or proportion of LEP persons should ensure that their resource limitations are well-substantiated before using this factor as a reason to limit language assistance.”<sup>238</sup> Some recipients may

have taken greater strides in meeting their LEP requirements over the last 14 years; all recipients should have current plans, including budgetary plans, in place to meet these requirements. CRC is available to provide technical assistance to the workforce system on the requirement to take reasonable steps to provide meaningful access for LEP individuals and will update and/or issue tools to assist recipients to facilitate compliance.

*Comment:* A State labor agency recommended against the requirements of § 38.9(g) unless the partner is colocated within a one-stop center.

*Response:* In response to one State labor agency’s recommendation to delete § 38.9(g) unless the partner is colocated within a one-stop center, we decline the recommendation but provide broader context for the commenter regarding the obligations of recipients. One-stop partners, as defined in section 121(b) of WIOA, are recipients for purposes of this rule 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. One-stop centers are not just a physical location, but may include a larger electronic network. Recipients, including one-stop partners, regardless of location, must translate vital information in accordance with § 38.9(g). Written training materials offered or used within employment-related training programs as defined under § 38.4(t) are excluded but recipients must take reasonable steps to ensure meaningful access for LEP individuals as stated in § 38.9(b). Thus, CRC declines to make any regulatory modifications.

*Comment:* A State agency emphasized the importance of defining “standardized documents” to clarify the scope of the translation requirement. The commenter proposed that the term “standardized documents” be defined to mean “static documents that are not unique to a case.” Additionally, the commenter noted that it would be reasonable to include the standard elements of documents that may also contain unique, targeted, or dynamic

<sup>233</sup> See U.S. Dep’t of Labor, Emp’t & Training Admin., Unemployment Insurance Program Letter No. 02–16, State Responsibilities for Ensuring Access to Unemployment Insurance Benefits (Oct. 1, 2015), available at [http://wdr.doleta.gov/directives/attach/UIPL/UIPL\\_02-16.pdf](http://wdr.doleta.gov/directives/attach/UIPL/UIPL_02-16.pdf).

<sup>234</sup> DOJ 2002 LEP Guidance, *supra* note 23, at 41463.

<sup>235</sup> DOL 2002 LEP Guidance, *supra* note 28, at 32298.

<sup>236</sup> DOJ 2002 LEP Guidance, *supra* note 23, at 41463; DOL LEP Guidance, *supra* note 28, at 32298.

<sup>237</sup> DOJ 2002 LEP Guidance, *supra* note 23, at 41460.

<sup>238</sup> *Id.*; *Colwell v. Dep’t of Health & Human Servs.*, 558 F.3d 1112, 1129 (9th Cir. 2009) (holding

recipients’ allegations “that they are spending money on language assistance” was “insufficient” to establish a hardship); *Sandoval v. Hagan*, 7 F. Supp. 2d 1234, 1312 (M.D. Ala. 1998) (holding recipient cannot establish a substantial legitimate cost concern under Title VI to cease the translation of exams into foreign languages when the recipient has a budget of over \$50 million and such translations costs would be “trifling” in comparison), *aff’d*, 197 F.3d 484 (11th Cir. 1999); *rev’d* on other grounds, *Alexander v. Sandoval*, 532 U.S. 275 (2001).

information (e.g., representative versions of common correspondence).

*Response:* We agree that “vital information in written materials,” as discussed in § 38.9(g)(1), may include standard language in certain documents, for example, template language in a benefits letter requesting a response from the beneficiary. However, we decline the commenter’s recommendation to define “standardized documents” because the term is self-explanatory. We also note that the translation requirement regarding vital information in written materials is not necessarily limited to standardized documents (or standard language in standard documents), contrary to the commenter’s suggestion in defining that term. For example, recipients are required to translate vital information in case-specific documents in certain circumstances, such as documents containing decisions about benefits or appeal rights. Of course, recipients could not and are thus not required to translate vital information in case-specific documents prior to the time of issuance as the contents of such communications cannot be discerned in advance.

*Comment:* A State agency asked CRC to clarify whether the Babel notice must be translated as a vital document because previous communications with CRC indicated otherwise.

*Response:* Proposed § 38.9(g)(3) required recipients to 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. The definition of “Babel notice” in § 38.4(i) clarifies that the notice must be in “multiple languages.” This requirement ensures 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. Accordingly, consistent with its definition and like other vital information, the Babel notice must be translated into multiple languages. We appreciate the commenter’s concern that CRC should ensure that all communications with respect to this requirement are consistent with the final rule. While we are unaware of any communications with recipients that contradicted these requirements, recipients should rely upon the requirements of §§ 38.9(g)(3) and 38.4(i) going forward.

*Comment:* Several advocacy organizations strongly disagreed with the exclusion provided in the translation requirement for training

materials, reasoning that recipients should be required to create an environment in which LEP individuals can participate in training programs, not simply receive information about the available opportunities. A union recommended that CRC provide funding for the costs of translating training materials for LEP individuals, rather than exclude them from the translation requirement.

*Response:* CRC appreciates the commenters’ concern regarding translation of training materials for employment-related training programs. In deciding not to adopt the commenters’ suggestion, and to keep the regulatory exception for such training materials, CRC considered that translation of written training materials may be challenging for training providers for a number of reasons, including the variety, size, and technical nature of training materials, and the cost of written translation services. CRC believes that recipients can take reasonable steps to provide meaningful access to employment-related training programs without translating written training materials. The vital information these materials contain can be provided to LEP participants by oral interpretation or summarization during the training program itself or other steps outlined in the regulation text and the appendix to the regulation. Of course, recipients retain the option of translating training materials if they wish to do so.

The final rule does not preclude recipients from translating training materials, and for purposes of cost, from using economies of scale to share translation materials and provide greater access than what is required under this rule. The DOJ’s 2002 LEP Guidance explained the importance of “pooling resources and standardizing documents to reduce translation needs, using qualified translators and interpreters to ensure that documents need not be ‘fixed’ later and that inaccurate interpretations do not cause delay or other costs, [and] centralizing interpreter and translator services to achieve economies of scale . . . [which] may help reduce costs.”<sup>239</sup> As noted above, recipients were directed to “carefully explore the most cost-effective means of delivering competent and accurate language services before limiting services due to resource concerns. Large entities and those entities serving a significant number or proportion of LEP persons should ensure that their resource limitations are

well-substantiated before using this factor as a reason to limit language assistance.”<sup>240</sup> Thus, regulatory modifications are unnecessary, and we note that providing funding for specific translation projects is beyond the scope of this rule.

In the preamble to proposed § 38.9, CRC also discussed thresholds which would trigger a requirement to translate standardized vital documents into particular languages. In the proposed rule, CRC gave examples for consideration of thresholds 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 percent 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., languages spoken by at least 5 percent of LEP individuals or 1,000 LEP individuals, whichever is lower). CRC sought 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 were recommended, CRC also sought comment on the time that should be allowed for recipients to come into compliance with the threshold(s), including whether this regulation should permit recipients to implement their obligations with a phased-in approach.

*Comment:* Without making a particular recommendation about the appropriate threshold, a State labor agency described relevant portions of the 2003 DOL LEP Guidance that the commenter thought CRC should consider, including examples incorporated from DOJ’s LEP Guidance in 2002. The commenter noted that the DOL LEP Guidance did not specifically define what is “a significant number or portion” of an LEP population, but it did describe the safe harbor provisions from the DOJ 2002 LEP Guidance, which the commenter asserted were reasonable; provided tangible guidelines for recipients; and specified that “strong evidence of compliance” exists where “[t]he DOJ recipient provides written translation of vital documents for each eligible LEP language group that constitutes five percent or 1,000, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered.”<sup>241</sup> The commenter also stated that the existing DOL LEP Guidance explains that when

<sup>240</sup> *Id.*

<sup>241</sup> DOL LEP Guidance, *supra* note 28, at 32290 (quoting DOJ LEP Guidance).

<sup>239</sup> DOJ 2002 LEP Guidance, *supra* note 23, at 41460.

a recipient is determining whether a particular language should be subject to the translation requirement, “it is also advisable to consider the frequency of different types of language contacts” and that resources available to the recipient and costs are legitimate considerations.<sup>242</sup> The commenter objected that the proposed rule failed to address these provisions.

*Response:* CRC declines to adopt a safe harbor provision in the final rule. As discussed above, after considering the comments on the proposed rule, CRC believes that providing a specific, inflexible standard to trigger translation obligations may make compliance difficult for a small recipient or be wholly inapplicable to another.

CRC agrees with the commenter that a number of relevant factors should be considered when evaluating a recipient’s compliance with § 38.9(g). As discussed regarding § 38.9(b), CRC will consider all relevant factors (on a case-by-case basis) when evaluating whether a recipient has provided meaningful access for LEP individuals generally, and when evaluating whether the recipient has translated vital information into appropriate languages more specifically. Primary weight will be given to the nature and importance of the program or activity, but other factors may also be relevant in a particular case, including, as the commenter suggested, the LEP population in the service area, the frequency of different types of language contacts, the resources available, and costs. With regard to costs, as noted above, recipients must “carefully explore the most cost-effective means of delivering competent and accurate language services before limiting services due to resource concerns. Large entities and those entities serving a significant number or proportion of LEP persons should ensure that their resource limitations are well-substantiated before using this factor as a reason to limit language assistance.”<sup>243</sup>

In this regard, both DOL’s and DOJ’s LEP Guidances are useful but must yield in the event that they conflict with the statute or regulations to which they apply.<sup>244</sup> Ultimately, recipients are bound by the obligations set forth in WIOA and this part, and CRC declines

to specifically incorporate the guidance provisions cited by the commenter into this rule for all recipients.

*Comment:* Some commenters recommended that CRC adopt specific numerical thresholds that would trigger the obligation to translate vital documents in advance of encountering any specific LEP individual. Other commenters recommended that CRC adopt no thresholds at all. An individual commenter stated that the establishment of any threshold would result in discrimination because there would be a portion of the population that was not fairly served. Several advocacy organizations recommended that recipients be required to translate vital information in written materials for languages spoken by at least 500 LEP individuals in the service area, or for languages spoken by at least 5 percent of LEP individuals in that area, whichever is lower. A State workforce agency recommended that the threshold be consistent with the “DOJ Civil Rights Policy,” which we believe is a reference to the DOJ LEP Guidance. A State workforce agency recommended that the threshold be set as a percentage of language speakers based on data from the U.S. Census Bureau and the ongoing statistical data collected by the American Community Survey. After asserting that CRC should eliminate the requirement for the translation of vital information, a State agency recommended a threshold based on the percentage of LEP individuals state-wide if a threshold was necessary. The commenter also urged CRC to explicitly exempt State-level information systems and documents from the translation requirement, unless the adopted threshold was based on a percentage of LEP individuals state-wide. A few government agencies urged CRC to eliminate the requirement for the translation of vital information into multiple languages. One commenter recommended that CRC instead allow States to determine the most appropriate translation policy.

A few State agencies asked for clarification of the meaning of “significant number” as it relates to the requirement to translate vital information. Similarly, referencing language in § 38.9(c), one of these State agencies asked how recipients would determine the languages into which they would need to translate documents.

*Response:* Recipients are required to take reasonable steps to provide meaningful language access services for each LEP individual. To ensure equal opportunity for LEP individuals, and to prevent discrimination based on

national origin, CRC declines to eliminate the requirement for the translation of vital information into multiple languages for LEP individuals. Vital information is information that is necessary for an individual to understand in order to obtain, or understand how to obtain, any aid, benefit, service or training. Without such information about WIOA Title I programs, individuals will not have meaningful access to the aid, services, benefits and training those programs provide. As explained above, it is well established that policies and practices that deny LEP individuals meaningful access to federally assisted programs and activities may constitute unlawful national origin discrimination.<sup>245</sup>

Therefore, recipients must take reasonable steps to provide LEP individuals with meaningful access to WIOA Title I programs and activities. While recipients, including States, are not free, as one commenter urged, to determine the most appropriate translation policy without reference to this standard, CRC’s decision to forgo thresholds that trigger advance translation of vital documents allows recipients the flexibility to tailor, to their specific circumstances, the reasonable steps they will take to provide meaningful access to LEP individuals.

Thus, in answer to one commenter’s question about how recipients would determine the languages for which they need to translate documents in advance, CRC recommends that recipients create an LEP Plan by consulting the appendix to § 38.9, the 2003 DOL LEP Guidance, as well as the Department of Justice’s 2011 Language Access Assessment and Planning Self-Assessment Tool for Federally Conducted and Federally Assisted Programs (LEP Tool).<sup>246</sup> The latter resource includes a self-assessment that guides recipients through the process of analyzing demographics in the relevant geographic area; assessing the frequency of contact with LEP individuals; factoring the importance of the services provided by the recipient; and managing resources and costs.

Based on the information gathered through the self-assessment, the LEP Tool provides a roadmap for recipients to create an LEP Plan tailored to their specific circumstances, including a determination of which languages are encountered with sufficient frequency (or are spoken by a significant number

<sup>242</sup> See *id.* at 32294.

<sup>243</sup> DOJ LEP Guidance, *supra* note 23, at 41460.

<sup>244</sup> LEP guidance documents clarify preexisting Title VI responsibilities but do not create new obligations beyond those in the statute and its implementing regulations. See *Colwell v. Dep’t of Health & Human Servs.*, 558 F.3d 1112, 1125 (9th Cir. 2009); *Nat’l Multi Hous. Council v. Jackson*, 539 F. Supp. 2d 425, 431 (D.D.C. 2008).

<sup>245</sup> See *supra* notes 24–26 and accompanying text.

<sup>246</sup> [https://www.lep.gov/resources/2011\\_Language\\_Access\\_Assessment\\_and\\_Planning\\_Tool.pdf](https://www.lep.gov/resources/2011_Language_Access_Assessment_and_Planning_Tool.pdf).

or proportion of the service population that is eligible or likely to be encountered) to require advance translation of vital information. In this way, recipients are more apt to fulfill their obligation to provide meaningful access to their programs and activities in a cost-effective manner.

Indeed, the DOL LEP Guidance issued in 2003 did not specifically define what constitutes a “significant number or proportion of the eligible service population” that would trigger the need to translate vital information into a particular language (in advance of encountering any specific LEP individual) because that number should be measured on a case-by-case basis. The 1999 rule similarly did not define the phrase or adopt a threshold. Although we have extensively considered whether to include thresholds that would trigger advance translation of vital information in written materials, as either a safe harbor or as an across-the-board minimum requirement, we decline to set such thresholds in the final rule.

Although thresholds may improve access for some national origin populations, the approach does not comprehensively effectuate WIOA’s prohibition of national origin discrimination affecting LEP individuals. Setting thresholds would be both under-inclusive and over-inclusive, given the diverse range, type, and sizes of entities covered by Section 188 and the diverse national origin populations within the service areas of recipients’ respective programs and activities. For instance, a threshold requiring all recipients, regardless of type or size, to provide language assistance services in languages spoken by 5 percent of a county’s LEP population could result in the provision of language assistance services in more languages than the entity would otherwise be required to provide under its obligation in § 38.9(g). This threshold would apply regardless of the number of individuals with limited English proficiency who are eligible to be served or likely to be encountered by the recipient’s program or activity and regardless of the recipient’s operational capacity. Similarly, this threshold could leave behind significant numbers of individuals with limited English proficiency served by the recipient’s program or activity, who communicate in a language that constitutes less than 5 percent of the county’s limited English proficient population.

Although some federal regulations set thresholds, those regulations address entities or programs of similar sizes and

types.<sup>247</sup> In comparison, WIOA and this part regulate more diverse types of recipients with potentially more diverse limited English proficient populations. CRC is concerned that significant limited English proficient populations might receive no or inadequate language assistance services under a threshold-based regulation. CRC is also concerned about the burden an across-the-board translation threshold might place on small covered entities.

Moreover, we value the flexibility inherent in this contextualized approach to assess recipients’ compliance with the requirement to take reasonable steps to provide meaningful access for LEP individuals. We thus decline to impose the prescriptive standards recommended by the commenters as inconsistent with this customized regulatory approach.<sup>248</sup>

Finally, we note that even when there is no requirement for advance translation in a particular language, recipients still have a duty to take reasonable steps to provide meaningful language access services to each LEP individual, once encountered, pursuant to § 38.9(g)(2).

*Comment:* Several advocacy organizations recommended establishing a threshold using data at the regulated entity’s service delivery level to determine the appropriate languages into which to translate vital information. The commenters explained that State-level data may not necessarily reflect the wide variations in local communities.

*Response:* CRC acknowledges the commenters’ concern that State-level data are not a perfect solution to capturing the variations in local communities. As set forth above, however, CRC has not adopted specific thresholds. Thus, the commenters’ concern is addressed by § 38.9(g) and regulatory modifications are unnecessary.

*Comment:* Several advocacy organizations recommended that regulated entities be mandated to implement requirements to translate

vital information as soon as possible, at most within a one-year timeframe, reasoning that any delay is a delay in ensuring that job seekers and workers who are LEP have access to Title I services.

*Response:* We requested comments on whether to delay enforcement of translation requirements in the event we required (for the first time) thresholds that trigger the obligation to automatically translate vital information into certain languages. Since we are not implementing such thresholds, but retaining the status quo, there is no need to delay the enforcement of requirements that are already in place. Accordingly, CRC declines to put a timeframe on translating vital documents.

*Comment:* In the proposed rule, CRC sought 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.

A local workforce agency provided information about an existing program in Chicago. Specifically, the commenter stated that the diversity of employees at its one-stop center enables the center staff to provide on-site translation, in addition to utilizing the language services provided by the State-contracted service provider. Additionally, the commenter described the existing procedures in place regarding requests for language services, which enables customers to acquire data upon request from the service provider. The commenter asserted that recipients that provide on-site language services have a reporting process to capture the number of services needed. Finally, the commenter stated that recipients can capture real numbers that address the quantity of services provided by the workforce area by identifying and noting LEP individuals in their database during the registration process.

*Response:* CRC notes that the commenter’s experiences demonstrate that this model is a promising approach for recipients with proper planning and commitment to compliance.

*Comment:* Finally, an advocacy organization recommended that the rule be revised to include certified ASL interpreter services for translation of vital information. The commenter explained this could accommodate the many individuals in the deaf community who feel that they are not adequately supported for success in employment due to the lack of effective communication of vital information.

<sup>247</sup> See 45 CFR 155.205(c)(2)(iii), (iv) (regarding HHS’s regulation of health care exchanges); 26 CFR 1.501(r)–4(b)(5)(ii) (Department of the Treasury’s regulation regarding hospital organizations and financial assistance policies); 7 CFR 272.4(b) (Department of Agriculture’s Supplemental Nutrition Assistance Program).

<sup>248</sup> See HHS Nondiscrimination Final Rule, *supra* note 18, at 31419 (declining to adopt “thresholds for the non-English languages in which covered entities must provide a range of language assistance services” as an approach that “does not comprehensively effectuate” the statutory prohibition of national origin discrimination, and instead adopting a “contextualized approach . . . to assess compliance with the requirement to take reasonable steps to provide meaningful access”).

*Response:* As explained in connection with § 38.15, providing sign language interpretation is specifically covered under the obligation to provide auxiliary aids and services to individuals with disabilities. Communications with individuals with disabilities must be as effective as communications with others. However, § 38.9 does not address access for individuals with disabilities, only the prohibition on national origin discrimination, and § 38.9(g) restates the obligation to provide translated vital information for LEP individuals to ensure meaningful access. For this reason, CRC declines to make the suggested changes.

CRC therefore adopts § 38.9(g) as proposed, except for two technical corrections: Changing “make” to “take” in paragraph (g)(1) and, in paragraph (g)(2), for consistency with the definition of “Babel notice,” specifying that the Babel notice must indicate in multiple languages that language assistance is available.

CRC received no comments on proposed § 38.9(h) and adopts it in the final rule without modification.

Proposed § 38.9(i) provided that recipients should develop a written language access plan to ensure LEP individuals have meaningful access to their programs and activities, and references the appendix to § 38.9 where CRC has provided guidance to recipients on developing a language access plan.

*Comment:* Noting the use of the word “should” in § 38.9(i), a State agency asked whether a language access plan was required or recommended. And, if required, the commenter asked for clarification on the required contents of the plan.

*Response:* CRC’s use of the word “should” is intentional. Developing a language access plan is not a requirement, but may be considered as a relevant factor among others when analyzing whether a recipient has afforded LEP individuals meaningful access to programs and activities under WIOA Title I and this part. CRC recognizes that a recipient may wish to conduct thorough assessments of its language assistance needs and 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 encounters LEP individuals. The appendix to § 38.9 provides detailed

guidance to recipients on developing a language access plan.

In the appendix to § 38.9, CRC makes the following technical edits: In the first sentence of the appendix, adding the word “meaningful” to match the language access standard as described above; in the first sentence of example 1, referring to the final rule instead of the proposed rule and changing “its” to “their” to correct a grammatical error, and in the first sentence of example 2, changing “on” to “as to” for the sake of clarity.

#### Summary of Regulatory Changes

For the reasons set forth above and in the NPRM, and considering the comments received, CRC finalizes § 38.9 as follows: CRC adopts § 38.9(a) as proposed but adds the words “including limiting English proficiency” at the end of the first sentence. CRC finalizes proposed § 38.9(b)–(f) without modification. CRC finalizes § 38.9(g) as proposed, with the exception of two technical changes; revising “make” to “take” in the first sentence of paragraph (g)(2) and clarifying that the Babel notice must be in multiple languages. CRC adopts proposed § 38.9(h) and (i) without modification.

#### Harassment Prohibited § 38.10

CRC proposed a new § 38.10 to provide additional direction for the existing obligation to prevent harassment because of all bases protected by WIOA Section 188 and this part. Most commenters providing input on this issue supported the proposed provision. An advocacy organization specifically supported the addition of harassment based on age.

Proposed § 38.10(b) defined harassment because of sex under WIOA broadly to include 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 is because of sex or where one sex is targeted for the harassment. CRC received comments supporting, opposing, and recommending modifications to this paragraph.<sup>249</sup>

*Comments:* Several commenters commended CRC’s recognition of sex-based harassment as a form of sex discrimination. For example, an

<sup>249</sup> In addition to the comments described in the text, CRC received comments supporting and opposing the inclusion in § 38.10(b) of gender identity and sexual orientation. For the same reasons as discussed previously in the main preamble and in connection with the definition of “sex” in § 38.7(a), CRC retains gender identity in this provision as proposed and declines to add sexual orientation.

organization representing tradeswomen noted that sexual harassment “is a serious impediment to women’s success in nontraditional jobs and job training.” That commenter urged CRC to require training program providers to incorporate a sexual harassment prevention policy and training into the training program curriculum, especially in programs that train for male-dominated jobs. Both the women in trades organization and the coalition of eighty-six women’s, workers’, and civil rights organizations further suggested that CRC clarify the circumstances under which recipients are obligated to prevent and remedy sexual harassment by specific parties, such as fellow program participants, coworkers, and supervisors.

*Response:* With regard to sexual harassment prevention policies and training, CRC agrees that recipients should, as a best practice, foster an environment in which all individuals feel safe, welcome, and treated fairly by developing and implementing procedures to ensure that individuals are not harassed because of sex. However, it is beyond the scope of this rule to impose a categorical requirement in regulatory text that all recipients take these steps. Therefore, CRC declines to make the suggested changes.

CRC also declines to expand § 38.10(b) to address recipients’ liability for various parties’ sexual harassment. To do so would require incorporation of principles of tort and agency law into the final rule, which CRC believes is not necessary. CRC recognizes and follows the principles of liability for harassment established by the Department of Education’s Title IX guidance documents<sup>250</sup> and by Title VII and Title IX case law.<sup>251</sup>

CRC makes a technical change to § 38.10(b). As proposed, the regulatory text may have been unclear that harassment based on gender identity and harassment based on failure to comport with sex stereotypes can be independent forms of harassment because of sex. Therefore, in the final rule, the two are listed individually and separated by a semicolon. CRC intends

<sup>250</sup> See, e.g., U.S. Dep’t of Educ., Office for Civil Rights, Dear Colleague Letter: Sexual Violence (Apr. 4, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; Revised Sexual Harassment Guidance, *supra* note 63.

<sup>251</sup> Relevant Title IX cases include *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), and *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998). Relevant Title VII cases include *Vance v. Ball State University*, 133 S. Ct. 2434 (2013); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

no substantive change by making this revision.

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

The proposed rule added 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 the final rule. CRC will enforce this provision consistent with other federal agencies’ interpretations of their federal statutory eligibility requirements.

*Comment:* A professional association supported expansion of antidiscrimination provisions regarding ethnicity to cover citizenship status and national origin, including limited English proficiency. The commenter stated that these changes recognize the full diversity of the U.S. workforce. Several advocacy organizations agreed that the prohibition on discrimination based on citizenship status provides greater clarity to recipients about the protection for certain noncitizens. The commenters were particularly supportive of the inclusion of individuals, such as those with work authorization through the Deferred Action for Childhood Arrivals initiative, who the commenters asserted are eligible for services under Title I and who should be protected from discrimination in the provision of these services. An individual commenter, however, argued that non-citizens should not be granted equal opportunities and equal status as citizens.

*Response:* With respect to the bases of citizenship and national origin, WIOA Section 188(a)(5) expressly protects the right of 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 to work in the United States to participate in WIOA Title I programs and activities without being subjected to discrimination.<sup>252</sup>

<sup>252</sup> 29 U.S.C. 3248(a)(5). Although Section 188(a)(5) refers to the Attorney General, § 38.11 refers instead to the Secretary of Homeland Security because Congress transferred the authority to authorize aliens to work from the Attorney General to the Secretary of Homeland Security in the Homeland Security Act of 2002. *See* Homeland Security Act of 2002, Public Law 107–296, 8 U.S.C. 1103(a)(1). Section 1517 of the Homeland Security Act, 6 U.S.C. 557, provides that a reference in any other federal law to any function transferred by the

Accordingly, the individual commenter’s position that non-citizens should be categorically excluded from these protections is contrary to the specific statutory language of Section 188 of WIOA and beyond CRC’s authority to adopt.

#### Discrimination Prohibited Based on Disability § 38.12

Proposed § 38.12 revised the title of this section<sup>253</sup> and added a new paragraph (p) which incorporates the ADA’s prohibition on claims of discrimination because of an individual’s lack of disability.<sup>254</sup> Overall, this section retained the language from the 1999 and 2015 rules, which paralleled the wording of DOJ’s “General prohibitions against discrimination” Title II ADA regulation, including the requirement that a recipient must administer WIOA Title I programs and activities “in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”<sup>255</sup> The “most integrated setting appropriate” requirement must also be consistent with the requirements of the Rehabilitation Act, as amended by WIOA.

*Comment:* A State agency supported the language in § 38.12(d). A training provider commented that clarifying language should be added in § 38.12(d) to define “most integrated setting” consistent with the ADA and the Supreme Court’s opinion in *Olmstead v. L.C. ex rel. Zimring*.<sup>256</sup> However, a statewide association representing community service providers asserted that CRC’s proposed rule exceeded statutory authority. The commenter objected to the proposed requirements, saying that it would put additional restrictions on employment by mandating integration within not only the community, but also within the work unit. The commenter warned that such requirements could lead to individuals with disabilities being replaced by workers without disabilities.

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 the Department of Homeland Security 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>253</sup> *See* 29 CFR 37.7 (1999 rule); 29 CFR 38.7 (2015 rule).

<sup>254</sup> 42 U.S.C. 12201(g).

<sup>255</sup> 28 CFR 35.130(d); 29 CFR 37.12(d) (1999 rule); 29 CFR 38.12(d) (2015 rule).

<sup>256</sup> 527 U.S. 581 (1999).

An individual commenter argued that a “one-size-fits-all” approach that assumes that integration and equalized services is the best solution for all individuals with disabilities will be detrimental to people that greatly benefit from group programs and specialized services.

Indeed, a number of commenters focused on § 38.12 in general, and § 38.12(d) in particular, to comment about work for individuals at subminimum wage and/or in so-called “sheltered workshops,” which provide training and employment opportunities<sup>257</sup> in segregated or “sheltered” settings. A coalition of organizations “urge[d] the Department to ensure that the proposed regulations promote competitive integrated employment for students and youth with disabilities.” Another commenter objected:

While maximizing opportunities for competitive integrated employment among individuals with disabilities was one of the central purposes of WIOA, the goal of competitive integrated employment is not mentioned in the nondiscrimination regulations. It is critical that the nondiscrimination mandates in this proposed rule require that covered entities provide people with disabilities equal opportunity to access competitive integrated employment and protect the rights of people with disabilities to receive a fair income comparable to that of other employees, be employed in settings that include people with and without disabilities rather than limited to segregated facilities, and access opportunities for advancement that are comparable to those of their non-disabled peers.

*Response:* CRC appreciates the supportive comments we received and disagrees that the rule exceeds statutory authority. As discussed above, CRC has the authority to promulgate regulations necessary to implement WIOA’s equal opportunity and nondiscrimination provisions under Section 188(e). Regarding the commenter’s request to add clarifying language regarding “the most integrated setting” in light of the ADA and the *Olmstead* case, we believe this standard is clear, and has been so since the 1999 rule. We also believe that it is consistent with disability law (including Supreme Court precedent). Therefore, we decline to define it further. A recipient must administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. This is an individualized determination that is based on the specific needs of the individual with a

<sup>257</sup> Sheltered workshops are also sometimes referred to as “work centers.”

disability. Overall, the provision is intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others (without disabilities), based on presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with this requirement, recipients are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do. We therefore disagree that correctly administering the obligation to operate programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities would result in individuals with disabilities being replaced by individuals without disabilities.

Next, CRC disagrees with the belief of some commenters that the rule directly addresses competitive integrated employment or integration in the “work unit,” or that the rule requires in all cases the elimination of sheltered workshops and subminimum wage employment. Neither the proposed rule nor the final rule contains a definition for “competitive integrated employment” or “work unit.” It appears that one of the commenters may have been referring to a 2015 Department of Education NPRM that addresses these issues.<sup>258</sup> Regarding the advocacy organizations that asked CRC to require competitive integrated employment in the final rule, we decline to do so. The Rehabilitation Act as amended by WIOA, as well as the Department of Education’s regulations implementing the Rehabilitation Act,<sup>259</sup> defines the term “competitive integrated employment,” and moreover, competitive integrated employment of individuals with disabilities is an overall goal in the Rehabilitation Act as amended by WIOA. We note that in many instances, providing employment related services in non-integrated settings (such as sheltered workshops) may violate the “most integrated setting appropriate” standard in the Rehabilitation Act, the ADA, and this rule. For the purposes of Section 188 of WIOA and this regulation, the “most integrated setting appropriate” standard is consistent with the requirements of the Rehabilitation Act and the ADA. Additionally, WIOA prioritizes and

emphasizes competitive integrated employment. We therefore add explanatory references in § 38.12(a)(1) and (4) to ensure compliance.

*Comment:* Several commenters warned of the potential impacts of the proposed rule on sheltered workshops. An employment service provider requested that CRC delete any language in the proposed rule that states or implies that pre-vocational and group training services (aka sheltered workshops) are discriminatory towards persons with disabilities. The commenter stated that the language in the proposed rule could lead to the elimination of center-based, pre-vocational, sheltered training programs across the nation for individuals with developmental disabilities. An individual commenter agreed and stressed that group centered employment is not discriminatory; instead it allows persons with disabilities to work with their peers in a group centered supported environment. Similarly, another individual commenter argued that group work centers are not discriminatory and provide valuable skills for individuals with disabilities who may not be ready for the competitive community jobs. An individual commenter stated that the elimination of group work centers would exceed congressional intent and interfere with a person’s choice in employment. Several commenters argued that the loss of these programs would be detrimental and cause more persons with disabilities to be isolated and less likely to be employed.

An adult education provider argued that its facility provides individuals with disabilities, who do not receive funding, job training in the form of part-time employment at the work center. The commenter argued that the proposed rule could eliminate this as an option, which would decrease the availability of job training opportunities to individuals with disabilities. The commenter stressed that people with disabilities need on-the-job support, and without segregated job training for various periods of time, particularly for those who are not funded for services, a substantial number of individuals would never have the opportunity to achieve gainful and meaningful employment.

*Response:* While there are specific provisions in the 2014 reauthorization of the Rehabilitation Act that impact the eligibility of certain individuals to work in so-called sheltered workshops, there are no specific provisions in the Section 188 rule that either directly approve or disapprove of work in such settings. Rather, the integration requirement of

§ 38.12(d) requires recipients to administer their Title I—funded programs and activities in the most integrated setting appropriate to the needs of individuals with disabilities. As stated previously, this is an individualized determination that is based on the specific needs of the individual with a disability. Overall, the provision is intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with this requirement, recipients are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do. As noted earlier, the “most integrated setting appropriate” requirement must also be consistent with the requirements of the Rehabilitation Act as amended by WIOA.

*Comment:* An individual commenter stated that the proposed rule would eliminate employment choices for persons with disabilities, including preventing those with severe disabilities from working in community rehabilitation programs. The commenter argued that all employment, including that paid at a subminimum wage, has value. The commenter argued that without work centers many individuals with disabilities would be stuck at home or forced to participate in “glorified day care.”

Conversely, several commenters asserted that the Department should ensure that the proposed rules promote competitive wages for people with disabilities. The commenters cited statistics that showed that many individuals with disabilities working in sheltered workshops are being paid less than minimum wage, and in some cases at \$0.50 per hour.

*Response:* While there are specific provisions in the Fair Labor Standards Act and the 2014 reauthorization of the Rehabilitation Act that govern and impact the eligibility of certain individuals with disabilities to work at less than the federal minimum wage, there are no specific provisions in the Section 188 rule that directly address this issue. However, under § 38.12(a), a recipient is not permitted to discriminate by, among other things, (1) denying a qualified individual with a disability the opportunity to participate in or benefit from any aid, benefit, service, or training; (2) affording a qualified individual with a disability an opportunity to participate in or benefit

<sup>258</sup> U.S. Dep’t of Educ., Office of Special Educ. & Rehabilitative Servs., State Vocational Rehabilitation Services Program; State Supported Employment Services Program; Limitations on Use of Subminimum Wage; Notice of Proposed Rulemaking, 80 FR 21059, Apr. 16, 2015.

<sup>259</sup> 34 CFR parts 316 and 463.

from any aid, benefit, service, or training that is not equal to that afforded to others; (3) providing 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; or (4) providing 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 is as effective as those provided to others, and consistent with the requirements of the Rehabilitation Act as amended by WIOA.

Therefore, this rule neither directly approves nor disapproves specific wages for individuals with disabilities. Rather, the rule addresses nondiscrimination and equal opportunity on the basis of disability which may take wages into account on a case-by-case basis.

In addition, CRC received a few general comments concerning the prohibitions on disability discrimination in proposed § 38.12.

*Comment:* An advocacy organization commended the Department on expanding inclusion of individuals who are blind or visually impaired within the workforce development system. The commenter stressed that Rehabilitation Service Administration service programs have become more restrictive for persons with visual impairments; therefore these individuals, particularly older individuals, will need to rely on the larger workforce development system to sustain and return to work.

*Response:* CRC appreciates the feedback from the commenter. The goal of this rule is to ensure that when individuals with disabilities engage the larger workforce development system, they are able to do so in an accessible manner, without discrimination.

*Comment:* An individual commenter recommended that the Department remove “failure” from Divisions of Vocational Rehabilitation as the entry point to 14(c) program participation. The commenter stated that not all individuals are ready to work once they complete high school and requiring failure would damage the individual’s view of competitive employment. The commenter also suggested that high schools should continue to be able to contract with Section 14(c) certificate

holders.<sup>260</sup> The commenter noted that these programs provide opportunities for individuals with the most severe disabilities.

*Response:* This comment refers to provisions in Section 511 of the Rehabilitation Act,<sup>261</sup> which CRC does not implement, and which are therefore outside the scope of these regulations.

*Comment:* An individual commenter recommended that the Department lower or remove the threshold spending amounts for PETS services and allow State agencies the ability to provide services to all individuals with disabilities.

*Response:* Threshold spending amounts regarding the services recipients provide to individuals with disabilities are outside the scope of this rule. Instead, recipients must provide aid, benefits, services, and training on an equal basis to qualified individuals with disabilities. Where reasonable accommodations or modifications are necessary to achieve that result, recipients must provide them absent undue hardship or a fundamental alteration of the program, activity, or service.

*Comment:* A professional association supported more accessible services for individuals with disabilities, and urged that these provisions recognize the specific needs of individuals with mental health conditions and cognitive disabilities to ensure that they receive services that are specifically tailored to their needs. The commenter suggested additional training for program staff to help staff recognize appropriate training and employment opportunities for such individuals.

*Response:* The statute and regulations require that no individual with a disability be excluded from participation from, denied the benefits of, or subjected to discrimination under any program or activity on the basis of disability,<sup>262</sup> and that qualified individuals with disabilities should have the same opportunity to participate in or benefit from any aid, benefit, service, or training.<sup>263</sup> By prohibiting discrimination and requiring equal opportunity and inclusion of individuals with disabilities, we believe that this final rule will ensure that all individuals with disabilities receive services that are tailored to their interests and abilities, including individuals with mental health conditions and cognitive disabilities. It

is critical for recipients to maintain high expectations for program participants, and to provide opportunities based on the individual’s interests and abilities, rather than on assumptions based on stereotypes regarding particular types of disabilities. In addition, recipients are required to provide reasonable modifications of policies, practices, and procedures where necessary to avoid discrimination against individuals with particular disabilities, and to provide auxiliary aids and services where necessary to ensure effective communication.

CRC agrees that training WIOA staff to understand these obligations is a best practice, but declines to explicitly mandate the specific training requested in the final rule. Each recipient is responsible for ensuring compliance with its obligations under WIOA and this part, including determining the appropriate types and frequency of staff training.

*Comment:* An advocacy organization urged CRC to include examples of how some of the nondiscrimination provisions apply in the context of WIOA Title I—funded entities. For example, providing reasonable accommodations to individuals with disabilities means that American Job Centers must, among other things, use accessible language where necessary to ensure that a person with an intellectual disability can fully participate in and benefit from Job Center services, programs and activities, and must use effective engagement strategies when needed to ensure full participation and benefit for a person with cognitive or psychiatric disabilities.

*Response:* The nondiscrimination provisions that apply to recipients under Section 188 with respect to individuals with disabilities are broad and expansive, effectively tracking similar nondiscrimination provisions in the ADA. For this reason, it is unlikely that providing a few examples of fact-specific discrimination within the regulatory text will be particularly useful. Therefore, CRC declines to provide additional examples in the text. However, additional examples of achieving universal access and equal opportunity can be found in the Department’s recent guidance Promising Practices in Achieving Universal Access and Equal Opportunity: A Section 188 Disability Reference Guide.<sup>264</sup>

<sup>260</sup> Section 14(c) refers to the Fair Labor Standards Act, 29 U.S.C. 214(c).

<sup>261</sup> 29 U.S.C. 794f.

<sup>262</sup> 29 U.S.C. 3248(a)(2).

<sup>263</sup> See § 38.12(a)(1).

<sup>264</sup> U.S. Dep’t of Labor, Promising Practices in Achieving Universal Access and Equal Opportunity: A Section 188 Disability Reference Guide, available at <https://www.dol.gov/oasam/programs/crc/Section188Guide.pdf> (hereinafter “Section 188 Disability Reference Guide”).

For these reasons, CRC adopts § 38.12 with the following changes: One change to paragraph (a)(1) to add an additional example regarding meaningful opportunities consistent with the Rehabilitation Act amendments in WIOA, and two changes to paragraph (a)(4): A grammatical correction (changing “are” to “is”) and a clarification that the most integrated setting appropriate must be consistent with the Rehabilitation Act as amended by WIOA.

#### Accessibility Requirements § 38.13

The proposed rule added § 38.13, which did not have a counterpart in the 1999 or 2015 rule, to address the new emphasis Congress placed on ensuring programmatic and physical accessibility to WIOA Title I-financially assisted services, programs and activities. In no fewer 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>265</sup>

Proposed paragraph (a) addressed physical accessibility requirements and proposed paragraph (b) addressed programmatic accessibility requirements. The proposed programmatic accessibility language tracked language that Congress considered in 2005 in the context of debating amendments to WIA in an effort to improve accessibility to the workforce development system for individuals with disabilities.<sup>266</sup>

*Comment:* An advocacy organization and a State agency supported § 38.13(a)'s requirements for physical accessibility in existing facilities and new construction/alterations. An advocacy organization recommended CRC include examples of the steps recipients must take to ensure accessibility.

*Response:* The physical accessibility requirements that apply to recipients under Section 188 track long-standing accessibility requirements under the ADA and Section 504 of the Rehabilitation Act. For this reason, it is unlikely that providing a few examples of the requirements will be particularly useful. Therefore, CRC declines to provide additional examples in the text. However, additional examples can be found in Promising Practices in Achieving Universal Access and Equal

Opportunity: A Section 188 Disability Reference Guide.<sup>267</sup>

*Comment:* Several commenters addressed the programmatic accessibility requirements in § 38.13(b). Advocacy organizations and a State agency agreed with the definition of programmatic accessibility in § 38.13(b). Two advocacy organizations recommended the following change to ensure successful implementation of programmatic accessibility: Providing notice to individuals with disabilities of their right to programmatic accessibility, including verbal offers to provide information in an alternative format such as large font text, Braille, or electronic disc.

*Response:* Providing unsolicited verbal offers of information in alternative formats is contrary to the ADA, since it reflects another's perception or stereotype about particular disabilities. The individual is always free to request such an accommodation of auxiliary aids and services, and the obligation to provide such is only triggered upon such a request. As discussed above, CRC agrees it is important to provide written notice of the general availability of auxiliary aids and services to all participants. Accordingly, as discussed above in § 38.4(i), CRC amends the equal opportunity notice in § 38.35 to add that notification.

*Comment:* An advocacy organization suggested CRC add language to the final rule requiring ongoing training of program staff on what programmatic accessibility requires including best practices in promoting integrated and competitive employment, disability cultural competency, and examples of reasonable accommodations and modifications to policies, practices, and procedures.

*Response:* CRC agrees that training WIOA staff on programmatic accessibility requirements is a best practice, but declines to explicitly mandate that specific level of training in the final rule. Each recipient is responsible for ensuring compliance with its obligations under WIOA and this part, including determining the appropriate types and frequency of staff training. Recipients that are seeking additional guidance on these issues can consult Promising Practices in Achieving Universal Access and Equal Opportunity: A Section 188 Disability Reference Guide.<sup>268</sup>

*Comment:* The advocacy organization also suggested CRC add requirements regarding modification of standard equipment, technology or software programs used by the Title I-financially assisted program or activity as assessment, diagnostic, training, or skills-building tools.

*Response:* These requirements are already contained within the rule. A recipient is required to take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others, unless doing so would result in a fundamental alteration of a service, program, or activity.<sup>269</sup> In addition, a recipient must provide reasonable accommodations to qualified individuals with disabilities, unless providing the accommodation would cause undue hardship.<sup>270</sup> Moreover, a recipient must 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.<sup>271</sup>

*Comment:* The advocacy organization also recommended CRC add requirements regarding coordinating with other State services and benefit delivery systems.

*Response:* While CRC supports the coordination with other State services and benefit delivery systems as a best practice, we decline to require it in all cases. As discussed below, a certain level of coordination is required for Governors, facilitated by their State-level Equal Opportunity Officers (and described in their Nondiscrimination Plans). For other recipients, CRC prefers to allow more flexibility to structure their compliance with WIOA Section 188 and this part regarding such coordination.

For these reasons, CRC adopts § 38.13 as proposed, with the exception of a minor modification to § 38.13(a) to more accurately describe the source of some recipients' additional obligations regarding accessibility requirements.

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

With the exception of an introductory clause in one paragraph, proposed § 38.14 retained the existing text from § 37.8 in the 1999 rule and § 38.8 in the 2015 rule.

<sup>265</sup> See, e.g., 29 U.S.C. 3112(b)(2)(C)(vii), 29 U.S.C. 3122(b)(4)(A)(iii), 29 U.S.C. 3122(d)(6)(A), 29 U.S.C. 3122(d)(13).

<sup>266</sup> S. Rep. No. 109–134, 2005 WL 2250857, at \*11 (2005).

<sup>267</sup> Section 188 Disability Reference Guide, *supra* note 264.

<sup>268</sup> Section 188 Disability Reference Guide, *supra* note 264.

<sup>269</sup> See § 38.15(d).

<sup>270</sup> See § 38.14(a).

<sup>271</sup> See § 38.14(b).

*Comment:* Several commenters provided comments on proposed § 38.14 regarding reasonable accommodations and modifications for individuals with disabilities. A State agency expressed concern about the threshold of proof required in § 38.14 to determine whether a modification places an undue burden on the recipient, and how that determination would be made. The commenter recommended modifying the language to incorporate the EEOC's role in evaluating the evidence presented on behalf of the recipient to determine the validity of their claim of undue hardship.

*Response:* The current language is sufficient without change. The definition of "undue hardship" in § 38.4 includes the factors to be considered in determining whether an accommodation would impose an undue hardship on a recipient. The threshold of proof is consistent with the ADA and the 1999 and 2015 rules. Requiring the EEOC to evaluate evidence to determine if it properly supports a claim of undue hardship goes beyond the scope of these regulations.

*Comment:* An advocacy organization suggested specific revisions to proposed § 38.14 to ensure accessibility and that recipients involve the individual seeking an accommodation in the process of deciding whether the requested accommodation will be provided. The commenter suggested additional language as follows (suggested additions in bold and deletions indicated with ellipses):

- 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.

- 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 § 38.44(rrr)(1). The decision must be accompanied by a written statement of the recipient's reasons for reaching that conclusion. **The written statement must meet readability standards that reflect the program participant's literacy level and plainly communicate the actual reasoning behind a conclusion that an accommodation would comprise an undue hardship.** The recipient must provide a copy of the statement of reasons to the individual or individuals who requested the accommodation.

- If a requested accommodation would result in undue hardship, the recipient must, in consultation with said individual(s), take . . . other actions that would not result in undue 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.

*Response:* In paragraph (a)(2), the language is sufficient without change. Imposing a readability standard that reflects another's perception or stereotype about an individual with a disability's literacy level (absent a request to do so by the individual with a disability) is inappropriate, and contrary to the ADA and other federal anti-discrimination statutes. The individual is always free to request such an accommodation or modification, and the obligation to provide such is only triggered upon such a request.

In paragraph (a)(3), CRC changes the provision to state "after consultation with an individual with a disability (or individuals with disabilities)." This revision is consistent with the requirements under the ADA.

*Comment:* A coalition of organizations representing the interests of individuals with disabilities argued that CRC needs to change the way covered entities handle the cost of ongoing accommodations for persons with disabilities. The commenters recommended that CRC implement regulations that encourage all entities covered under WIOA to adopt a centralized funding system to pay for the cost of reasonable accommodations for employment of persons with disabilities. The commenters asserted that when hiring managers have to pay for the cost of accommodations out of their division's budget, these managers have a powerful disincentive against hiring people with disabilities, especially those who need ongoing accommodations. Overall, the commenters stated that centralized funding systems would increase opportunities for persons with disabilities to secure jobs and promotions.

*Response:* While we support creative ideas like a centralized accommodation fund that increases the availability of accommodations, CRC believes that mandating such a solution is not necessary to ensure that recipients meet their obligations to provide reasonable accommodations to individuals with disabilities under WIOA and this part, and should therefore be up to individual recipients. In addition, it is outside the scope of this rule to require that recipients utilize a particular funding system to pay for accommodations.

*Comment:* A union stated that if further accommodations were necessitated by the proposed rule, additional funding may be needed to effectuate these accommodations.

*Response:* The final rule creates no new obligations for recipients regarding reasonable accommodations and modifications that were not already

required by existing laws. Accommodations in the rule parallel those already required under the ADA and Section 504 of the Rehabilitation Act, as well as those that were required under the 1999 and 2015 rules.

#### Summary of Regulatory Changes

For the reasons described above and in the NPRM, and considering the comments received, CRC finalizes § 38.14 as proposed, with a modification to paragraph (a)(3) to clarify the consultation requirement.

#### Communications With Individuals With Disabilities § 38.15

Proposed § 38.15 revised paragraphs (a) and (b) from the 1999 and 2015 rules<sup>272</sup> to be consistent with DOJ's ADA Title II regulations. Proposed § 38.15 also contains new language regarding video remote interpreting services and accessible electronic and information technologies.

*Comment:* A coalition of organizations representing the interests of individuals with disabilities stated that part 38 of the proposed rule should be amended to ensure all nondiscrimination and equal opportunity provisions are applicable to all technological aspects in employment. With respect to Web sites, recipients should be required to caption all audio-based content, and such auditory content should also be provided in American Sign Language (ASL). Transcripts of video descriptions should be required to provide maximum access. Moreover, all relevant information should be fully accessible for persons with disabilities, including deafblind individuals.

*Response:* A recipient must take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others. A recipient must furnish appropriate auxiliary aids and services where necessary to accomplish this. The type of auxiliary aid or service necessary to ensure effective communication varies 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 type of auxiliary aid and service is necessary, a recipient must give primary consideration to the request of an individual with a disability. Thus, the provision of auxiliary aids and services is always individually based and

<sup>272</sup> See 29 CFR 37.9 (1999 rule); 29 CFR 38.9 (2015 rule).

depends on a number of factors. There is no proactive requirement separate from an individual's request to provide auxiliary aids and services. We therefore decline to make a change with respect to the requirements regarding the provision of auxiliary aids and services.

Although CRC declines to require recipients to use specific Web site accessibility standards under this rule, recipients must ensure that information provided through electronic and information technology, such as on Web sites, is accessible to individuals with disabilities. In CRC's experience, where a recipient provides required information through Web sites, it may be difficult to ensure compliance with accessibility requirements without adherence to modern standards, such as the Section 508 Standards<sup>273</sup> or the WCAG 2.0 Level AA guidelines,<sup>274</sup> which include criteria that provide comprehensive Web accessibility to individuals with disabilities—including those with visual, auditory, physical, speech, cognitive, developmental, learning, and neurological difficulties. Accordingly, we strongly encourage recipients that disseminate information via Web sites to consider these specific standards as they take steps to ensure that their Web sites comply with the requirements of these regulations and with federal civil rights laws. Having considered these issues, and in the interest of clarity on this point, we revise the regulatory language in § 38.15(a)(5)(ii) to add examples of specific modern Web accessibility standards currently available.

*Comment:* An advocacy organization expressed support for the requirements for accessible electronic and information technology. However, a State agency commented that the provisions requiring recipients to utilize electronic and information technologies, applications, or adaptations that incorporate accessibility features for individuals with disabilities could preclude training providers from listing their training programs because of the extra cost to provide accessibility to an individual with disabilities.

*Response:* CRC notes that additional accessibility features will not necessarily cost more; in many cases the features are already built in or may be required by other laws. Accordingly, CRC declines to change the rule as suggested.

*Comment:* An advocacy organization supported the use of video remote interpreting in the proposed rule, reasoning that the rule allows for the

use of VRI as an alternative to a live qualified interpreter. A coalition of organizations representing the interests of individuals with disabilities stated that CRC should not utilize the DOJ's definition of "VRI" because it is inadequate and vague and could lead to the use of a smartphone to be used to Skype the interpreter. The commenters stated that this would be problematic because VRI effectiveness would be dependent on the size of the cell phone screen and effective signal strength.

The commenters also raised numerous concerns about the effectiveness of VRI technology including malfunctioning of equipment and video quality. The commenters were concerned that the inclusion of VRI would lead to a decrease in onsite interpreters who have greater flexibility, access to environmental cues, and are not subject to technology or equipment malfunctions. Therefore, the commenters recommended that CRC add language to the final rule limiting the use of VRI to certain situations like brief meetings or appointments with the consent of the person with the disability. The commenters also stated that the regulations should provide guidance on how VRI should be used. Further, the commenters stated that VRI is not always an appropriate means of communication for all individuals with disabilities. The commenters added that any person who is given the responsibility to obtain an interpreter should conduct an analysis to determine whether VRI is appropriate based on the consumer's disability and preference between VRI and on-site interpreter.

*Response:* The current language, which mirrors the DOJ ADA Title II regulations, is sufficient. A recipient must take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others. A recipient must furnish appropriate auxiliary aids and services where necessary to accomplish this. Thus, if VRI is not appropriate for a particular individual with a disability, the recipient must provide a different option, absent undue hardship. Of course, in most cases recipients and qualified individuals with disabilities must in good faith engage in an interactive process in which they exchange relevant information so the recipient may determine an effective accommodation, giving primary consideration to the request of the individual with the disability. This process should reveal whether VRI is appropriate for a particular individual.

Again, the type of auxiliary aid or service necessary to ensure effective

communication varies 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 addition, with respect to video remote interpreting, there are particular requirements for how VRI should be used under § 38.15(a)(4) that address the speed, size, and quality of the service, which would in many cases limit the use of a smart phone for VRI.

For these reasons, CRC adopts § 38.15 as proposed, except for modifications in § 38.15(a)(5)(ii) to add examples of specific modern Web accessibility standards currently available, as well as technical changes (including a regulatory citation)<sup>275</sup> in § 38.15(c).

#### Service Animals § 38.16

The proposed rule added a new § 38.16 to provide direction to recipients regarding the obligation to modify their policies, practices or procedures to permit the use of a service animal by an individual with a disability. This section tracked the ADA Title II regulations issued by the DOJ regarding service animals.<sup>276</sup>

*Comment:* A coalition of advocacy organizations supported the inclusion of § 38.16 regarding a recipient's obligation to modify policies and practices to permit the use of a service animal. Another advocacy organization commended the Department for using the DOJ's ADA regulations and guidance, particularly with regard to service animals. However, the organization recommended that CRC follow DOJ's guidance more closely and, where the WIOA context does not require differences, CRC should incorporate and defer to the DOJ's ADA regulations by specific reference.

*Response:* In the interest of uniformity, the proposed rule tracked DOJ's ADA Title II provisions regarding service animals, as well as its definition of a service animal. As a matter of policy, CRC provides the full text of those provisions with appropriate modifications in its own regulations, rather than incorporating DOJ's by reference. In some instances, the specific DOJ provision may not be applicable to a recipient, or a different regulatory section may apply. In addition, this will prevent having to revise CRC regulations if the DOJ regulation is subsequently revised in a way that conflicts with this part.

*Comment:* A State agency recommended that CRC utilize the term

<sup>273</sup> 36 CFR part 1194.

<sup>274</sup> See, e.g., <http://www.w3.org/TR/WCAG20/>.

<sup>275</sup> 36 CFR part 1191, appendix B, section 103.

<sup>276</sup> 28 CFR 35.136.

“service dog” to be consistent with the ADA.

*Response:* While DOJ’s ADA 2010 Title II regulation limited service animals to dogs, the regulation continued to refer to them as “service animals” and not “service dogs” in both the definition and the specific regulatory section. Thus, the proposed rule is consistent with DOJ’s current language, and should be readily understood by recipients and individuals with disabilities. For these reasons, CRC declines to make the suggested changes to proposed § 38.16.

#### Mobility Aids and Devices § 38.17

The proposed rule added a new § 38.17 to provide direction to recipients regarding the use of wheelchairs and manually powered mobility aids by program participants and employees. The new language is based on the DOJ ADA Title II regulations.<sup>277</sup> CRC received one supportive comment on this provision from a coalition of disability advocacy organizations, and adopts § 38.17 as proposed.

#### Employment Practices Covered § 38.18

CRC received no comments on this provision and, accordingly, adopts § 38.18 as proposed, with the exception of one technical change, replacing “incorporated into this part by reference” with “adopted by this part” in paragraph (d).

#### Intimidation and Retaliation Prohibited § 38.19

CRC received no comments on this provision and, accordingly, adopts § 38.19 as proposed.

#### Administration of This Part § 38.20

CRC received no comments on this provision and, accordingly, adopts § 38.20 as proposed.

#### Interpretation of This Part § 38.21

CRC received no comments on this provision and, accordingly, adopts § 38.21 as proposed.

#### Delegation of Administration and Interpretation of This Part § 38.22

CRC received no comments on this provision and, accordingly, adopts § 38.22 as proposed.

#### Coordination With Other Agencies § 38.23

CRC received no comments on this provision and, accordingly, adopts § 38.23 as proposed.

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

CRC received no comments on this provision and, accordingly, adopts § 38.24 as proposed.

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

##### Assurances

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

Section 38.25 of the proposed rule generally retained the existing requirements in § 38.20 for grant applicants. In § 38.25(a)(1), CRC proposed adding language to emphasize the 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.” CRC proposed this revision because the 1999 and 2015 rules did not provide that this requirement applies for the duration of the award.

CRC received one comment from a coalition of organizations that strongly supported the revisions to the written assurance section.

CRC adopts § 38.25 as proposed with the exception of two technical changes: Moving the words “by reference” to the end of the last sentence in paragraph (a)(2), and adding the parenthetical phrase “including limited English proficiency” following “national origin” in paragraph (a)(1)(i)(A). CRC makes the latter change for the same reasons as discussed above in connection with the addition of the phrase to § 38.9(a) and for the sake of consistency with that and other provisions of the rule.

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

In proposed §§ 38.26 and 38.27, CRC retained the same language as in the 1999 and 2015 rules,<sup>278</sup> with the exception of revised section headings. CRC received no comments on these sections and therefore adopts §§ 38.26 and 38.27 as proposed.

##### Equal Opportunity Officers

##### Designation of Equal Opportunity Officers § 38.28

Section 38.28 proposed several changes to the 2015 rule’s § 38.23 and the 1999 rule’s § 37.23 and incorporated components from the 2015 rule’s § 38.27, and the 1999 rule’s § 37.27.

First, § 38.28(a) proposed the requirement that the Governor designate a State-level EO Officer, who would report directly to the Governor. Paragraph (a) also required the State-level EO Officer to be responsible for statewide coordination of compliance with the equal opportunity and nondiscrimination requirements in WIOA, and that the State-level EO Officer have staff and resources sufficient to carry out these requirements. Under paragraph (b), the NPRM proposed to require that each recipient, with the exception of small recipients and service providers, designate a recipient-level EO Officer, who must have staff and resources sufficient to carry out the requirements of this part. CRC received a total of 21 comments on these proposals.

*Comment:* Several State agencies requested clarification that the State-level EO Officer can be appointed by and report to the Governor’s designee, rather than the actual Governor. In support of their position, two State agencies referenced the proposed subpart A definition of “Governor” to include “the chief elected official . . . or [the Governor’s] designee.” These commenters indicated that allowing the State-level EO Officer to report to the Governor’s designee, such as a director or liaison, gives State-level EO Officers the proper authority, visibility, and level of support needed to carry out their responsibilities.

*Response:* CRC agrees that the definition of “Governor” under proposed § 38.4(aa) included the “Governor’s designee” as part of the definition of “Governor.” CRC has retained the reference to the Governor’s designee in the final rule. Accordingly, the designated State-level EO Officer must report directly to the Governor or the Governor’s designee, such as a director, liaison, or other appropriately titled official in the Governor’s office. CRC recognizes the autonomy that the Governors have in structuring their offices, but also emphasizes that State-level EO Officers must have the authority extended by the Governor to fulfill their responsibilities under Section 188. Because the Governor is ultimately responsible for ensuring compliance with the nondiscrimination and equal opportunity obligations within the State, CRC believes that the Governor is best suited to determine to whom the EO Officer should report.

*Comment:* Several commenters argued that the proposed rule’s requirement to have a State-level EO Officer and a recipient-level EO Officer was duplicative and inefficient. A State

<sup>277</sup> 28 CFR 35.137.

<sup>278</sup> 29 CFR 37.21 and 37.22 (1999 rule); 29 CFR 38.21 and 38.22 (2015 rule).

agency argued that having a specific individual report to the Governor is burdensome, duplicative, confusing, and an undue hardship to States that would have to create a new EO Officer position or restructure their current EO Officer position. One State workforce agency requested clarity on whether the new State-level EO Officer who reports directly to the Governor would be established independently of a State's WIOA Title I-B administrative agency. The commenter requested clarification as to whether the new State-level EO Officer reporting directly to the Governor is a new position or is simply the same EO Officer.

*Response:* CRC disagrees with the assertion that this requirement would result in a duplication of efforts. Governors retain flexibility as to whom to designate as a State-level EO Officer, which includes the ability to restructure the current EO Officer position to meet the requirements of §§ 38.28 through 38.31. The requirement that recipients, including Governors, designate an EO Officer is longstanding and exists under the 2015 rule, just as it existed under the 1999 rule. In practice, most Governors have empowered a designee, typically, the director(s) of a State cabinet agency or agencies that oversee(s) labor and workforce programs, to appoint an EO Officer often times referred to as the State EO Officer. That EO Officer reported to the State agency cabinet director and, in practice, often limited oversight to the EO Officer's own specific agency.

However, the Governor has obligations beyond the duties of a recipient to ensure nondiscrimination and equal opportunity across all State Programs including State Workforce Agencies. Indeed, under certain circumstances the Governor can be held jointly and severally liable for all violations of these nondiscrimination and equal opportunity provisions under § 38.52, which includes State Workforce Agencies as defined in § 38.4(lll), and State Programs as defined in § 38.4(kkk). This final rule's requirement serves to emphasize the importance of the Governor's obligations, and ensure that a State-level EO Officer can carry out those obligations—with authority flowing from the Office of the Governor and with the staff and resources sufficient to carry out those requirements.

The changes in the rule do not remove the flexibilities available to a Governor to determine how the equal opportunity program works in the State, and is described in the Governor's Nondiscrimination Plan. For example, the Governor can designate a new State-

level EO Officer or restructure a current EO Officer position as the Governor's State-level EO Officer. As noted above, the rule also does not change the definition of "Governor," and an individual designated to act on the Governor's behalf may also carry out the responsibilities of the Governor under this part. In that case, the Governor's authority to ensure equal opportunity would flow to the Governor's designee and, in turn, to the State-level EO Officer. The State-level EO Officer would then have the authority necessary to carry out the Governor's equal opportunity obligations.

In response to these comments, and to provide more clarity, CRC inserts subheadings in the regulatory text as follows: "Governors" in § 38.28(a) and "All recipients" in § 38.28(b). The final rule also clarifies the distinction between the "State-level EO Officer" for the Governor in paragraph (a) and the "recipient-level EO Officer" for all recipients in paragraph (b). These modifications are intended only to clarify § 38.28 as proposed and are not intended as substantive changes.

*Comment:* Several State agencies questioned how the EO Officer and support staff would be funded and asserted that the requirement adds an additional staff member without additional funding. The commenters argued the proposed rule would divert much needed funding away from job training towards administrative costs for the new EO Officer and additional staff. Relatedly, a State labor agency argued that WIOA funding was insufficient to support the proposed rule's requirement that the EO Officer has sufficient funds and resources.

*Response:* CRC disagrees with the commenters' assertions that this rule requires additional staff or funding that would lead to underfunding in other areas. Regarding the commenter's concern that statutory funding is insufficient to support the proposed rule's requirement that EO Officers have sufficient funds and resources, CRC believes the changes to the rule requiring a State-level EO Officer will allow States to become more efficient while implementing a more effective equal opportunity program. An individual with the requisite knowledge, skills and abilities coupled with the authority provided by reporting to the Governor, will enhance the State's ability to develop an efficient and effective nondiscrimination program. Those efficiencies result because the new State-level EO Officer will improve the coordination of the recipient-level EO Officers for all of the State Programs. The Governor or designee and State-

level EO Officer should rely on the Nondiscrimination Plan as the planning tool to eliminate duplication of staff efforts and to ensure appropriate delegation of duties. CRC is available to provide technical assistance in this regard. Otherwise, specific funding levels are beyond the scope of this rule.

With respect to the Governor's obligations, as mentioned above in this section, the Governor retains discretion in structuring the State-level EO Officer position. The Governor has the option of creating a new State-level EO Officer position or retaining the current EO Officer to serve as the State-level EO Officer. In this regard, the Governor controls how these positions are funded. The rule does not require the Governor to hire additional staff to meet these obligations unless necessary to provide the State-level EO Officer with the resources sufficient to meet the obligations under this part. CRC anticipates that current State EO Officers will in certain States become the Governor's State-level EO Officer, and recognizes that, in practice, the Governor can combine these positions into a single position within the parameters of this part.

*Comment:* A State workforce development board requested an exemption from the proposed rule's requirement that the State-level EO Officer should report directly to the Governor when the EO Officer has direct access to the Governor. The commenter argued that its State is a single-State-area with only one Workforce Investment Board and its Executive Director is a cabinet member of the Governor's administration and thus reports directly to the Governor.

*Response:* All Governors have the obligation to designate a State-level EO Officer. In the example the commenter offered, the Executive Director of the Workforce Development Board reports directly to the Governor. If the Governor designates the Executive Director as discussed above, the State-level EO Officer could report to the Executive Director.

*Comment:* Several State agencies and a private citizen commented that the EO Officers currently have enough authority and CRC was well equipped under existing regulations to ensure that EO Officers have the authority and resources to do their job. These commenters encouraged CRC to conduct a thorough analysis of the Methods of Administration (renamed in the NPRM as the "Nondiscrimination Plan") and work immediately with the States, when needed, to ensure that the EO Officer has available resources and is placed in a position of authority with sufficient

visibility and support to carry out the responsibilities under this part.

*Response:* CRC acknowledges that some States may already provide EO Officers with the requisite authority and resources to ensure compliance with nondiscrimination and equal opportunity provisions. However, it has been CRC's experience that often times EO Officers are completely removed from the reporting chain to the Governor, or the authority granted the EO Officer is limited to the agency which the EO Officer oversees. The revisions in the final rule in § 38.28 resolve these issues. By requiring State-level EO Officers to report directly to the Governor, who is ultimately responsible for ensuring nondiscrimination and equal opportunity in all State Programs, the Governor will be more knowledgeable about the nondiscrimination and equal opportunity issues faced by the WIOA Title I-financially assisted programs and activities and will be in a better position to effectively administer the required Nondiscrimination Plan in § 38.54. While CRC is available to provide technical assistance to all recipients and their EO Officers, CRC declines, however, to assume from the Governor the obligation to monitor the authority and resources of the State-level EO Officers. That responsibility remains with the Governor.

*Comment:* One State agency said that moving the equal opportunity monitoring function directly under the Governor would separate the equal opportunity and program compliance monitoring functions between two different governmental entities, leading to less efficiency in overall program monitoring and economic inefficiencies. That State agency also commented that monitoring programs under WIOA is not an appropriate function for the Governor's office. A different State agency commented that it would be impractical for the State-level EO Officer to report directly to the Governor. Another State agency argued that the proposed rule failed to consider the flexibility that WIOA gives States to organize and administer their workforce development system. Several commenters expressed frustration that the proposed rule requires the designation of a recipient-level EO Officer for each recipient and does not dictate how a State must organize this function.

*Response:* As mentioned above, proposed § 38.28 required a State-level EO Officer to direct the flow of information directly to the Governor, who is already responsible for ensuring compliance with the nondiscrimination

and equal opportunity provisions in part 38. CRC disagrees with the commenters' assertion that it is not an appropriate function for the Governor's Office to monitor programs. The monitoring and oversight obligations of the Governor have existed dating back at least to the 1999 rule, as has the requirement that each recipient designate an EO Officer.<sup>279</sup> CRC believes that requiring each recipient to designate at least one recipient-level EO Officer is essential to ensure appropriate monitoring of the recipient's individual compliance with WIOA Section 188 and this part.

CRC agrees with commenters that States should have flexibility in deciding the structure and function of the State-level EO Officer position and other recipient-level EO Officer positions, within the requirements of this part. For that reason, as addressed above, Governors have the autonomy to structure the State-level EO Officer position according to the needs of their States. Governors need not separate equal opportunity from program compliance monitoring functions provided that the appropriate EO Officer receives the results of the equal opportunity monitoring and can act appropriately to ensure equal opportunity and nondiscrimination. The Governor may designate a current EO Officer as the State-level EO Officer. This requirement does not mandate that the Governor create a new State-level EO Officer position through a new placement. An individual could serve as both the State-level EO Officer and as a recipient-level EO Officer provided there is no conflict of interest<sup>280</sup> and that the individual has sufficient staff and resources to properly perform both the duties of the State-level EO Officer position and the recipient-level EO Officer position.

Furthermore, CRC has retained the definition of "Governor" to include the Governor's designee. Therefore, CRC disagrees that the new reporting structure is impractical. This provision allows the Governor the proper flexibility and discretion needed to determine the manner in which to delegate authority, while also providing the State-level EO Officer the requisite authority to ensure compliance with this part.

*Comment:* A state agency argued that the revised definitions in §§ 38.28 and 38.29 should be deleted because they

<sup>279</sup> 29 CFR 37.54(d)(2)(ii) (1999 rule); 29 CFR 38.54(d)(2)(ii) (2015 rule).

<sup>280</sup> § 38.30 (EO Officers "must not have other responsibilities or activities that create a conflict or the appearance of a conflict with the responsibilities of an EO Officer").

would expand the number of EO Officers and increase duplication of effort and expense, and could discourage the participation of non-mandatory partners. The commenter attributed this to its belief that the proposed rule expanded the definition of recipient to include not just State Workforce Agencies, but also State-level partner agencies, State and local workforce boards, one-stop operators, and others. The state agency commented that inclusion of on-the-job training employers would "kill" their programs.

*Response:* Again, CRC disagrees that these provisions will result in a duplication of effort and expense. Recipients retain flexibility as to whom to designate as their recipient-level EO Officers, which includes the ability to restructure a current recipient-level EO Officer position to meet the requirements of §§ 38.28 and 38.29. Moreover, a recipient-level EO Officer with the requisite knowledge, skills and abilities coupled with the authority provided by reporting to the highest level of the recipient will enhance the recipient's ability to develop an efficient and effective nondiscrimination program, including coordination with other EO Officers to avoid duplication.

Although the definition of "recipient" in proposed § 38.4(zz) expanded to include federally operated Job Corps Centers, CRC proposed no other change to this definition. CRC has consistently included state-level partner agencies, state and local workforce investment boards, one-stop operators, and on-the-job training employers as part of the definition of "recipient" in the 1999 and 2015 rules. The inclusion of these entities in the definition of recipient remains appropriate. Moreover, we note that as the requirement to designate an EO Officer has existed, CRC believes that most large, on-the-job training providers are already compliant, and small providers do not have all of the same obligations as other recipients under WIOA and this part.<sup>281</sup>

*Comment:* Several commenters discussed CRC's authority under WIOA to implement § 38.28. One State agency argued that CRC did not have the authority under WIOA to require a State to appoint a State-level EO Officer, mandate that the State-level EO Officer must report directly to the Governor, and dictate the structure for program administration. Similarly, another commenter argued that Section 188 provides no authority for the Department to prescribe the reporting structure for the individual designated

<sup>281</sup> See §§ 38.4(hhh) and 38.32.

by the Governor to serve as the State-level EO Officer.

*Response:* CRC disagrees with commenters' characterization of CRC's authority under WIOA Section 188. As an initial matter, Section 188 of WIOA delegates to the Secretary of Labor the responsibility for enforcing this section through implementing regulations. The Secretary has delegated to CRC the authority to enforce Section 188 of WIOA and thus to promulgate this rule. It is CRC's responsibility to ensure that access to any WIOA Title I-financially assisted program, service, or benefit is free from discrimination. Thus, CRC has the authority to promulgate regulations that will be most effective in accomplishing this goal, including mandating the reporting structure for recipients that receive WIOA Title I financial assistance to ensure effective monitoring and compliance.

Moreover, the relationship between the Governor and the State-level EO Officer is not unique to this final rule. As a recipient, the Governor, just like all other recipients, has been required under the 1999 and 2015 rules to designate an EO Officer, and the practice, as CRC understands it, was to have that EO Officer serve as the State EO Officer with the responsibility for the Governor's Methods of Administration (MOA). However, as discussed above, that State EO Officer may not have held the authority to effectively implement the MOA, monitor compliance by all State Programs, and then ensure accountability. By requiring the State-level EO Officer to report to the Governor, the Governor will have a specific individual with the 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.

*Comment:* Several commenters argued that the proposed requirement that the Governor appoint a State-level EO Officer would weaken that office's position and make it susceptible to political pressure. These commenters argued that State-level EO Officers may be hesitant to take on controversial positions because the Governor could terminate the State-level EO Officer for any reason. Several commenters also pointed out that the State-level EO Officer position would be subject to frequent turnover upon a change in the Governor's administration. These commenters argued that this would be detrimental to the performance and continuity of the programs.

*Response:* Regardless of political turnover in respective States' Governors' offices, Governors and State-level EO Officers are expected to comply with the provisions in this part. State-level EO Officers who report directly to the Governor strengthen oversight and allow the Governor to make informed decisions to ensure nondiscrimination and equal opportunity. Moreover, the final rule does not require that the State-level EO Officer be a political employee whose term is limited by that of the Governor. CRC notes that recipients are prohibited from engaging in employment discrimination on the basis of political affiliation with respect to employment that is in the administration of or in connection with any WIOA Title I-funded program. Thus, CRC anticipates that State-level EO Officers will complete their required tasks free from political pressure and regardless of administration turnover.

#### Summary of Regulatory Changes

In response to the comments received, CRC has revised § 38.28 to clarify further the distinction between Governors and recipients generally, but has not made any substantive changes to the proposed rule. CRC modifies § 38.28(a) and (b) to include the subheadings "Governors" and "All recipients," respectively. CRC also clarifies the distinction between the State-level EO Officer for the Governor in paragraph (a) and the recipient-level EO Officer for all recipients in paragraph (b), including by changing "statewide" to the more precise "State Program-wide" in paragraph (a). As discussed in response to a comment below, CRC further revises paragraph (b) to specify the level of the official to whom the recipient-level EO Officer must directly report, with specific examples.

#### Recipients' Obligations Regarding Equal Opportunity Officers § 38.29

The proposed rule relocated this section to highlight the importance of all recipients' responsibilities regarding their EO Officers. As indicated in the NPRM, proposed § 38.29 is applicable to the EO Officers of all recipients, including the Governor.

In proposed § 38.29(a), CRC incorporated the existing obligation that the EO Officer be a senior level employee. CRC added to this provision that the EO Officer, as a senior-level employee, report directly to the Chief Executive Officer, Chief Operating Officer, or equivalent top-level official of the recipient. CRC explained that the proposed change in paragraph (a) was to ensure that EO Officers have the

requisite authority to successfully carry out the responsibilities in this part. Proposed paragraph (b) added a requirement to designate an EO Officer who can fulfill the responsibilities as described in § 38.31. This provision was proposed to ensure that EO Officers have the required capabilities to comply with their obligations under this part. CRC received four comments on these changes.

*Comment:* A State agency and a coalition of organizations commented that they supported § 38.29 because it would ensure that EO Officers have adequate authority and staffing to carry out their duties.

However, a State labor agency argued that § 38.29's requirement that the EO Officer be a senior level employee who reports directly to the Chief Executive Officer was contradictory to § 38.28's requirement that the EO Officer report to the Governor who is defined as "the Chief Elected Official . . . or the Governor's designee." The commenter also noted that "Chief Executive Officer" was not defined in the proposed regulations. A State workforce development board requested clarification on CRC's definition of Chief Executive Officer or Chief Operating Officer. The commenter asked whether CRC's definition would include Executive Directors of State Workforce Agencies designated as the WIOA Fiscal Agent, Grant Recipient, State Administrative Entity, and WIOA Liaison.

*Response:* Section 38.29 is consistent with the provisions found in §§ 38.28 and 38.30 and details all recipients' obligations regarding their EO Officers. In response to the comments received, CRC revises §§ 38.28(b) and 38.29 to clarify the distinction between the Governor's responsibilities as to the State-level EO Officer and those of all recipients generally regarding EO Officers, but is not making any substantive changes from the NPRM to proposed § 38.28(a) or § 38.29. As did the proposed rule, the final rule requires that two types of EO Officers be designated.

First, § 38.28(a) provides that the Governor must designate a State-level EO Officer who reports directly to the Governor or designee. That State-level EO Officer is responsible for overseeing the obligations of the Governor to coordinate and monitor compliance State Program-wide with this part. Second, § 38.28(b) provides that each recipient must designate a recipient-level EO Officer that reports to the highest-level official of that recipient, to coordinate that recipient's compliance with this part. Because a Governor may

also be a recipient, the position of “Governor” appears in § 38.28(b) as an example of the “highest-level” official of the entity that is a recipient. The recipient-level EO Officer designated by the Governor in the Governor’s role as recipient, however, is only responsible for compliance in that program, and thus has a different role than the State-level EO Officer who is responsible for State Program-wide compliance. Nevertheless, a recipient-level EO Officer may also serve as the State-level EO Officer, provided there is no conflict of interest and that individual has sufficient staff and resources to adequately perform the duties of both positions.

Next, §§ 38.29 through 38.31 apply to both types of EO Officers (State-level and recipient-level). Thus, to add clarity, CRC revises the title of § 38.29 and the section’s introductory sentence to specify that “All recipients have the following obligations related to their EO Officers.” These clarifications will improve readability and address commenters’ concerns that § 38.29(a) contradicts the requirement that the State-level EO Officer report directly to the Governor in § 38.28(a).

CRC emphasizes that the requirements for EO Officers generally in §§ 38.29 through 38.31 apply to all EO Officers, whether State-level or recipient-level. The State-level EO Officer, however, will have additional responsibilities in connection with the Governor’s monitoring and oversight of State Programs. Thus, the State-level EO Officer has the same responsibilities and qualifications of a recipient-level EO Officer, but with the additional mandate to carry out the Governor’s obligations. As indicated in § 38.28(a), State-level EO Officers are responsible for State Program-wide coordination of compliance with the equal opportunity and nondiscrimination requirements in WIOA and this rule.

CRC declines to define the terms Chief Executive Officer, Chief Operating Officer, or equivalent official in the final rule. The purpose of this provision is to ensure that EO Officers report to the top-ranking official within the entity that is the recipient, who is responsible for overseeing compliance of that recipient. Rather than provide a description, CRC has provided more examples of the titles that such officials may have. In the final rule, CRC revises § 38.28(b) to specify that all recipients must designate a recipient-level EO Officer, “who reports directly to the individual in the highest position of authority for the entity that is the recipient, such as the Governor, the Administrator of the State Department

of Employment Services, the Chair of the Local Workforce Development Board, the Chief Executive Officer, the Chief Operating Officer, or an equivalent official.” This revision provides more examples of the level of officials to whom the recipient-level EO Officer must report, and incorporates the same language as is included for all EO Officers in final § 38.29(a).

*Comment:* Referring to proposed § 38.30, a State agency recommended that, instead of requiring that the EO Officer be a senior-level employee, the EO Officer could hold a middle management position with access to the Governor’s designee. The commenter stated that, if the EO Officer must be a senior level employee with additional staffing, then there should be shared funding.

*Response:* As mentioned in the NPRM and above, CRC wants to ensure through these provisions that EO Officers have the requisite authority to effectuate compliance with WIOA Section 188 and this part. CRC retains the requirement that the EO Officer must be a senior level employee. The 1999 rule at § 37.24 and the 2015 rule at § 38.24 required that the EO Officer be a senior level employee; that requirement has not changed. Thus, the same provisions in this final rule require no additional funding to implement. As to the requirement in proposed and final §§ 38.28(a) and (b) and 38.29(e) that the EO Officer have sufficient staff to ensure compliance, CRC notes that the 1999 rule at § 37.26(c) and 2015 rule at § 38.26(c) already required that the recipient assign sufficient staff and resources to the EO Officer. Thus, this provision is not new either and consequently should require no additional funding to implement. Regarding the commenter’s suggestion to require “shared funding,” the allocation of specific funds is beyond the scope of this rule.

#### Summary of Regulatory Changes

For the reasons described in the proposed rule and considering the comments received, CRC finalizes proposed § 38.29, with some modifications. CRC modifies the title and introductory sentence to state: “All recipients have the following obligations related to their EO Officers.” Additionally, CRC revises paragraph (a) to further describe the EO Officer’s authority to report directly to “the individual in the highest position of authority for the entity that is the recipient,” and provides additional examples of the titles of those officials, “such as the Governor, the Administrator of the State Department

of Employment Services, the Chair of the Local Workforce Development Board the Chief Executive Officer, the Chief Operating Officer, or equivalent top-level official of the recipient.” CRC also makes a grammatical correction to paragraph (d) (changing “appears” to “appear”).

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

Together with proposed §§ 38.28 and 38.29, proposed § 38.30 was intended to emphasize the level of authority recipients must give to the EO Officer and the capabilities of the person holding that position. This provision explained that the EO Officer must be a senior level employee of the recipient who possesses the knowledge, skills, and abilities necessary to competently fulfill the responsibilities of the EO Officer, described in this part. The provision also states that the EO Officer may be assigned other duties but must not have other responsibilities or activities that create a conflict or the appearance of one. CRC received six substantive comments regarding this provision.

*Comment:* A State agency and State workforce development board supported the requisite skill and authority given to the EO Officer in § 38.30. The State agency commented that this provision would ensure that the Governor would not have reservations delegating authority to the EO Officer because the EO Officer would be qualified to enforce compliance with WIOA and would be accountable for any conflicts of interest. The State workforce development board recommended that similar requirements for skill and authority be in place for Equal Opportunity Liaisons that are assigned to individual American Job Centers or be required in each State “Nondiscrimination Plan.”

*Response:* CRC appreciates the commenters’ support for proposed § 38.30. In the final rule, CRC adopts proposed § 38.30 and declines to require States to include language in the Nondiscrimination Plan regarding Equal Opportunity Liaisons. Some, but not all States, have the Equal Opportunity Liaison position. While CRC agrees that Equal Opportunity Liaisons should have sufficient authority and skills, CRC declines to require recipients to have such a position or to include regulatory provisions addressing that position. Thus, unless the Equal Opportunity Liaison also serves as an EO Officer, the EO Liaison position is outside of the scope of this rule’s requirements. However, States are not restricted from listing skills needed for other positions

such as the EO Liaison position in their Nondiscrimination Plans.

*Comment:* An advocacy organization recommended that the EO Officer be provided training on disability discrimination and disability issues.

*Response:* While CRC generally agrees that the EO Officer should, as a best practice, be trained on disability discrimination, CRC declines to single out a specific protected category about which EO Officers should be trained. CRC believes that the legitimate exercise of discretion regarding training on disability and other protected bases is best left with recipients. Section 38.30 only requires that the EO Officer possess the knowledge, skills, and abilities that are necessary to comply with this part. CRC notes that § 38.31(f) also requires that EO Officers undergo training (at the recipient's expense) to maintain competency, which would include training related to disability discrimination along with all of the other protected bases under Section 188 and this part. Accordingly, CRC declines to specify in the final rule that recipients must provide disability discrimination training for EO Officers.

*Comment:* A State agency noted that "size" is not defined and requested an explanation as to when a recipient is large enough to warrant a dedicated EO Officer. The commenter recommended that any restrictions on what an agency can and cannot do with their staff was overly intrusive and should be stricken.

*Response:* CRC disagrees that the requirements in proposed § 38.30 are intrusive. CRC declines to modify the provision that precludes the EO Officer from having other responsibilities whenever the size of the recipient, or the size of its WIOA Title I—funded programs, would prevent the EO Officer from competently fulfilling the duties of the office. CRC in this provision has given recipients the flexibility to assign other duties to the EO Officer as long as those duties do not interfere with the EO Officer duties or present an actual or apparent conflict. The proposed rule does not define "size" as used in § 38.30 because CRC wants to give recipients the flexibility to structure their workforces in the manner that best meets their needs, while still complying with this part. For that reason, the rule does not require in all cases that EO Officers be dedicated exclusively to their duties under this part.

Moreover, regarding when a recipient would be considered a small recipient, the 1999 rule, the 2015 rule and the proposed rule defined "small recipient" in § 38.4(hhh) as 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. As indicated in the 2015 rule and proposed rule §§ 38.28(b) and 38.32, small recipients do not need to designate recipient-level EO Officers. Thus, any recipient who qualifies as a small recipient under § 38.4(hhh), or as a "service provider" under § 38.4(ggg), is not obligated to designate a recipient-level EO Officer.

#### Equal Opportunity Officer Responsibilities § 38.31

Most of the language in the 1999 and 2015 rules was retained in proposed § 38.31, with some additions. Proposed § 38.31 added new language in paragraph (d) clarifying the existing requirements that the EO Officer develop and publish the recipient's procedures for processing discrimination complaints by adding examples of specific procedures to be included and that the EO Officer make sure that those procedures are followed, including by tracking the discrimination complaints filed against the recipient, developing procedures for investigating and resolving discrimination complaints, and making available to the public, in appropriate languages and formats, the procedures for filing a complaint. Proposed paragraph (e) added to the EO Officer's responsibilities an outreach and education requirement, which recipients were already required to undertake pursuant to the 1999 and 2015 rules.<sup>282</sup> In addition, the NPRM deleted § 38.25(e), which addressed reporting lines of authority for the Equal Opportunity Officer because those reporting lines are now addressed in the final rule under §§ 38.28 and 38.29(a). Finally, the NPRM proposed language in paragraph (f) to clarify that the existing training obligation for the EO Officer includes EO Officer staff training. CRC received seven comments on these provisions.

*Comment:* A State workforce development board supported § 38.31, describing the requirements as well-defined. The commenter also recommended that this provision be added to requirements that apply to Equal Opportunity Liaisons. The commenter also stated that, if the provision was not included in the final rule, then the Department should consider including it within the State Nondiscrimination Plan.

*Response:* While CRC generally agrees that persons other than the EO Officers may be involved in overseeing or

monitoring compliance with the nondiscrimination and equal opportunity provisions as set out in this subpart, CRC declines to regulate each of these positions and their responsibilities. As mentioned in the section above, CRC does not regulate EO Liaisons that States may designate to help fulfill their obligations under part 38 unless they also serve as EO Officers. Instead, CRC's focus is on the EO Officer and that individual's responsibilities. States have the flexibility, however, to decide how best to incorporate EO Liaisons and their responsibilities within the structure of their programs. States are not prohibited from listing skills needed for other positions such as the EO Liaison in their Nondiscrimination Plans. In fact, CRC encourages this practice, but declines to make it a requirement.

*Comment:* Some commenters requested clarification of the EO Officer's responsibilities. A State workforce agency asked whether employee complaints in the agency would be the responsibility of the "State EO Officer" or other human resources staff.

*Response:* The recipient-level EO Officer is responsible for developing and publishing the recipient's procedures for processing discrimination complaints, including covered employee complaints, and for making sure those procedures are followed as described in § 38.72. The State-level EO Officer oversees all recipient-level EO Officers assigned to State Programs. Since States retain flexibility to structure their equal opportunity staff as they deem necessary to comply with this part, a State could require the recipient-level EO Officer to process complaints, or to oversee human resources staff that handle complaint processing, provided no conflict of interest exists and human resources staff have the requisite knowledge to fulfill equal opportunity responsibilities. Again, the recipient-level EO Officer is accountable for overseeing that process, ensuring there is no conflict of interest, and confirming that the process complies with Section 188 of WIOA and this part.

*Comment:* One commenter asked whether the Department would allocate funding for trainings because the proposed rule stated that budgetary restrictions are not a sufficient excuse for not sending EO Officers to training.

*Response:* As mentioned in the NPRM, EO Officers reported to CRC that they were unable to attend trainings for budgetary reasons. CRC rejected budgetary reasons as a basis for recipients to deny training opportunities

<sup>282</sup> 29 CFR 37.42 (1999 rule); 29 CFR 38.42 (2015 rule).

to EO Officers and their staff. CRC continues to believe that recipients must permit their EO Officers and staff to participate in such training whenever necessary to ensure that EO Officers and their staff have the requisite knowledge to comply with their responsibilities under this part. Furthermore, under proposed § 38.25 (§ 38.20 in the 2015 rule and § 37.20 in the 1999 rule), in their written assurances, grant applicants agree to comply fully with the nondiscrimination and equal opportunity provisions in this part. Providing training to EO Officers and their staff is part of that obligation. The requirement to provide training for the EO Officer and staff has existed for years. Indeed, under the 2015 rule at §§ 38.25(f) and 38.26(d), and the 1999 rule at §§ 37.25(f) and 37.26(d), recipients were required to ensure that the EO Officer and staff were afforded the opportunity to receive the training necessary and appropriate to maintain competency. CRC retains this requirement in the final rule in § 38.31(f). Allocation of funding for specific expenses is beyond the scope of this rule.

*Comment:* A State agency requested clarification on how or whether the State-level EO Officer and the recipient-level EO Officer would coordinate monitoring activities. The commenter argued that this oversight could be time-consuming and costly for State agencies because, for example, a one-stop operator would be monitored at a minimum of three times a year: By the State-level EO Officer, the recipient-level EO Officer of at least one state-level agency partner, and by the local Workforce Development Board or LWDA grant recipient. One commenter suggested that CRC should provide the policy, procedure, and forms on processing, investigating, and tracking a complaint. The commenter argued that this would unify the procedures and allow all States to provide a uniform result.

*Response:* CRC understands the commenter's concerns about cost and time management issues, but reiterates that such concerns do not relieve recipients from complying with Section 188 of WIOA or this part. CRC believes that the Nondiscrimination Plan will be an effective tool to help States coordinate efforts and avoid duplicative costs and drafts this final rule to give States the flexibility to determine how State-level and recipient-level EO Officers should coordinate monitoring activities. The final rule retains the EO Officer's responsibilities to develop and publish the recipient's procedures for processing complaints, which recipients

are currently required to do under the 2015 rule in §§ 38.76 and 38.77, and were required to do under the 1999 rule in §§ 37.76 and 37.77.

As to whether CRC should provide the policy, procedure and forms that the commenter requests, CRC notes that the EO Officer is the recipient's employee likely to be the best suited to help recipients develop and publish procedures for processing discrimination complaints and the investigatory practices that occur thereafter. CRC believes it has provided sufficient criteria for recipients and their EO Officers related to the processing and tracking of complaints. The requirements in subpart D include a subheading titled "Complaint Processing Procedures," beginning at § 38.69, which includes sections that identify, among other things, the required contents of a complaint, required elements of a recipient's complaint processing procedures, and the recipient's obligations as to complaints generally. CRC believes its detailed provisions in this rule provide sufficient direction to help recipients develop and publish procedures for processing discrimination complaints. Recipients also are encouraged to contact CRC for technical assistance.

*Comment:* A local workforce agency stated that implementation of the proposed rule would take more than six months and possibly more than a year. The commenter recommended that CRC mandate that State-level EO Officers hold training sessions for local EO Officers on a quarterly basis. The commenter argued that training would help with interpretation of the rule and help the State unify its objectives to ensure that the State-level EO Officer is providing the best oversight and implementation of Section 188 of WIOA.

*Response:* CRC appreciates the commenters' concerns regarding implementation and training. However, the 30-day effective date for the final rule provides recipients with sufficient time to come into compliance. CRC notes that most of the requirements in the final rule are obligations that currently exist. For those provisions where CRC believes that more time is needed for implementation, CRC has explicitly provided that additional time in the regulatory text.<sup>283</sup>

<sup>283</sup> For example, recipients have two years after the effective date of this rule to update their data collection of LEP individuals' primary and preferred languages under § 38.41(b)(2). Section 38.55 also provides an additional 180 days for States to develop and implement their initial Nondiscrimination Plans. Furthermore, § 38.36(d) gives recipients up to 90 days to comply with the

With respect to the suggestion that State-level EO Officers be required to train recipient-level EO Officers on a quarterly basis, CRC understands the commenters' concern, but declines to impose that requirement in this rule. CRC wishes to retain States' flexibility in deciding how often training should be conducted, so long as they are complying with their overall obligations in this part. The requirements in §§ 38.29(f) and 38.31(f) emphasize that the EO Officer and staff receive training necessary to maintain competency. In that regard, the revisions set forth in §§ 38.28 through 38.30 modifying the reporting structure of the State-level EO Officers and the management level of the recipient-level EO Officer now puts Governors and recipients in the best position to determine the frequency of training needed for State-level EO Officers and other EO Officers to maintain competency to enable them to ensure compliance with this rule.

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

Proposed § 38.32 replaced 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. CRC received no comments on this provision and adopts § 38.32 as proposed.

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

The NPRM modified the title of § 38.28 to "Service provider Equal Opportunity Officer obligations" and renumbered it as § 38.33. CRC received no comments on this provision and adopts § 38.33 as proposed.

#### Notice and Communication

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

Proposed § 38.34 retained language from the 1999 and 2015 rules,<sup>284</sup> while incorporating minor revisions to paragraphs (a)(6) and (b). Proposed § 38.34(a)(6) added a requirement that the equal opportunity notice be provided to "those with limited English proficiency." Similarly, § 38.34(b) proposed that the notice be provided "in appropriate languages to ensure meaningful access for LEP individuals as described in § 38.9." Proposed § 38.9

new equal opportunity notice requirements in §§ 38.34 and 38.35.

<sup>284</sup> 29 CFR 37.29 (1999 rule); 29 CFR 38.29 (2015 rule).

included recipients' obligation to provide written translations of vital documents for LEP populations. We received no comments exclusively pertaining to this provision,<sup>285</sup> and adopt § 38.34 as proposed.

#### Equal Opportunity Notice/Poster § 38.35

Section 38.35 proposed the specific wording recipients must use in their equal opportunity notices and posters. CRC retained most of the language from the 1999 and 2015 rules.<sup>286</sup> Proposed § 38.35 added the term "poster" to the title, noting an explicit requirement that the notice be posted in conspicuous physical locations and on Web site pages. Proposed § 38.35 also added parentheticals to the required wording, explaining that "sex" as a prohibited basis for discrimination includes "pregnancy, child birth, and related medical conditions, sex stereotyping, transgender status, and gender identity" and "national origin" includes "limited English proficiency." Section 38.35 proposed these changes to be consistent with current law and to remind beneficiaries and recipients that discrimination based on these subcategories is prohibited. The NPRM also proposed language in the notice/poster stating that CRC will accept complaints via U.S. mail and email at an address provided on CRC's Web site.<sup>287</sup>

Many organizations expressed support for the requirements in proposed § 38.35. An individual commenter stated that the equal opportunity notice seems to have a comprehensive scope, allowing individuals that have been or are being discriminated against under WIOA programs to be aware of their rights and file a complaint. Some commenters recommended specific revisions to the required wording of the equal opportunity notice. In total, we received 11 comments on this section, which are addressed below.

*Comment:* One commenter recommended that CRC add language to this provision that "the notice, poster, and/or appeal rights set forth in this section must be provided in an accessible format."

*Response:* CRC declines to add the suggested wording to § 38.35 because it is worded as an across-the-board

requirement. Section 38.36(b) provides that the notice must be provided in appropriate formats to registrants, applicants, participants, and employees with visual impairments. That provision adequately puts recipients on notice regarding their obligations to publish the equal opportunity notice and to provide the notice in an accessible format. Section 38.15 provides further instruction to recipients regarding communications with individuals with disabilities. Sections 38.36 and § 38.15 therefore appropriately capture the commenters' concerns. For these reasons, CRC declines to make the change suggested by the commenter. However, as discussed above in connection with § 38.4(i), we are adding two sentences to § 38.35 to provide similar notice to beneficiaries. The equal opportunity notice now alerts individuals with disabilities of their right to request auxiliary aids and services at no cost.

*Comment:* Several advocacy organizations recommended adding "sexual orientation" to the parenthetical language concerning sex as a form of discrimination.

*Response:* CRC appreciates the commenters' suggestion, but declines to make this change. For the same reasons described above in the main preamble and in connection with the discussion of § 38.7(a), CRC has decided not to resolve in this rule whether discrimination on the basis of an individual's sexual orientation alone is a form of sex discrimination. CRC will continue to monitor legal developments in this area.

*Comment:* Two State agencies suggested removing the parenthetical language relating to transgender status and gender identity from the notice/poster requirement in proposed § 38.35. One agency argued that the posters identifying prohibited discrimination be limited to the governing statutory provisions. Similarly, another State agency commented that Title VII does not include the parenthetical language proposed. Specifically, the State agency noted that the area of law regarding sex discrimination is unsettled and thus the parentheticals as to gender identity and transgender status should be removed. A coalition of organizations, on the other hand, supported expanding the statutory provisions by including parentheticals for certain prohibited bases.

*Response:* For the same reasons discussed previously in the main preamble and in connection with the definition of "sex" in § 38.7(a), CRC finds the inclusion of gender identity and transgender status in the final rule

to be consistent with case law under Title VII and Title IX. We therefore decline to remove the parenthetical language from the notice/poster requirement in this section.

*Comment:* One State agency recommended that the required wording of the equal opportunity notice/poster should specify that recipients accept complaints via email and without signature.

*Response:* Nothing in the equal opportunity notice mandated in § 38.35 prohibits a recipient from accepting complaints via email. A complaint may be filed electronically if the complaint meets the requirements outlined in proposed § 38.70(d). One required element of a complaint is a written or electronic signature of the complainant (or representative). CRC continues to believe that it is important for complaints to include signatures. A signature indicates that the contents in the complaint are grounded in fact, and to the best of the complainant's knowledge, the information is being presented in good faith. Accordingly, CRC declines to specify in the notice/poster that recipients accept complaints by email without signature.

For the same reasons as discussed above in connection with § 38.5, CRC makes technical revisions to the wording and punctuation of the first sentence of the EO notice/poster to clarify the list of protected bases.

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

Proposed § 38.36 retained the language in § 38.31(a)(1) of the 2015 rule, and § 37.31(a)(1) of the 1999 rule, that the equal opportunity notice be posted prominently in reasonable numbers and places. Proposed § 38.36(a)(1) added a requirement that the notice be posted "in available and conspicuous physical locations," as well as on the recipient's Web site pages. CRC updated this provision to reflect the current widespread use of Web site pages to convey program and employment information. CRC also highlighted the need to post the notice in places that are easily visible and to which employees, beneficiaries and program participants have ready access. Similarly, proposed § 38.36(a)(3) retained the requirement that the notice be included in employee and participant handbooks and manuals, and clarified that this included electronic handbooks and manuals to account for their current widespread use. Proposed paragraph (a)(4) was updated to require that the notice would be made a part of each participant's and

<sup>285</sup> We received one comment from an advocacy organization that generally cross-referenced this provision along with proposed §§ 38.4(i), 38.4(ttt), 38.36 and 38.39. Our response to that comment is addressed in the section-by-section analysis of § 38.36.

<sup>286</sup> 29 CFR 37.30 (1999 rule); 29 CFR 38.30 (2015 rule).

<sup>287</sup> U.S. Dep't of Labor, Civil Rights Center, <https://www.dol.gov/oasam/programs/crc/>.

employee's electronic as well as paper file, if both are maintained.

Proposed paragraph (b) of § 38.36 required that the notice be provided in appropriate formats for registrants, applicants, eligible applicants/registrants, applicants for employment and employees and participants with visual impairments, correcting an oversight in the 1999 and 2015 rules that such notice be given only to participants. Paragraph (b) retained the language from the 1999 and 2015 rules that, where notice has been given in an alternate format to a participant with a visual impairment, a record that such notice has been given must be made a part of the participant's file. CRC emphasizes that it is a record that *notice was given* that should be added to the main file, not a record that the individual has a visual impairment. That type of medical or disability information must be maintained in a separate file in accordance with § 38.41(b)(3).

Proposed paragraph (c) of § 38.36 stated that the notice must be provided to participants in appropriate languages other than English as required in § 38.9, which sets out recipients' obligations as to LEP individuals. This provision was added because recipients had an existing obligation under the 1999 and 2015 rules to provide limited English proficient individuals with meaningful access to this notice.<sup>288</sup>

Proposed paragraph (d) of § 38.36 provided that the notice required by proposed §§ 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.

Several advocacy organizations expressed support for the requirements in proposed § 38.36. We received five comments on the provisions in this section.

*Comment:* A coalition of organizations representing the interests of individuals with disabilities commented that ASL versions of notices should be available to ensure equal access for deaf, hard of hearing, and deafblind beneficiaries, employees, and job applicants, as well as those with additional disabilities. The commenters asserted that recipients cannot assume that English notification is sufficient for individuals who are fluent in ASL.

*Response:* CRC agrees that ASL versions of the equal opportunity notice should be made available upon request in appropriate cases, and the final rule reflects that requirement in § 38.15.

However, unsolicited offers of information in ASL or alternative formats may be contrary to the ADA, whenever they reflect another's perception or stereotype about particular disabilities. Instead, individuals are always free to request the notice in ASL, and the obligation to provide it is only triggered upon such a request.

As stated in § 38.15, which parallels the language of DOJ's ADA Title II regulations, a recipient must take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others. A recipient must furnish appropriate auxiliary aids and services where necessary to accomplish this. The type of auxiliary aid or service necessary to ensure effective communication varies 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 type of auxiliary aid and service is necessary, a recipient must give primary consideration to the request of an individual with a disability. Thus, the provision of auxiliary aids and services is always individually based and depends on a number of factors. There is no proactive requirement separate from an individual request to provide notification in ASL. For these reasons CRC declines to make the suggested changes to § 38.36.

*Comment:* One State agency commented that it should be the responsibility of the human resources department of the recipient, as opposed to the EO Officer, to ensure that the equal opportunity notice is included in each participant's and employee's electronic and paper file, if one of each is kept.

*Response:* CRC agrees with the commenter that it is the recipient's responsibility to ensure that the notice is included in each employee's and participant's file. Section 38.36 explicitly addresses the commenter's concern and is appropriately titled "Recipients' obligations to publish equal opportunity notice." Thus, the recipient has the flexibility to determine which members of its staff will ensure compliance with this obligation and can choose to assign that role to its Human Resources staff.

*Comment:* A State agency recommended that the provisions of § 38.36 be applicable to partner agencies only if the partner is colocated within a one-stop center, reasoning that this is

an unfunded mandate for partner agencies.

*Response:* CRC disagrees with the State agency's description of this obligation, and declines to adopt the commenter's suggestion. As discussed above, the requirement to publish the equal opportunity notice is not new and existed in the 1999 and 2015 rules. Moreover, CRC will make translations of this notice available to recipients in the ten most frequently used languages in the U.S. other than English. While there will be some cost associated with printing and disseminating the notice, as discussed below, the final rule does not impose an unfunded mandate on State or other governments as defined by the Unfunded Mandates Reform Act.<sup>289</sup>

Regarding the issue of colocation, as discussed in § 38.2 above, this final rule covers recipients regardless of whether they are colocated within a one-stop center. All covered entities, including one-stop partner agencies, must meet the equal opportunity obligations of WIOA and this part. Those obligations include publication and dissemination of the equal opportunity notice under § 38.36. While the statute now makes partnerships with certain entities mandatory, both the 1999 and 2015 rules required compliance by all one-stop partners. Thus, CRC's jurisdiction has not changed, nor has the category of entities that are required to comply with the notice requirement.

#### Notice Requirement for Service Providers § 38.37

Proposed § 38.37 retained the same substantive requirements as the 1999 and 2015 rules,<sup>290</sup> with updates to the title, internal citations, and the name of the Methods of Administration (now the Nondiscrimination Plan). We received one comment on this section.

*Comment:* A local workforce development board asked whether service providers will be required to "sign-off" to indicate that they have received, read, and understood the requirements of the equal opportunity notice. If so, the commenter suggested that that requirement be defined in the State Nondiscrimination Plan.

*Response:* Proposed § 38.37 did not require signatures from service providers to indicate that they received the equal opportunity notice from the Governor or LWDA grant recipient, or understood that notice. Instead, proposed § 38.37 required the Governor

<sup>289</sup> See *infra* discussion of the Unfunded Mandates Reform Act.

<sup>290</sup> 29 CFR 37.33 (1999 rule); 29 CFR 38.33 (2015 rule).

<sup>288</sup> See 29 CFR 37.35(a)(2) (1999 rule); 29 CFR 38.35(a)(2) (2015 rule).

or LWDA grant recipient to disseminate the notice on behalf of service providers pursuant to § 38.34, with the requisite language provided in § 38.35. The Nondiscrimination Plan must include a description of how the Governor will ensure that the equal opportunity notice requirement will be met for service providers. The service providers themselves will be bound by, and should have signed, the written assurance required by § 38.25 in which the providers agree to comply with the Section 188 equal opportunity regulations. Accordingly, apart from the provisions of § 38.25, we decline to impose the requirement that service providers “sign off” that they have received the equal opportunity notice in the final rule, and adopt § 38.37 as proposed.

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

Proposed § 38.38 contained most of the same requirements as the corresponding sections in the 1999 and 2015 rules.<sup>291</sup> Proposed § 38.38(a) provided 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 telecommunications system” such as a relay service used by the recipient. These modifications reflected current technology used by individuals with hearing impairments. Proposed paragraph (c) of this section made a minor revision, replacing the term “prohibited ground” with “prohibited basis” for consistency with this part. We received one comment on § 38.38.

*Comment:* A coalition of organizations representing the interests of individuals with disabilities recommended that the proposed language in § 38.38 that aims to reflect current technology used by individuals with hearing impairments be replaced with “videophones, captioned telephones, or equally effective telecommunications systems.” With regard to videophones, the commenters recommended that covered entities accept video relay calls and be prohibited from requiring callers to use a particular form of telephone, such as the text telephone (TTY), to place a call. Furthermore, the commenters stated that videophones and captioned telephones, including their respective relay systems—video relay service (VRS) and internet-protocol captioned telephone service (IP-CTS), as well as

all other relay services—should be readily available to all deaf, hard of hearing, and deafblind employees, as well as those with additional disabilities, so that covered entities can permit them to make calls on the same basis that hearing colleagues are able to make phone calls. The commenters asserted that any concerns about videophones and IP-CTS posing a risk of disrupting or interfering with a covered entity’s internet service can be resolved by using a network that is either a separate internet service or completely walled off from the intranet of the entity solely for videophone use. The commenters also noted that use of videophones and captioned phones has been denied in some cases as a result of concerns regarding access to confidential information, despite the fact that Telecommunication Relay Service rules clearly state that all calls are kept confidential. The commenters concluded that any restriction in response to privacy concerns should be eliminated.

*Response:* While CRC believes that the proposed language of “equally effective telecommunications system” would include “videophones, captioned telephones, or equally effective telecommunications systems,” including additional examples of current technology regarding telephones will be useful for recipients. CRC accepts the recommendation to revise the last sentence in § 38.38(a) to include the examples of videophone and captioned telephone.

The issue of requiring recipients to have specific telecommunications devices and technology available to be used to place or receive a call is governed by § 38.15, which requires that a recipient take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others. A recipient must furnish appropriate auxiliary aids and services where necessary to accomplish this. The type of auxiliary aid or service necessary to ensure effective communication varies 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 type of auxiliary aid and service is necessary, a recipient must give primary consideration to the request of the individual with a disability. Accordingly, CRC declines to set blanket mandatory requirements, such as requiring recipients to accept video relay calls in all instances; providing the

specific communications device requested in all cases (as opposed to an effective alternative communications device); or imposing specific internet network requirements. Under some circumstances, the failure to provide specific devices or systems may constitute discrimination, and CRC will evaluate the facts presented on a case-by-case basis by applying the standards in § 38.15.

For these reasons, CRC adopts § 38.38(a) with the addition of two examples to paragraph (a).

#### Communication of Notice in Orientations § 38.39

Proposed § 38.39 generally retained the same requirements as the 1999 and 2015 rules,<sup>292</sup> with modifications to account for current technology and the existing requirements to provide language services to LEP individuals, and equally effective communications for individuals with disabilities.<sup>293</sup> The 1999 and 2015 rules required recipients, during each presentation to orient new participants, employees or the general public to its WIOA Title I funded programs or activities, to include a discussion of rights and responsibilities under Section 188 and this part, including the right to file a discrimination complaint. The proposed rule clarified that not only in-person orientations but also those provided remotely over the internet or using other technology are subject to these notice requirements. Proposed § 38.39 also required that the discussion of rights and responsibilities during the orientation 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. We received two comments on these provisions.

*Comment:* A coalition of organizations expressed support for requiring recipients’ equal opportunity notice to be communicated in orientation presentations to new participants, employees, and/or the general public. The commenters reasoned that this provision will help increase recipient compliance by ensuring that individuals engaging in the workforce development system are aware of their rights. A coalition of organizations representing the interests of individuals with disabilities commented that ASL versions of equal opportunity notices should be provided during orientation. The commenters

<sup>292</sup> 29 CFR 37.36 (1999 rule); 29 CFR 38.36 (2015 rule).

<sup>293</sup> See, e.g., §§ 38.9 and 38.15.

<sup>291</sup> 29 CFR 37.34 (1999 rule); 29 CFR 38.34 (2015 rule).

noted that, regardless of the format of the orientation, whether in person or remote, the orientation should be fully and equally accessible to individuals with disabilities.

*Response:* CRC agrees that proposed § 38.39 will increase compliance and promote awareness of individuals' rights under WIOA Section 188. CRC also agrees that, when required, the orientation discussion of rights and responsibilities should be communicated in a format that is accessible to individuals with disabilities. However, §§ 38.39 and 38.15 are intended to be consistent with the requirements of the ADA.<sup>294</sup> As mentioned in § 38.36, to determine the type of auxiliary aid and service that is necessary, recipients must give primary consideration to the request of the individual with a disability. Thus, the provision of auxiliary aids and services is always individually based and depends on a number of factors. There is no proactive requirement separate from an individual request to provide notification in ASL. Accordingly, CRC declines to adopt the suggested changes, and finalizes proposed § 38.39 without modification.

#### Affirmative Outreach § 38.40

Proposed § 38.40 generally contained the same requirements as the 1999 and 2015 rules.<sup>295</sup> However, the proposed rule changed the title of this section from requiring "universal access" to requiring "affirmative outreach" to more descriptively explain the requirements contained in this section.

Section 38.40 also proposed limited updates to clarify that the affirmative outreach requirement applies not just to the listed examples of groups and populations, but to "the various groups protected by these regulations." CRC expanded the existing list of example groups by adding "national origin groups, various religions, [and] individuals with limited English proficiency." We also changed the reference to "both sexes" to "persons of different sexes" to broaden the terminology. We received three substantive comments on § 38.40.

*Comment:* Several advocacy organizations expressed support for the provisions requiring affirmative outreach. One advocacy organization specifically expressed support for CRC's inclusion of "individuals in different age groups." Other advocacy organizations recommended that CRC

strengthen the affirmative outreach provisions by requiring that "reasonable efforts to include members of various groups protected by these regulations" include analysis of local population data to identify ethnic/national origin groups and individuals with limited English proficiency that should be targeted by such outreach. Furthermore, the commenters stated that outreach materials should be translated into any language identified in § 38.9 to effectively reach limited English proficient speakers of those languages.

*Response:* CRC appreciates the commenters' support of the affirmative outreach requirement, and finds it unnecessary to adopt the commenters' recommendations regarding local population data and translation of outreach materials. CRC disagrees with the commenters that § 38.40 needs to specifically mention analysis of local population data. Section 38.40 requires recipients to conduct affirmative outreach that targets various populations in order to "ensure that [recipients] are providing equal access to their WIOA Title I-financially assisted programs and activities." Targeting various populations in this manner necessarily includes a preliminary determination of which populations to target. Making that determination will likely involve consulting various sources of information—including equal opportunity data, performance data, local population data, and other relevant resources from within and without the recipient's organization. Using these types of resources to determine which populations to target for affirmative outreach is something recipients should have been doing under the 1999 and 2015 rules (§§ 37.42 and 38.42, respectively), and should continue to do pursuant to § 38.40 of this final rule. Otherwise, recipients would not be "tak[ing] appropriate steps to ensure that they are providing equal access to their WIOA Title I-financially assisted programs and activities."

Regarding translation of outreach materials, CRC believes that § 38.40 implicitly requires such translation whenever the required outreach is to targeted LEP populations. Otherwise, the outreach would not include "tak[ing] appropriate steps" and would not "involve reasonable efforts to include members" of the targeted group.<sup>296</sup> Also, when outreach material

contains vital information, § 38.9(g)(1) in the final rule appropriately captures recipients' obligation to translate that vital information. As defined in § 38.4(ttt), vital information includes information that is necessary for an individual to understand how to obtain any aid, benefit, service, or training. Whether outreach materials contain vital information will be a fact-specific inquiry dependent upon the circumstances of each case. Accordingly, CRC views as a best practice that recipients translate all outreach materials into languages identified in § 38.9(g)(1), but declines to impose that requirement in this rule for materials that neither include vital information nor target an LEP population.

*Comment:* A coalition of organizations recommended making the list of "reasonable efforts" a list of minimum, specific targeted outreach required of recipients to address underrepresentation or inequitable representation of protected individuals within WIOA programs and activities. These commenters also recommended that the Department require all recipients to provide all applicants and program participants information, including wages and benefits, about the full range of employment opportunities offered by the program, reasoning that research shows that women might have pursued training for different, higher paying occupations had they received more detailed information about the wages and benefits of different occupations before they began their training.

*Response:* While CRC acknowledges the obligation for recipients to conduct affirmative outreach as provided in proposed § 38.40, CRC also believes that the outreach required to comply with WIOA and this part will depend upon the circumstances of individual recipients, who should therefore have the flexibility to adopt case-specific reasonable efforts under this requirement. Accordingly, CRC declines to impose a list of required minimum reasonable efforts.

Similarly, CRC declines to require recipients to provide wage and benefit information to all applicants and program participants, but considers it a best practice for recipients to implement. Indeed, CRC strongly encourages recipients to provide as much information as possible regarding wages and benefits for occupations to help applicants and participants make informed decisions about the

example of an implementing step in a recipient's LEP plan).

<sup>294</sup> See also DOJ Final Rule to Implement ADA, *supra* note 18.

<sup>295</sup> 29 CFR 37.42 (1999 rule); 29 CFR 38.42 (2015 rule).

<sup>296</sup> § 38.40. This is consistent with § 38.9(b)(1)'s reference to "outreach to LEP communities to improve service delivery in needed languages." See also Appendix to § 38.9, Recipient LEP Plan: Promising Practices, ¶ 8 (listing outreach as an

occupations before receiving training. If recipients choose to provide information regarding possible wages and benefits, that information should be provided on an equal basis to all applicants and program participants. CRC also notes that, if recipients steer women or members of other protected groups into lower paying occupations, they may be liable for discrimination under WIOA Section 188 and § 38.5 of this part.

#### Data and Information Collection and Maintenance

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

Proposed § 38.41 generally retained the same requirements as the 1999 and 2015 rules.<sup>297</sup> CRC did, however, propose changes in § 38.41(b)(2) and added new paragraph (b)(3).

Proposed paragraph (b)(2) added “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 trainee. As noted in the NPRM, this data collection obligation would not apply to applicants for employment and employees because the obligation as to LEP individuals in § 38.9 does not apply to those categories of individuals. Recipients’ collection of information relates directly to serving (not employing) LEP individuals. In addition, CRC proposed 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.

Proposed paragraph (b)(3) introduced new obligations regarding 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. This new paragraph listed the range of persons who may have access to such files or be informed of a particular individual’s disability, medical condition, work restrictions, or reasonable accommodation under certain circumstances. We received 16 substantive comments regarding § 38.41.

*Comment:* Several commenters supported the new equal opportunity data elements that must be collected by recipients. A local workforce agency stated that the additional data would help recipients learn more about the

individuals using their services. The commenter said capturing and recording these data points would be easy to incorporate into their operation.

Similarly, several advocacy organizations supported the collection of the additional data elements and recommended that CRC require these data to be made publicly available annually to monitor the effectiveness of outreach and nondiscrimination regulations. A coalition of organizations stated that the collection of additional data is essential to ensure compliance and would move WIOA programs away from reinforcing gender inequities.

In contrast, several commenters expressed opposition to the collection of additional data elements by recipients. Many State agencies and professional associations argued that the new data collection requirements were outside of the scope of Section 188 of WIOA. Specifically, State agencies urged that CRC eliminate the requirement relating to LEP individuals and their preferred languages. In support of their position, a State agency commented that “limited English proficiency” was difficult to quantify and thus the data would be questionable. Another State agency commented that the collection of “preferred language of an individual” would create unnecessary costs. A third State agency questioned the value of collecting more information because individuals are not required to disclose their race/ethnicity, sex, and disability status. The commenter therefore argued that any report generated using this information would be useless because the information could be inaccurate and imprecise.

*Response:* After careful consideration, CRC retains the requirement that recipients must record the limited English proficiency and preferred language of an individual. As some commenters noted, capturing these data will help recipients learn more about the preferred languages of the individuals using their services. Although there is no way for recipients to guarantee 100 percent accuracy as to the information received from applicants, registrants, participants, and trainees, CRC recognizes that giving individuals the opportunity to self-identify their preferred language is the most efficient and effective way to capture this information as to LEP individuals. This information is also used by States with language access laws.<sup>298</sup> CRC, however, declines to require recipients to make the collected information publicly available as part of this rule because CRC understands that

this information is already publicly available for most core programs.<sup>299</sup> Therefore, CRC does not consider it necessary to impose that requirement on recipients in this provision.

Finally, as explained above, it is well-settled that discrimination on the basis of national origin may include discrimination against LEP individuals. Collection of LEP and preferred language data is therefore within the scope of these implementing regulations, and a necessary step towards meeting the nondiscrimination and equal opportunity obligations of WIOA Section 188 and this part. CRC recognizes that the addition of these two data points will impose additional obligations on recipients’ data collection systems. Thus, as proposed in the NPRM, CRC will allow recipients two years to come into compliance with the requirement to update their data collection practices as to limited English proficiency and preferred language, and amends the third sentence in § 38.41(b)(2) to reflect that compliance date.

*Comment:* CRC received several comments regarding the collection of disability information in proposed § 38.41(b)(3). In order to make WIOA Title I programs more responsive to individuals with disabilities, an advocacy organization suggested that CRC modify the rule to indicate that a person with a disability may voluntarily disclose their disability status during the course of service, and this information should be used by workforce system staff for a limited number of reasons with the focus on enhancing the services provided to the individual.

The advocacy organization also stated that the proposed rule did not take into account that there are numerous reasons staff may need to have knowledge of an individual’s disability status beyond eligibility for Title I of WIOA. The commenter further opined that the proposed rule may be too restrictive and could result in Title I programs failing to be fully responsive to the needs of individuals with disabilities as service recipients. To support its position, the commenter provided examples of instances where knowledge of an individual’s disability would improve the services offered to that individual. The commenter also stressed that the proposed rule must emphasize that this voluntarily disclosed disability information is confidential. Similarly,

<sup>297</sup> 29 CFR 37.37 (1999 rule); 29 CFR 38.37 (2015 rule).

<sup>298</sup> See *supra* note 228 and accompanying text.

<sup>299</sup> See U.S. Dep’t of Labor, Emp’t & Training Admin., WIA Performance Results, [https://www.doleta.gov/performance/results/eta\\_default.cfm#wiasrd\\_databook](https://www.doleta.gov/performance/results/eta_default.cfm#wiasrd_databook).

an advocacy organization supported the recipient's responsibility to keep medical and disability related information on separate forms and in separate files.

*Response:* CRC agrees that recipients must treat information obtained regarding an individual's disability or medical condition as confidential, and that in appropriate circumstances such information may be relevant beyond eligibility for WIOA services. CRC declines, however, to adopt the modifications suggested by the commenter because they are unnecessary. The final rule does contemplate situations beyond eligibility determinations in which an individual's disability is relevant. For example, other sections of the rule describe recipients' obligations regarding physical accessibility and communications with individuals with disabilities.<sup>300</sup> In those situations, information received regarding an individual's disability must be treated in a confidential manner, in accordance with § 38.41(b)(3).

The requirements of § 38.41(b)(3) are only intended to address the manner in which disability status information must be maintained by the recipient, in order to ensure that it is treated in a confidential manner. This provision parallels the requirements of the ADA on this issue. New paragraph (b)(3) is also consistent with the Department's regulations implementing Section 504 of the Rehabilitation Act, and with the EEOC's regulations implementing Title I of the ADA.<sup>301</sup> CRC believes that consistency across enforcement agencies will better enable recipients to develop protocols that are consistent with these requirements.

Regarding the advocacy organization's comment, an individual with a disability is always free to disclose disability status if desired; however, such disclosure is limited to those to whom the individual with a disability chooses to make the disclosure, unless other officials are permitted to know pursuant to § 38.41(b)(3). Permitting medical or disability information to be shared without the individual's specific consent is contrary to the requirements of the ADA. Thus, CRC stresses the importance of keeping narrow the range of persons who may be permitted to access files containing medical and disability-related information to ensure that sensitive disability information remains confidential. The rule's obligations do not limit when individuals with disabilities may

voluntarily self-identify, but govern how the recipient should treat such information once it is received.

*Comment:* Several commenters made recommendations to improve the quality of data collected by grant recipients. An advocacy organization commented that recipients were collecting data on "too limited a pool of customers." The commenter recommended that recipients collect and record the age (and other protected bases) of all those who seek services. The commenter argued that without a report on all individuals who seek information or services, there is no base against which participants, registrants, applicants, and others can be monitored or analyzed. A coalition of organizations suggested that CRC require recipients to collect data on WIOA service and program usage by race, sex, and ethnicity. The commenters also recommended that these data be cross-tabulated so that recipients and CRC can better evaluate the utilization of WIOA services and programs by each particular group (e.g., African American women or Latinas).

*Response:* CRC appreciates the commenters' suggestions to expand the data collection requirements and their usage. However, CRC declines to do so, and disagrees that under this final rule there is no base against which participants, registrants, applicants, and others can be monitored or analyzed. Section 38.31 requires each recipient's EO Officer "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 [equal opportunity] data required [in § 38.41] to ensure compliance . . . ." Monitoring the data in this way—to ensure a recipient has not violated its nondiscrimination and equal opportunity obligations—will often require comparing that equal opportunity data to various sources, including programmatic data (e.g., performance data), local population data (e.g., census data), and other relevant resources from within and without the recipient's organization. Otherwise, recipients' EO Officers would not be fulfilling their duty to use the equal opportunity data collected "to ensure compliance."

Therefore, it is unnecessary to require data collection in addition to that already contemplated by § 38.41. Furthermore, CRC notes that the data collection requirement generally captures the commenter's concern, in any event, because those who seek information or services for WIOA Title

I programs are mostly accounted for within the prescribed categories in § 38.41: Applicants, registrants, participants, terminees, employees, and applicants for employment.<sup>302</sup>

Additionally, recipients' obligation to collect and maintain data on the race/ethnicity, age, sex, and (where known) disability status of all applicants, registrants, participants, and employees existed in the 1999 rule; currently exists in the 2015 rule; and CRC retains this requirement in § 38.41. CRC declines to impose a blanket additional requirement that the data be cross-tabulated by subgroups as this might in some circumstances impose an additional burden on recipients. However, CRC would expect recipients to conduct cross-tabulated analyses between individual groups and to take a more thorough look at the intersections of race and sex when appropriate as part of the monitoring process.

#### Summary of Regulatory Changes

For the reasons set forth above and in the NPRM and considering the comments received, CRC finalizes § 38.41 as proposed, with one modification. Paragraph (b)(2) now allows recipients two years from the effective date of this final rule to begin collecting the LEP status and preferred language of individuals.

#### Information To Be Provided to the Civil Rights Center (CRC) by Grant Applicants and Recipients § 38.42

Proposed § 38.42 retained most of the requirements from the 1999 and 2015 rules.<sup>303</sup> Proposed paragraph (a) of this section added 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. Proposed paragraph (b) removed the reference to grant applicants. Proposed paragraphs (c) and (e) inserted the phrase "that the Director considers" before the word "necessary" to advise recipients that the Director of CRC ultimately determines what information is necessary for CRC to investigate complaints and conduct compliance reviews. The Director will also decide what information is necessary to determine whether the grant applicant

<sup>302</sup> CRC notes for the commenters' convenience that the definition of "applicant" in § 38.4(c) includes an individual "who has signified . . . interest by submitting personal information in response to a request by the recipient."

<sup>303</sup> 29 CFR 37.38 (1999 rule); 29 CFR 38.38 (2015 rule).

<sup>300</sup> See §§ 38.13(a) and 38.15.

<sup>301</sup> See 29 CFR 1630.14(b)(1)(i)–(iii).

would be able to comply with the nondiscrimination and equal opportunity provisions of WIOA and this part. As indicated in the NPRM, proposed paragraph (e) confirmed CRC's ability to engage in pre-award reviews of grant applicants, but CRC 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 were addressed in proposed § 38.62. We received three substantive comments on proposed § 38.42.

*Comment:* An organization representing women in the trades recommended that the Department require State and local workforce systems to provide information on their gender equity gap analysis and how funds have been used to improve programs and close gaps. The commenter suggested that the Department require States, workforce areas, and job training programs that demonstrate a gender equity wage gap at placement or underrepresentation of women in training programs in male dominated fields to develop written affirmative action/gender equity plans.

*Response:* We acknowledge the pay disparities that exist between men and women, and the need to close the gender wage gap.<sup>304</sup> CRC believes the final rule requires Governor and recipient monitoring responsibilities that will identify and remedy gaps that are the result of discrimination or denial of equal opportunity. Pursuant to § 38.31(b) of the final rule, EO Officers are required to monitor and investigate the activities of recipients to ensure compliance with nondiscrimination and equal opportunity obligations. Additionally, Governors are required, under § 38.54, to develop and implement Nondiscrimination Plans for proper oversight of recipients' State Programs. CRC believes that the requirements set forth in §§ 38.31, 38.42 and 38.54 address the commenters' concerns, while not imposing additional obligations on recipients' staff and resources. Therefore, CRC declines to require grant applicants and recipients

to perform the analyses suggested by the commenters, or to create affirmative action plans.

*Comment:* A State agency argued that the requirement in § 38.42(a) to notify the Director whenever a discrimination lawsuit or administrative enforcement action has been filed is overly burdensome and unrelated to equal opportunity compliance. The commenter stressed that initiating a discrimination action does not mean that there has been a violation. The commenter also mentioned that under Section 188 of WIOA, CRC only has jurisdiction over violations; therefore notice serves no legitimate purpose and is arbitrary. Furthermore, the commenter stated that the requirement was overly broad because a State can be a recipient outside the context of a State Workforce Agency. The commenter recommended that the requirement in § 38.42(a) be removed or modified.

*Response:* CRC declines to remove or modify the language set forth in proposed § 38.42(a). That section proposed no new obligations on recipients, but only clarified the scope of sex and national origin discrimination under existing law by adding parenthetical explanations. In both the 1999 and 2015 rules, CRC required that grant applicants and recipients notify the Director of CRC when administrative enforcement actions or lawsuits were filed against it. Thus, there is no new burden associated with this provision, and the existing burden to give notice of enforcement actions and lawsuits is minimal. While CRC acknowledges that the initiation of a discrimination action does not mean there has been a violation, CRC's goal is to help recipients come into compliance if a violation does exist. CRC believes it is in the best position to offer recipients technical assistance to ensure compliance with the nondiscrimination and equal opportunity provisions when it has pertinent information about an enforcement action or lawsuit as soon as possible.

CRC agrees that a State can be a recipient outside of the context of a State Workforce Agency. Indeed, §§ 38.2 and 38.4(zz) and (kkk) describe the entities to which part 38 applies, and define "recipient" and "State Programs." Entities that receive WIOA Title I federal financial assistance remain obligated to comply with the nondiscrimination and equal opportunity provisions of this part. That obligation has not changed, even with the minor modifications we have proposed in § 38.42.

*Comment:* A State labor agency stated that the requirements in § 38.42(c) are

vague and broad and should be specifically defined.

*Response:* CRC declines to modify the language in proposed § 38.42(c). This provision appropriately allows the Director flexibility in requesting and obtaining necessary documents and information to properly investigate complaints and conduct compliance reviews. Each discrimination action filed presents its own set of unique facts. Because of that variability, the Director cannot specify in this rule the precise information needed to appropriately investigate a particular complaint or conduct a particular compliance review under the nondiscrimination and equal opportunity provisions of this part. Moreover, proposed § 38.42(c) contains no new requirements for grant applicants or recipients as compared to the 1999 and 2015 rules. Accordingly, the proposed language is adopted in the final rule.

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

Proposed § 38.43(a) retained most of the language from the 1999 and 2015 rules,<sup>305</sup> but added the preservation of "electronic records" to the existing requirement that grant applicants and recipients maintain certain records. The electronic record keeping requirement retained the same three-year period that applies to hard copy records. Proposed paragraph (b) expanded the requirements from the 1999 and 2015 rules by requiring the preservation of records once a discrimination complaint has been filed or a compliance review is initiated. As explained in the NPRM, CRC chose to incorporate compliance reviews in this records retention section because the same preservation of records is necessary for the duration of a compliance review as for a complaint investigation. We received one comment on § 38.43.

*Comment:* A local workforce agency supported the requirements in proposed § 38.43, commenting that generating and maintaining electronic records would provide additional support to the recipient's current recordkeeping. The commenter stated that the requirement would allow recipients to have their records and files easily available for discrimination complaints and compliance reviews.

*Response:* CRC agrees and, for the reasons set forth above and in the NPRM and considering the comments received, finalizes proposed § 38.43 without modification.

<sup>304</sup> A comparison of average annual wage data from 2013 reveals that women make 78 cents for every dollar that men make. U.S. Bureau of the Census, *Income and Poverty in the United States: 2013* (Sept. 2014), available at <https://www.census.gov/library/publications/2014/demo/p60-249.html>. Data on average weekly wages from the Bureau of Labor Statistics for the same year shows a similar gap with women making 82 cents for every dollar that men make. Bureau of Labor Statistics, U.S. Department of Labor, *Highlights of Women's Earnings* (Dec. 2014) (averaging annual data collected from the Current Population Survey, Median Weekly Earnings of Full-Time Wage and Salary Workers), available at <http://www.bls.gov/opub/reports/cps/highlights-of-womens-earnings-in-2013.pdf>.

<sup>305</sup> 29 CFR 37.39 (1999 rule); 29 CFR 38.39 (2015 rule).

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

Proposed § 38.44(a) included a minor revision to the corresponding section of the 1999 and 2015 rules,<sup>306</sup> by requiring 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 reviews, monitoring activities, or other similar activities outlined in this section. We received two substantive comments on proposed § 38.44.

*Comment:* A State agency recommended that § 38.44(a) be revised to state that sub-recipients must also provide access to the Director. The commenter noted that some recipients may not be able to provide access to sub-recipients’ premises, employees, etc.

*Response:* CRC appreciates the commenter’s recommendation, but declines to revise paragraph (a) to specifically require that sub-recipients provide access to the Director. Section 38.4(zz) defines “recipient” to include entities that receive WIOA Title-I financial assistance “directly from the Department or through the Governor or another recipient” (emphasis added). This definition captures the commenters’ concern regarding sub-recipients. Sub-recipients, like (primary) recipients, are expected to provide the Director the same access to the entity’s premises, employees, and participants.

*Comment:* A State agency requested that the term “normal business hours” be stricken and replaced with “hours of operation,” reasoning that this change would allow access to a recipient’s facilities and the employee who filed the complaint, regardless of the assigned shift. Furthermore, the commenter stated that this change would promote higher levels of compliance by the recipients, knowing that investigations could occur at any time, day or night.

*Response:* We agree with the commenter’s recommendation. Therefore, we have replaced “normal business hours” with “its hours of operation.” As a practical matter, however, CRC has interpreted “normal business hours” to mean the hours of operation for that specific entity,<sup>307</sup> so this revision does not represent a change in CRC’s current practice.

<sup>306</sup> 29 CFR 37.30 (1999 rule); 29 CFR 38.40 (2015 rule).

<sup>307</sup> For example, if a recipient’s normal business hours were from 10 p.m. to 6 a.m., CRC would expect that recipient to allow the Director access to the recipient’s premises, employees, and participants during that time.

### Summary of Regulatory Changes

For the reasons described in the proposed rule and considering the comments received, CRC finalizes proposed § 38.44 with one modification. We replace the phrase “normal business hours” with “its hours of operation” in paragraph (a).

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

Proposed § 38.45 retained the same requirements as the 1999 and 2015 rules<sup>308</sup> but made small organizational changes to this section to improve readability. CRC received no comments on this provision and adopts § 38.45 as proposed.

### Subpart C—Governor’s Responsibilities To Implement the Nondiscrimination and Equal Opportunity Requirements of the Workforce Innovation and Opportunity Act (WIOA)

#### Subpart Application to State Programs § 38.50

Proposed § 38.50 modified the title of this section and replaced the term “State Employment Security Agencies” with “State Workforce Agencies” to remain consistent with WIOA and with ETA’s regulations.<sup>309</sup> CRC received no comments on this provision and adopts § 38.50 as proposed.

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

Proposed § 38.51 mostly retained the requirements in this section from the 1999 and 2015 rules, but also incorporated certain paragraphs from a different section of those rules.<sup>310</sup> This reorganization was intended to underscore the importance of the Governor’s monitoring responsibilities.

Specifically, proposed § 38.51(a) retained the Governor’s oversight responsibilities,<sup>311</sup> which included ensuring compliance with the nondiscrimination and equal opportunity provisions of WIOA Section 188 and this part, and negotiating, where appropriate, with a recipient to secure voluntary compliance when noncompliance is found under proposed § 38.91(b). Proposed § 38.51(b) incorporated the Governor’s obligation

<sup>308</sup> 29 CFR 37.41 (1999 rule); 29 CFR 38.41 (2015 rule).

<sup>309</sup> U.S. Dep’t of Labor, Emp’t & Training Admin., Workforce Innovation and Opportunity Act; Final Rule, 81 FR 56071, Aug. 19, 2016 (hereinafter “ETA WIOA Final Rule”).

<sup>310</sup> 29 CFR 37.54(d)(2)(ii)(A)–(C) (1999 rule); 29 CFR 38.54(d)(2)(ii)(A)–(C) (2015 rule).

<sup>311</sup> 29 CFR 37.51 (1999 rule); 29 CFR 38.51 (2015 rule).

to monitor recipients for compliance,<sup>312</sup> and changed the frequency of that monitoring requirement from “periodically” to “annually.”

Proposed § 38.51(b)(1) added “limited English proficiency” and “preferred language” to the list of categories of records and data that the Governor must analyze. We received 18 comments on proposed § 38.51.

*Comment:* Several commenters supported the annual monitoring requirement under § 38.51(b). An advocacy organization stated that annual monitoring would provide greater focus on areas requiring improvement and identify any structural barriers in the way of programmatic access. In support of this change, an advocacy organization commented that periodic reviews were too ambiguous. Additionally, two advocacy organizations supported the annual review requirements outlined in § 38.51, including statistical or quantifiable analysis of recipient data and the investigation of any significant differences in participation to determine whether they are due to discrimination.

In contrast, many State agencies disagreed with the proposed rule’s annual monitoring requirement. Several commenters claimed that annual monitoring was not supported by WIOA. Two of these commenters argued there was no statistical justification for why annual monitoring was the most effective option and concluded that the annual requirement was arbitrary. Another State agency recommended periodic monitoring, reasoning that annual assessments are unnecessary as that State had never found any violations of equal opportunity and nondiscrimination requirements. To further support their position, numerous commenters pointed to the increase in workload that an annual monitoring requirement would create, without additional funding or resources from the Department. One State agency asked whether additional resources would be provided to conduct annual reviews. Several State agencies argued that increasing the frequency of reviews would reduce their quality.

In conclusion, the various State agencies asserted that states were in the best position to determine when monitoring is appropriate and recommended the Department replace “annual” with “periodic.” Although State agencies recommended replacing “annual” with “periodic,” they also indicated that many of these States currently monitor their recipients once

<sup>312</sup> 29 CFR 37.54(d)(2)(ii)(A)–(C) (1999 rule); 29 CFR 38.54(d)(2)(ii)(A)–(C) (2015 rule).

every two years. Some State agencies specifically recommended that the monitoring requirement be changed to a biennial schedule to allow more latitude and flexibility.

*Response:* After careful consideration of all the comments, CRC declines to replace “annual” with “periodic” or “biennial” monitoring. CRC agrees with commenters who believed that the 1999 and 2015 rules requiring periodic monitoring were too ambiguous and did not lead to effective monitoring for many States. Under the 1999 and 2015 rules, CRC acknowledges that its expectations for monitoring were somewhat unclear. Thus, CRC retains the annual monitoring requirement from the proposed rule to underscore the importance of the Governor’s oversight responsibilities in compliance with this subpart. This monitoring requirement is within the scope of CRC’s authority to issue regulations necessary to implement the equal opportunity and nondiscrimination provisions of WIOA Section 188, including enforcement procedures.<sup>313</sup>

CRC believes that monitoring conducted less than annually is ineffective, particularly when dealing with accessibility issues and correcting any discriminatory activity that may occur. For example, the populations being served may shift from year to year. Governors need to identify and correct, as soon as possible, any discriminatory practices or barriers that individuals face when attempting to access a service or program. Some violations may take time to remedy; under biennial or periodic monitoring, remedies will be slower in implementation. CRC believes that annual monitoring provides for better communication between the Governor and the State Programs, and that coordinated planning will enhance the quality of monitoring. Moreover, this monitoring requirement is consistent with ETA’s regulation requiring oversight of one-stop career centers<sup>314</sup> and helps maintain consistency in state-level practices nationwide. While allocation of funding for specific obligations is beyond the scope of this rule, the Nondiscrimination Plan will be an effective tool for coordination of state-wide monitoring and to minimize associated costs.

*Comment:* One advocacy organization expressed concern that equal opportunity data collection by recipients was separated from performance data collection by service providers. The commenter

recommended that the regulations clearly explain how equal opportunity data and performance data will be integrated for analysis purposes. The commenter stressed that this type of integrated analysis was crucial for the Governor to determine whether significant differences in participation are due to discrimination, a failure of performance, or some other reason.

*Response:* We appreciate the commenter’s concerns but believe the rule as written provides the ability for Governors/recipients to perform the kinds of analyses needed to uncover discriminatory patterns or practices. While this rule only requires the collection of demographic data, as discussed above regarding § 38.41, Governors and/or recipients are expected to utilize whatever data are available to them, including performance data, to ensure nondiscrimination and equal opportunity in their WIOA Title I programs and activities. We expect that the availability of data may vary on a case-by-case basis. Therefore, we decline to modify the regulations to explain how equal opportunity and performance data should be integrated for analysis.

*Comment:* A State agency asked whether a “desk review” that includes data and statistical analysis be acceptable for annual monitoring.

*Response:* The rule does not use the specific term “desk review.” Recipients are expected to complete their monitoring obligations under § 38.51(b) in a manner that is consistent with the provisions of the Nondiscrimination Plan described at § 38.54 (which outlines the Governor’s obligations for developing and implementing that Plan).

We recognize that annual monitoring can be accomplished through offsite review so long as all necessary data and information are collected and examined in relation to the Plan, including data on physical facilities. These data and information may be collected by the State-level EO officer directly or the State-level EO officer may obtain these data and information from other entities collecting it, such as monitoring officials for WIOA operations representing the State or local board, or the U.S. Department of Labor. To conduct the appropriate annual analysis, State-level EO Officers may wish to use quarterly participation data submitted to the Department, any findings or complaints on file for the program, any corrective actions taken in response to findings or complaints, and physical assessments of facilities, including those made by on-site

personnel. With respect to physical assessments, for example, to determine physical and programmatic accessibility for individuals with disabilities and whether the equal opportunity notice has been properly posted, recipients retain the flexibility to decide who will conduct that assessment and how that information (measurements, pictures, data, other monitoring reviews, etc.) will be conveyed to the appropriate EO Officer by on-site personnel, or otherwise collected by the EO Officer.

*Comment:* Several commenters addressed the new data elements that must be collected by recipients—recording the limited English proficiency and preferred language of individuals. Several commenters did not support the collection of additional data elements by recipients. Commenters argued that the new data collection requirements were outside of the scope of WIOA because they are not mentioned in Section 188.

Some advocacy organizations, however, supported the collection of additional data. A local workforce agency stated that the addition of a language collection category will enable recipients to record the number of individuals that are enrolled in their WIOA program, record the number of language services needed for individuals seeking WIOA services, and produce comprehensive reports detailing the diversity of the recipient’s workforce area. To help ascertain and analyze the quantity of language services needed to assist individuals, one commenter recommended that recipients establish a process for collecting periodic reports from their service providers to ensure data are recorded correctly and matches data in the recipient’s system.

*Response:* We appreciate hearing about the commenter’s experience with promising practices for data collection. We disagree with other commenters’ characterization of the LEP collection requirements as outside of the scope of the statute. CRC has the authority to issue and enforce regulations that prohibit discrimination on the basis of national origin and, as discussed above regarding § 38.9, that prohibition includes discrimination against LEP individuals. It is well established that policies and practices that deny LEP individuals meaningful access to federally funded programs and activities may constitute unlawful national origin discrimination.<sup>315</sup> As supporters of the

<sup>313</sup> See 29 U.S.C. 3248(e).

<sup>314</sup> ETA WIOA Final Rule, *supra* note 309.

<sup>315</sup> *Lau v. Nichols*, 414 U.S. 563, 566 (1974); *Colwell v. Dep’t of Health & Human Servs.*, 558 F.3d 1112, 1116–17 (9th Cir. 2009); *Cabrera v. Alvarez*, 977 F. Supp. 2d 969, 977–78 (N.D. Cal.

proposal stated, obtaining this information is critical in ensuring that LEP individuals are being serviced appropriately throughout each State. This requirement helps to ensure that States are properly carrying out their obligations in this subpart.

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

Section 38.52(a)(1) proposed minor changes by replacing the phrase "adhered to a Methods of Administration" with "implemented a Nondiscrimination Plan." We received one comment on proposed § 38.52.

*Comment:* A State agency commented that CRC should confirm acceptance of the Nondiscrimination Plan from the Governor and identify any discrepancies found by the Department, such as a noncompliant policy, process, or procedure adapted by the State.

*Response:* CRC declines to modify the proposed language in the final rule to require that CRC "accept" the Nondiscrimination Plan and/or identify any discrepancies in the plan. The Governor's monitoring and oversight responsibilities exist regardless of affirmative approval from CRC. States should not await validation to implement their Nondiscrimination Plan, although CRC is available to provide technical assistance as needed. Furthermore, in subpart D of this rule, CRC has adequately outlined the compliance procedures and the steps it will take if it determines that any State or recipient has not complied with any obligations under this rule.

For the reasons set forth above and in the NPRM and considering the comments received, CRC finalizes proposed § 38.52 without modification.

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

Proposed § 38.53 changed only the title of this section. CRC received no comments on this provision and adopts § 38.53 as proposed.

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

Proposed § 38.54 revised the title of this section and generally retained the language of the 1999 and 2015 rules, with the exception of the provisions that CRC moved to proposed § 38.51, discussed above. Proposed § 38.54(a)(1) replaced the phrase "adhere to a Methods of Administration" with

"implement a Nondiscrimination Plan" in the first sentence, and replaced "should" with "must" in the second sentence to require that, in States in which one agency contains both WIOA Title I-financially assisted programs and either a State Workforce Agency (formerly an SESA) or unemployment insurance, 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 WIOA Methods of Administration. This provision also eliminates 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 identified in § 38.28(a).

The proposed rule made one minor change to paragraph (c)(1)(v) of this section: Changing the reference to proposed § 38.40 to reflect its new title. The NPRM added a new paragraph (c)(2)(iv) to require procedures for ensuring compliance with WIOA Section 188 and this part for protected categories other than disability. This revision was intended to correct an oversight from the previous rules that inadvertently did not require the Governor to include procedures to ensure compliance as to these protected categories. Finally, proposed § 38.54(c)(2)(v) added a provision requiring the procedures discussed in that paragraph 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 the 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>316</sup> We received four comments on § 38.54.

*Comment:* Several advocacy organizations supported the requirement that the Governor implement a Nondiscrimination Plan for State Programs. One advocacy organization recommended that additional language be added to § 38.54 to ensure that the Nondiscrimination Plan "will be made available in alternative, accessible formats upon request." Another advocacy organization supported the proposed rule and stated that the new title and restatement of obligations on the part of States' chief executives for ensuring nondiscrimination in WIOA programs emphasize to States the importance of

proper implementation of Section 188 of WIOA. Other advocacy organizations supported making the Nondiscrimination Plan publicly available on the Governor's or State Workforce Agency's Web site. They also recommended specific revisions to § 38.54(c)(2)(iii) to ensure that the plan includes a system for reviewing that recipients have demonstrated sufficient resources and program designs that will allow them to meet the needs of groups protected by these regulations, including LEP individuals. Finally, they recommended that § 38.54(c)(2)(viii) be revised to require that supporting documentation to show that commitments made in the Nondiscrimination Plan have been and/or are being carried out include "a comparison of the race/ethnicity, sex, age, disability, limited English proficiency, and language spoken of the State and local workforce area populations with data on the number of applicants, registrants, participants and trainees in each group."

*Response:* CRC appreciates commenters' suggestions to bolster the requirements included in the Nondiscrimination Plan, but finds the final rule sufficient to address the commenters' concerns. CRC disagrees that § 38.54(c)(2)(iii) should be revised to include a system for reviewing that recipients have "demonstrate[d] sufficient resources and program designs" to comply with WIOA Section 188 and this part, because that requirement is already contemplated by other paragraphs in § 38.54(c), and by other sections in the final rule. For example, § 38.54(c)(1)(ii) requires the Nondiscrimination Plan to describe how recipients have satisfied certain requirements, including the requirement in §§ 38.28(a) and (b) and 38.29(e) that EO Officers have sufficient authority, staff, and resources to ensure compliance with WIOA Section 188 and this part; section 38.54(c)(2)(i) requires a system for determining whether grant recipients and training providers are likely to comply with this part; section 38.54(c)(2)(vi) requires a system to ensure that EO Officers and members of recipients' staff can effectively carry out their equal opportunity and nondiscrimination responsibilities; section 38.54(c)(2)(viii) requires supporting documentation to show that commitments made in the Nondiscrimination Plan are being carried out; and § 38.54(c)(2)(vii) requires procedures for obtaining prompt corrective action when noncompliance is found. Accordingly, the final rule already contemplates

2013); *Almendares v. Palmer*, 284 F. Supp. 2d 799, 807–08 (N.D. Ohio 2003).

<sup>316</sup> 42 U.S.C. 12131.

systems for reviewing that recipients have demonstrated sufficient resources and program designs to ensure compliance with WIOA Section 188 and this part.

The final rule also addresses the issue raised by the commenters regarding supporting documentation that compares demographic data to the number of applicants, registrants, participants and terminees in each group. Proposed § 38.54(c)(2)(viii)(A)–(F) lists several examples of the types of documents Governors must use to show that the commitments made in the Nondiscrimination Plan have been and/or are being carried out. The examples listed in paragraphs (c)(2)(viii)(A)–(F) are not exhaustive and generally capture the commenters' concerns about data comparisons. For example, § 38.54(c)(2)(viii)(B) requires copies of monitoring instruments and § 38.54(c)(2)(viii)(E) requires that reports of monitoring reviews and reports of follow-up actions taken where violations have been found be submitted with the Nondiscrimination Plan.

As a practical matter, such monitoring includes the Governor's required statistical or other quantifiable analyses of recipients' records and data under § 38.41, such as records on applicants, registrants, eligible applicants/registrants, participants, terminees, employees and applicants for employment by race/ethnicity, sex, limited English proficiency, preferred language, age and disability status.<sup>317</sup> CRC believes these provisions collectively result in the requirement to analyze comparison data that the commenters suggest. Moreover, CRC expects that in fulfilling their monitoring obligations under this part, State-level EO Officers will use whatever data are available to them, including population data and performance data, to ensure that State Programs comply with WIOA Section 188 and this part. Therefore, CRC declines to impose an additional requirement in this provision.

With regard to the commenters' request that Nondiscrimination Plans be publicly available on the Governor's or State Workforce Agency's Web site, CRC encourages publication as a best practice. However, CRC declines to impose this requirement at this time. CRC recognizes that some States currently post important excerpts of their Methods of Administration on their Web sites, and anticipates they will continue this practice with their

Nondiscrimination Plans. CRC reminds the Governors that, if the Plan is available on the Governor's Web site, it must be in an accessible format for individuals with disabilities.<sup>318</sup>

*Comment:* A State agency asked whether § 38.54 required the State to have a combined plan where the agency with oversight over WIOA does not administer the employment service and unemployment insurance programs.

*Response:* Each State must submit one combined Nondiscrimination Plan that covers all State Programs, as defined in 38.4(kkk). As explained in the NPRM, this formalizes the practice under WIA that every State submitted one Methods of Administration. It also eliminates unnecessary duplication. To highlight this, the NPRM proposed changing the optional best practice listed in the 1999 and 2015 rules (that certain States "should" develop a combined plan), to a requirement (that those same States "must" develop a combined Plan). The commenter should note that the "combined Nondiscrimination Plan" referenced in § 38.54(a) is not a reference to the "Combined Plan" described in section 103 of WIOA.

Pursuant to § 38.31(g), State-level EO Officers must oversee the development and implementation of the State's Nondiscrimination Plan.

#### Summary of Regulatory Changes

For the reasons set forth above and in the NPRM and considering the comments received, CRC finalizes § 38.54 as proposed.

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

Proposed § 38.55 revised the title of this section and generally retained the existing schedule that Governors follow for their Methods of Administration under the 2015 rule, and that they also followed under the 1999 rule. In proposed § 38.55, CRC intended to minimize the Governor's burden by allowing sufficient time to switch from the existing Methods of Administration to the new Nondiscrimination Plan. Therefore, proposed § 38.55 revised paragraph (a) to allow Governors an additional 180 days to develop and implement a Nondiscrimination Plan consistent with the requirements of this rule—either within 180 days of the date on which this final rule is effective or within 180 days of the date on which the Governor would have been required to review and update the Methods of Administration under the 2015 rule, whichever is later.

Proposed paragraph (b) also retained the previous requirement that the Governor promptly update the Nondiscrimination Plan whenever necessary and submit the changes made to the Director in writing at the time the updates are made.

Proposed paragraph (c) preserved the previous rule's requirement that the Governor review the plan every two years, determine whether changes are necessary, and, if so, make the changes and submit them to the Director. We received one comment on § 38.55.

*Comment:* A State agency stated that the Governor's administration and leadership in State workforce agencies often turn over quickly with little transitional training, resulting in loss of knowledge. The commenter noted that in the past CRC had not communicated with state-level staff to assure prompt compliance when State Methods of Administration plans were scheduled for updating. In order to ensure smooth transitions and communication between CRC and the States, the commenter proposed additional provisions that outline EO Officer obligations in the event of political transitions. The commenter stated that these provisions should include a transition plan so that when one EO Officer is outgoing, the new EO Officer is on notice of upcoming deadlines and immediate obligations. The commenter also recommended that CRC require and direct all communications, at least in carbon copy form, to recipients to the EO Officer as well.

*Response:* CRC appreciates the commenter's suggestions for effective communication between States and CRC during transition periods. While CRC strongly recommends that Governors create transition plans, as the commenter suggests, CRC does not require such plans in this rule. The obligation to comply with this part remains with the office of the Governor, regardless of turnover, and the Governor and the State-level EO Officer remain responsible for ensuring compliance in all State Programs. As stated in the discussion of § 38.28 in the preamble, we expect that State-level EO Officers will complete their required tasks, regardless of political turnover. For these reasons, we decline to create transition plans for States, to adopt a provision that explicitly requires Governors to develop transition plans, or to outline specific State-level EO Officer obligations during political transitions. We reiterate our commitment to provide technical assistance to both Governors and the State-level EO Officers to help them fulfill their obligations under this part.

<sup>317</sup> See § 38.41(b)(2). This provision excludes LEP and preferred language data for employees and applicants for employment.

<sup>318</sup> See § 38.15(a)(5).

CRC is committed to ensuring that State-level EO Officers, as the liaisons with CRC, are fully informed of their obligations regarding Nondiscrimination Plans, but decline to incorporate the suggestion that CRC carbon copy the EO Officer in all circumstances as unnecessary.

#### Subpart D—Compliance Procedures

##### Evaluation of Compliance § 38.60

Proposed § 38.60 modified the title of this section and retained its language, with the exception of a minor technical edit. The proposed rule added the phrase “the ability to comply or” in the first sentence to explain the standard of review for grant applicants regarding the nondiscrimination and equal opportunity provisions of WIOA Section 188 and this part. This language is parallel to the language in proposed § 38.25 regarding written assurances. CRC received no comments on this provision and makes one technical correction to § 38.60 as proposed. For the sake of clarity, CRC separates the reference to compliance reviews of grant recipients to determine their ability to comply from the reference to compliance reviews of recipients to determine their compliance. CRC makes this change to increase the ease of reading this provision and intends no substantive change.

##### Authority To Issue Subpoenas § 38.61

Proposed § 38.61 changed the title of this section and updated its citation to section 183(c) of WIOA, which authorizes the issuance of subpoenas.<sup>319</sup> CRC received no comments this section but is reorganizing it to clarify its parts. No substantive changes are intended by the reorganization.

##### Compliance Reviews

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

Proposed § 38.62 proposed several changes from the 1999 and 2015 rules, including adding a new provision to paragraph (b) that required Departmental grantmaking agencies to consult with the Director to determine if CRC had issued a Notice to Show Cause<sup>320</sup> or a Final Determination<sup>321</sup> against an applicant identified as a probable awardee for violating the nondiscrimination and equal opportunity provisions of WIOA and this part.

Proposed paragraph (c) added new language requiring that the grantmaking

agency consider, in discussing with the Director, the information obtained through the consultation described in paragraph (b), as well as any other information provided by the Director, in determining whether to award the grant(s). We received no comments on this provision and adopt § 38.62 as proposed, with the exception of a technical modification to place paragraph (d)(2) on a new line.<sup>322</sup>

##### 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 retained the exact same language as in the parallel sections in the 1999 and 2015 rules, with the exception of the revisions made to their titles. We received no comments on these sections, and adopt §§ 38.63 and 38.64 as proposed.

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

Proposed § 38.65 modified the title of this section and retained the language in paragraphs (a) and (b) from the 1999 and 2015 rules. Proposed paragraph (c) set out the enforcement actions that CRC may take as a result of Governors' failure to come into compliance with their monitoring obligations. We received seven comments on § 38.65.

*Comment:* Some State agencies and advocacy groups requested that CRC provide technical assistance if the Governor's performance is deemed inadequate or when a State asks for technical assistance to ensure compliance with the proposed rule. Similarly, another State agency stated that if a Governor has been issued a Letter of Findings, CRC should provide technical assistance to help the Governor become compliant. The commenter said the Governor should be given a timeframe in which CRC is required to respond to the Governor or designee's questions, requests, and results. Furthermore, the commenter suggested that CRC develop “Good Practice or useful tools” that States could use as a template. The commenter recommended that CRC review preliminary findings with States to give States the opportunity to provide additional information to rectify or resolve a proposed finding.

*Response:* CRC remains committed to ensuring that recipients comply with the nondiscrimination and equal opportunity provisions of this rule. As

such, CRC's issuance of this final rule should provide clarity to States and other recipients in helping them meet their obligations. CRC also intends to issue guidance regarding this rule, and already has useful tools on its Web site, for example, the DOL LEP Guidance discussed regarding § 38.9 and Promising Practices in Achieving Universal Access and Equal Opportunity: A Section 188 Disability Reference Guide.<sup>323</sup> For States or other recipients that wish to request further help regarding compliance with the rule, CRC is available to provide technical assistance. For technical assistance, recipients are strongly encouraged to visit CRC's Web page at <https://www.dol.gov/oasam/programs/crc/external-compliance-assistance.htm> or contact CRC at U.S. Department of Labor, 200 Constitution Avenue NW., Room N-4123, Washington, DC 20210. [CivilRightsCenter@dol.gov](mailto:CivilRightsCenter@dol.gov), telephone (202) 693-6501 (VOICE) or (202) 877-8339 (Federal Relay Service—for TTY). CRC declines to adopt a timeframe in this rule for such assistance, due to the fact-specific nature of technical assistance requests.

Regarding the commenter's request that CRC review preliminary findings with States to give States the opportunity to provide additional information to rectify or resolve a proposed finding, that is one of the purposes of issuing either a Letter of Findings or an Initial Determination under §§ 38.64 and 38.87, respectively. For recipients whose programs or activities have been found noncompliant, CRC routinely offers settlement or conciliation agreements that list the steps recipients need to follow to come into compliance. Once an agreement is in place, CRC does of course provide technical assistance regarding the agreement. Accordingly, the final rule addresses the commenters' concerns without modification.

*Comment:* One commenter stated that CRC could put more responsibility on Governors to assure federal funds are used to uphold civil rights for individuals with disabilities.

*Response:* CRC appreciates the commenter's concern and believes that this final rule appropriately sets forth the responsibility of Governors. These provisions are intended to strengthen the Governor's authority to monitor and ensure compliance with recipients' obligations as to individuals with disabilities and all other protected groups. Specifically, CRC also has strengthened its sections on disability,

<sup>319</sup> 29 U.S.C. 3243(c).

<sup>320</sup> Pursuant to § 38.66(b).

<sup>321</sup> Pursuant to §§ 38.95 and 38.96.

<sup>322</sup> Cf. CRC WIOA NPRM, *supra* note 70, at 4564 (incorrectly labeling § 38.62(d)(2) as “[Reserved]”).

<sup>323</sup> Section 188 Disability Reference Guide, *supra* note 264.

including § 38.15 and related definitions, to increase accountability to ensure that civil rights for individuals with disabilities are well supported, including that individuals with disabilities have equal access to WIOA Title I-funded programs and that recipients communicate as effectively with them as with others. Because of the revisions already set forth in this final rule, CRC declines to modify the language in this provision.

*Comment:* Two advocacy organizations recommended that the Director be required to review the adequacy of the Governor's Nondiscrimination Plan, by replacing the term "may" with "shall."

*Response:* CRC understands the commenters' concerns but declines to make this modification. CRC will continue to review Nondiscrimination Plans submitted by States. However, CRC believes it critical that the Director maintain flexibility and discretion as to when to review the adequacy of the Nondiscrimination Plan based on enforcement priorities and resources. Moreover, the discretionary language in proposed paragraph § 38.65(c) is the same found in § 38.65(a) of the 2015 rule, and § 37.65(a) of the 1999 rule. Both provisions permit the Director to review the adequacy of the Plans and compliance with this subpart without restriction.

*Comment:* A State agency recommended that § 38.65 be deleted, claiming that neither WIOA nor Title VI gave the Department the authority over Governors found in § 38.65.

*Response:* CRC disagrees with the commenters' characterization of its authority under WIOA and Title VI. Both Title VI and WIOA Section 188 prohibit those who receive federal financial assistance from discriminating against individuals in the classes protected under these statutes. WIOA Section 188(b) authorizes the Secretary of Labor to take action whenever the Secretary finds that a State or other recipient has failed to comply with the nondiscrimination obligation in Section 188(a) or with the regulations prescribed to carry out those provisions. The Secretary has delegated enforcement and rule making authority under Section 188(e) to CRC. Because Governors receive federal financial assistance under WIOA Title I programs and services, CRC has the requisite authority over Governors to enforce the provisions in the final rule. For these reasons, CRC declines to delete this provision.

CRC makes one technical revision to § 38.65(b), removing the unnecessary modifier "WIOA Title I" from the term

"recipient," because this part applies to "recipients" as defined in § 38.44(zz). This change is made for the sake of clarity and consistency throughout the final rule, and no substantive change is intended.

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

Proposed § 38.66 merged the 2015 rule's §§ 38.66 and 38.67,<sup>324</sup> the latter of which outlined the contents of a notice to show cause. This section proposed to retain most of the language in the 2015 rule's § 38.66 and all of the language in the 2015 rule's § 38.67.

Proposed paragraph (a) provided 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 section retained the three examples set forth in the prior rule, but renumbered them. Proposed paragraph (a)(1) replaced the 30-day requirement for recipients to submit the requested information, records, and/or data with "the timeframe specified" in the Notification letter. This minor change reflects CRC's common practice of including a timeframe for a response in the Notification Letter and eliminated its redundancy from the regulatory text.

Proposed paragraph (b) expanded the circumstances in which the Director may issue a Notice to Show Cause by allowing the Director to issue the Notice prior to issuing a Final Determination. Proposed paragraph (c) retained the same language found in the 2015 rule's § 38.67, and the 1999 rule's § 37.67. We received one comment in support of these revisions.

*Comment:* A State agency commented that the proposed rule would provide Governors and other recipients with an additional opportunity, as compared to the existing framework, to take corrective or remedial actions to come into compliance before enforcement proceedings were initiated. Furthermore, the commenter stated that the proposed rule would provide an additional opportunity for due process, allowing the Governor to come into compliance or enter into a conciliation agreement before a final determination is rendered.

*Response:* CRC agrees that the proposed rule gives Governors and recipients adequate time to come into compliance or negotiate a conciliation agreement regarding the violation(s) at issue before CRC issues a Final Determination. For the reasons set forth in the NPRM and considering the

comments received, CRC finalizes proposed § 38.66 as proposed.

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

Proposed § 38.67 changed the section title and removed reference to the letter of assurance because CRC proposed discontinuing use of that letter. This section also updated the cross-references for procedures related to correcting violations under §§ 38.91 through 38.93. CRC received no comments on this provision and adopts § 38.67 as proposed.

#### Failing to Show Cause § 38.68

Proposed § 38.68 retained the existing language from the 1999 and 2015 rules, with the slight modification of replacing the term "must" with "may." This revision was 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. CRC received no comments on this provision and adopts § 38.68 as proposed.

#### Complaint Processing Procedures

##### Complaint Filing § 38.69

Proposed § 38.69 combined the 2015 rule's §§ 38.70, 38.71, and 38.72 into one section to improve readability.<sup>325</sup> We retained most of the language from these sections, with some revisions to the text.

Proposed paragraph (a) maintained the language from the 1999 and 2015 rules. Proposed paragraph (a)(1), however, added a list of the bases upon which a complaint may be filed—race, color, religion, sex (including pregnancy, childbirth, 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. Consistent with proposed § 38.19, proposed paragraph (a)(2) added retaliation as a basis for filing a complaint. Proposed paragraph (b) expanded the option for filing to include electronic filing. Proposed paragraph (c) removed the reference to the Director to eliminate redundancy<sup>326</sup> and added that the complaint must be filed within 180 days of the alleged

<sup>325</sup> 29 CFR 37.70 through 37.72 (1999 rule).

<sup>326</sup> § 38.69(b) addresses with whom the complaint must be filed.

<sup>324</sup> 29 CFR 37.66, 37.67 (1999 rule).

discrimination or retaliation. We received two substantive comments on these proposed changes.

*Comment:* A State agency proposed that the list of the bases upon which a complaint may be filed reflect the categories identified in applicable statutes. The commenter asserted that any bases beyond the statutory language reflect CRC's interpretation and may not be an accurate statement of the law to which recipients are subject.

*Response:* The commenter refers to the parenthetical language added to sex and national origin as prohibited bases for discrimination. As discussed previously, CRC's inclusion of the parentheticals is consistent with the current state of the law as to sex and national origin discrimination. Again, CRC believes that, by incorporating this language, complainants will be more knowledgeable about and aware of the protected bases under the statute for which they may file a complaint. To maintain consistency with other provisions in the final rule, including §§ 38.7 and 38.9, the inclusion of those categories are appropriate in § 38.69.

*Comment:* A disabilities advocacy group recommended that CRC add "the designated EO Officer of the recipient" to § 38.69(b) so that a person or the person's representative may file a complaint with either "the recipient, the designated EO [O]fficer of the recipient, or the [D]irector."

*Response:* CRC agrees that § 38.69(b) should more clearly identify with whom a complainant should file the complaint if proceeding with the recipient-level complaint process. Thus, CRC amends this provision to be consistent with the language in the equal opportunity notice.

#### Summary of Regulatory Changes

For the reasons set forth above and in the NPRM and considering the comments received, CRC finalizes proposed § 38.69 with a modification in paragraph (b) stating that a complaint may be filed with, on the one hand, the recipient's EO Officer or the person the recipient has designated for that purpose or, on the other hand, the Director.

#### Required Contents of Complaint § 38.70

Proposed § 38.70 combined the 2015 rule's §§ 38.73 and 38.74 into one section and retained almost all of their provisions.<sup>327</sup> Proposed § 38.70 updated the language in this combined section to include the option of electronic filing and provided additional information on how to electronically access complaint

forms. We received two comments on § 38.70.

*Comment:* A private citizen recommended that CRC coordinate local assistance for individuals who want to file a discrimination complaint. The commenter stressed that individuals need guidance on compliance with the rules, procedures, and bases for a complaint.

*Response:* We decline to provide in the final rule that CRC coordinate local assistance for individuals who want to file a discrimination complaint. While local assistance may be beneficial, CRC is able to offer assistance through the resources on our Web site, and by telephone and email. In local areas, we strongly encourage individuals to view the equal opportunity notice posted on recipients' premises (and published in this rule in § 38.35), which provides information on how to file a complaint with the recipient or CRC. The poster must be available on the recipient's Web site, posted in conspicuous physical locations and provided to each participant and employee. Individuals may also contact recipients' EO Officers for assistance. Recipients are required to make their EO Officers' contact information available to the public under § 38.29(c).

Those who need further assistance in filing a complaint may also visit CRC's Web site at <https://www.dol.gov/oasam/programs/crc/external-enforce-complaints.htm>. CRC likewise invites members of the public to visit our Frequently Asked Questions page at <https://www.dol.gov/oasam/programs/crc/external-enforce-faq.htm>. For additional assistance, please contact CRC's External Enforcement division at the U.S. Department of Labor, 200 Constitution Avenue NW., Room N-4123, Washington, DC 20210. [CRCEXternalComplaints@dol.gov](mailto:CRCEXternalComplaints@dol.gov), telephone (202) 693-6502 (VOICE) or (202) 877-8339 (Federal Relay Service—for TTY).

*Comment:* A State agency commented that § 38.70 of the proposed rule would waive the "signature" requirement currently in place that makes a complaint a legally filed document. The commenter recommended that any hard copy filed should be required to have a signature.

*Response:* CRC disagrees with the commenter that electronic filing would waive the signature requirement. The purpose of electronic filing is to ease the filing process for complainants, not to eliminate the signature requirement. Proposed § 38.70(d) requires the "written or electronic signature" of the complainant or the complainant's representative. As mentioned in the

discussion in § 38.35, CRC believes that a signature, including an electronic one, helps support the legitimacy of a complaint as it signifies that the contents of the complaint are grounded in fact, and to the best of the complainant's knowledge, the information is being presented in good faith.

#### Right to Representation § 38.71

Proposed § 38.71 revised the title and section number of the 2015 rule's § 38.75, but retained its language. CRC received no comments on this provision and adopts § 38.71 as proposed.

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

Proposed § 38.72 revised the title and section number of the 2015 rule's § 38.76.<sup>328</sup> This section retained the requirements for recipients' complaint processing procedures from the 1999 and 2015 rules, but added paragraph (b)(1)(iii) obligating recipients to give complainants a copy of the equal opportunity notice in § 38.35.

Proposed paragraph (b)(1)(iv) also added the requirement that recipients provide 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 non-English languages, in accordance with proposed §§ 38.4(h) and (i), 38.34, and 38.36.

Proposed paragraph (c)(1) created a new provision that stated that alternative dispute resolution (ADR) may be attempted any time after a written complaint has been filed with the recipient.

Finally, proposed paragraph (c)(3)(ii) modified the language of the 2015 rule's § 38.76(c)(3)(ii), by providing in the last sentence that, "If the Director determines that the agreement [reached under ADR] has been breached, the complaint will be reinstated and processed in accordance with the recipient's procedures." We received three comments on § 38.72.

*Comment:* An individual commenter stated that allowing ADR methods may give recipients too much power to coerce complainants. The commenter believed that if recipients are given the option to discipline themselves, the punishment will be as minute as possible. This could result in unresolved or unreported issues, which will allow the discriminating acts to continue or worsen.

<sup>327</sup> 29 CFR 37.73, 37.74 (1999 rule).

<sup>328</sup> 29 CFR 37.76 (1999 rule).

*Response:* CRC recognizes the commenters' concerns, but believes that ADR can be an effective tool for both recipients and complainants. First, CRC disagrees that ADR within the meaning of this part is a process in which the recipient may unilaterally decide the outcome of the complaint. Instead, under these regulations ADR is a process to reach a mutually satisfactory resolution.

Second, CRC highlights that, under proposed § 38.72(c)(2), ADR is voluntary and the choice whether to use ADR or the customary process rests with the complainant. This allows for the complainant to have vital input in the process used for resolving the dispute. Moreover, as proposed § 38.72(c)(3)(ii) requires, if the Director determines that there is a breach of an ADR agreement, the complaint will be reinstated. CRC believes that this approach enables the complainant to have a fair process in resolving the discrimination complaint.

*Comment:* A few commenters requested clarification on the proposed rule's complaint processing procedures. One State agency commented that § 38.72(c)(2) allows the complainant to choose ADR but § 38.85, which allows for ADR on the federal level, requires consent by both the complainant and the respondent. The commenter requested clarification on whether CRC could make ADR at the recipient level require mutual consent. The commenter reasoned that ADR would not be effective if both parties were not actively participating. The commenter also stated that § 38.72(c)(1) needs to clearly state that the issuance of a Notice of Final Action by the recipient ends the complaint and terminates the complainant's ability to request ADR. The commenter stated that CRC needs to clarify that, after a recipient issues a Notice of Final Action, their only remaining option is to appeal to the Department under § 38.75.

*Response:* CRC agrees with the commenter that ADR is effective when both parties consent to ADR and actively participate. However, CRC declines to remove the complainant's ability to compel ADR at the recipient level. In that case, ADR is designed to encourage the complainant to resolve the complaint informally with the recipient, thus, the recipient cannot block the ADR process by withholding consent.

Regarding the timing of ADR, CRC agrees with the commenter that a written Notice of Final Action by the recipient ends the complainant's ability to compel ADR during the recipient-level complaint process. CRC's goal is to encourage prompt resolution of

complaints at the earliest possible stage of the process, however, CRC has always contemplated that recipient-level complaint processing procedures, including election of ADR, would be completed within 90 days.<sup>329</sup> To clarify that expectation, CRC revises § 38.72(c)(1) to reflect that the recipient's issuance of a Notice of Final Action ends the complainant's ability to compel ADR during the recipient-level process. CRC notes that the parties are encouraged to reach settlement at any time.

If the complainant files with CRC, CRC may offer the opportunity for both parties to engage in ADR under proposed § 38.85. In this instance, mutual consent is necessary because CRC is neither the complainant nor the respondent to the complaint. Again though, the parties are encouraged to conduct voluntary settlement discussions at any time in the complaint process.

*Comment:* A disabilities advocacy group made numerous recommendations for additional language to improve the clarity and efficiency of the complaint processing procedures. The commenter suggested that CRC "draft language that forwards 'reasonable accommodations' into the entire complaint process," and recommended that all communications related to proposed § 38.72 between the recipient and complainant be done in a format that is acceptable to the complainant and at a level reflective of the complainant's ability to understand all materials presented.

The commenter's recommendations also included creating a time frame the Director must follow in the complaint process, adding language that defines the relationship between specific types of entities and what federal protections govern them so that individuals and recipients have a clear understanding of the federal governance for individual protection. The commenter suggested creating comprehensive standards for investigations, including language to ensure due diligence on behalf of the recipient investigating a complaint. The commenter stated it is imperative that all complaint investigations conducted by the recipient have a strict conflict of interest component that protects the complainant's rights to a full and unbiased investigation, including strict protections against a recipient's influence over any investigation such as providing for an independent facilitator to investigate complaints. This should be available to both small and large recipients.

<sup>329</sup> See § 38.76.

Further, the commenter encouraged outlining procedures for the complaint process from the perspective of the complainant, suggesting the outline should be as detailed as that of the recipient outline with dates, procedures, how to check the progress of your complaint, contact information of the entity investigating the complaint, as well as all other related information.

*Response:* CRC appreciates the commenter's suggestions for fair, impartial, and effective complaint processing procedures at the recipient and federal level. We decline to implement the commenter's recommendations, however, because the regulations already provide adequate safeguards to ensure such a fair, impartial, and effective procedure. Regarding the commenter's first recommendation, complainants are of course free to request reasonable accommodations and auxiliary aids and services from recipients or CRC with respect to the complaint process. This may include requests for information in accessible formats or at a reading level understandable to the complainant. The availability of such accommodations is addressed in § 38.14 and need not be repeated in § 38.72. Moreover, § 38.15 requires recipients to take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others. This requirement includes the recipient's complaint processing procedures under § 38.72. It would be contrary to the ADA, however, for recipients or CRC to make assumptions about a complainant's literacy abilities on the basis of a disability in advance of a request for accommodation.

As to the request for time frames for the Director, CRC recognizes that each discrimination complaint filed, including those concerning individuals with disabilities, presents its own set of unique facts. This variability means that the Director and CRC staff need flexibility to investigate and analyze each complaint in a timeframe that allows for the full consideration of the allegations and defenses presented. The regulations set forth in this part provide clear complaint processing procedures for both recipients and complainants. For these reasons CRC declines to set a time frame for the Director to resolve complaints.

Next, the request that the rule include a discussion of the federal protections that govern specific types of entities is beyond the scope of this rule, which only addresses recipient and Governor obligations under Section 188 of WIOA. CRC also declines to implement the commenter's suggested changes

regarding comprehensive investigation standards, including an independent facilitator to investigate complaints, to prevent conflicts of interest and undue influence, and to ensure recipients' due diligence and a full and unbiased investigation. CRC believes those safeguards already exist in the final rule, and that recipients' EO Officers must serve as the type of independent facilitator to which the commenter refers. Under § 38.31(d), recipients' EO Officers are charged with overseeing the recipient-level complaint process, and must do so without any conflict of interest, pursuant to § 38.30. Small recipients must also establish complaint procedures under § 38.32. As an additional safeguard, complainants may appeal to CRC from the recipient's final action on the complaint.

Finally, the rule gives the complainant sufficient notice of how to check the progress of a complaint, the contact information of the entity investigating the complaint, as well as other related information. As stated above, EO Officers' information is public and complainants may use that information and the contact information in the equal opportunity notice to check on the status of complaints. Sections 38.69 through 38.85 provide comprehensive information about complaint procedures for both complainants and recipients.

#### Summary of Regulatory Changes

For the reasons set forth above and in the NPRM, and in consideration of the comments received, CRC finalizes proposed § 38.72, with two modifications. First, CRC makes a technical correction by changing "issued" to "received" in paragraph (b)(5)(ii) to be consistent with the standard in §§ 38.74 and 38.75. Second, CRC revises § 38.72(c)(1) to reflect that a complainant may attempt ADR only until the recipient has issued a Notice of Final Action.

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

Proposed § 38.73 modified the title and section number of the 2015 rule's § 38.77 but retained the same language. CRC received no comments on this provision and adopts § 38.73 as proposed.

#### Recipient's Obligations When It Determines That It Has No Jurisdiction over a Complaint § 38.74

Proposed § 38.74 modified the title and section number of the 2015 rule's § 38.79 and retained most of its language

with one modification.<sup>330</sup> The proposed rule changed the term "immediate" to "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. CRC proposed this change to reduce ambiguity and provide a more definite 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 with CRC. We received one comment on § 38.74.

*Comment:* One advocacy group commented that, in addition to notifying the complainant of the right to file with CRC, the notice should also provide guidance on the steps required to file with CRC, including "steps and procedures, required forms, addresses, phone numbers, etc."

*Response:* We understand the commenter's concern but believe that the new obligation in § 38.72(b)(1)(iii) to provide each complainant the equal opportunity notice contained in § 38.35 will provide individuals with adequate information on how to file a complaint with CRC and how to contact CRC directly if they need additional assistance in filing a complaint. That notice contains CRC's physical and Web site addresses, and instructions for complaint filing.

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

Proposed § 38.75 retained most of the language of the 1999 and 2015 rules, but changed "his/her" to "the complainant's," and clarified that this section applies whenever a recipient issues a Notice of Final Action before the end of the 90-day period for recipients to resolve a complaint. CRC received no comments on this provision and adopts § 38.75 as proposed.

#### If a Recipient Fails To Issue a Notice of Final Action Within 90 Days After the Complaint Was Filed § 38.76 and Extension of Deadline To File Complaint § 38.77

Proposed §§ 38.76 and 38.77 retained the same language as in the 1999 and 2015 rules, with the exception of the revisions made to their titles and corresponding section numbers. CRC received no comments on these sections and adopts §§ 38.76 and 38.77 as proposed.

#### Determinations Regarding Acceptance of Complaints § 38.78

Proposed § 38.78 retained the language from the 2015 rule's § 38.82, with minor modifications including changing the word "determine" to "decide" in the introductory sentence to distinguish the Director's decision whether to accept a complaint from the Director's Initial and Final Determinations. CRC received no comments on this provision and adopts § 38.78 as proposed.

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

Proposed § 38.79 retained the language from the 2015 rule's § 38.83, except for removing and replacing gender-specific pronouns and revising its title. Proposed paragraph (a) added language explaining 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. Proposed paragraph (c) added that the Director must send a written notice of complaint closure to the complainant's last known address, "email address (or other known method of contacting the complainant in writing)." This change was intended to update the methods of written communication that are available. CRC received no comments on this provision and adopts § 38.79 as proposed.

#### Lack of Jurisdiction § 38.80, Complaint Referral § 38.81, Notice That Complaint Will Not Be Accepted § 38.82, Notice of Complaint Acceptance § 38.83, and Contacting CRC About a Complaint § 38.84

Proposed §§ 38.80–38.84 retained the language of the 2015 rule's §§ 38.84–38.88, with the exception of their titles and section numbers. CRC received no comments on these sections and adopts §§ 38.80–38.84 as proposed.

#### Alternative Dispute Resolution § 38.85

Proposed § 38.85 retained most of the language from the 2015 rule's § 38.89, with some modifications. This section replaced the reference to "mediation" with "alternative dispute resolution (ADR)" to encompass a broader array of procedures that may be used to resolve a complaint.

Proposed paragraph (a) replaced the reference to "the parties," with "the complainant and respondent" to clarify that the actual parties in an enforcement action that arises from a complaint filed under Section 188 or this part are the

<sup>330</sup> 29 CFR 37.79 (1999 rule).

recipient/respondent and CRC. WIOA Section 188 provides no private right of action. Proposed paragraph (b) removed the word “issued” from the 2015 rule’s § 38.89(b), which stated, “The mediation will be conducted under guidance issued by the Director.” This change was intended to allow guidance from the Director on ADR to be provided informally. Proposed paragraph (c) added 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. Proposed paragraph (d) created a new provision to notify recipients and complainants that ADR does not suspend CRC’s investigation. CRC plans to continue to process and investigate complaints during ADR so that the complaint and its evidence will not become stale.

CRC received no comments on this provision and adopts § 38.85 as proposed.

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

Proposed § 38.86 retained the provisions in the 2015 rule’s § 38.90, but modified the title and section number. The proposed rule also added language at the end of paragraph (b) so that the recipient, complainant and grantmaking agency are aware of the procedural steps that CRC will follow under §§ 38.87 and 38.88. CRC received no comments on this provision and adopts § 38.86 as proposed.

#### Director’s Initial Determination That Reasonable Cause Exists To Believe That a Violation Has Taken Place § 38.87 and Director’s Final Determination That No Reasonable Cause Exists To Believe That a Violation Has Taken Place § 38.88

Proposed §§ 38.87 and 38.88 retained all of the existing language in the 2015 rule’s §§ 38.87 and 38.88, and only updated their titles and section numbers. CRC received no comments on these sections and adopts §§ 38.91 and 38.92 as proposed.

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

Proposed § 38.89 retained most of the language from the 2015 rule’s § 38.93 with some modifications. Proposed § 38.89 replaced the mandatory language regarding enforcement actions the Director could take to allow for CRC’s prosecutorial discretion, in accordance with Section 188(b) of WIOA.<sup>331</sup> CRC received no comments

on this provision and adopts § 38.89 as proposed.

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

In proposed § 38.90, we retained the language from the 2015 rule’s § 38.94 and only updated its section number and title. CRC received no comments on this provision and adopts § 38.90 as proposed, with the exception of a technical edit to paragraph (b) to change “must” to “may” to make it consistent with the title of § 38.90. CRC intends no substantive change with this revision.

#### Post-Violation Procedures § 38.91

Proposed § 38.91 retained most of the existing language from the 2015 rule’s § 38.95, with a few modifications. The proposed rule updated the section number and changed the title. Additionally, we proposed to delete the paragraphs (b)(1)(iii)(C) and (b)(3)(iii), which referred to using “both” a written assurance and a conciliation agreement as closing documents for the same set of violations. As discussed in § 38.92 of the final rule, this deletion reflects revisions to the circumstances under which a written assurance may be used. Finally, we proposed removing the inadvertent reference to a nonexistent paragraph (d) at the end of paragraph (a).

CRC received no comments on this provision and adopts § 38.91 as proposed.

#### Written Assurance § 38.92

Proposed § 38.92 clarified the corresponding provisions from the 1999 and 2015 rules to better explain when a written assurance rather than a conciliation agreement would be the appropriate resolution document. CRC received no comments on this provision and adopts § 38.92 as proposed.

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

Proposed § 38.93 retained the language in the 1999 and 2015 rules,<sup>332</sup> with some changes. We updated the section number and revised its title. Proposed paragraph (a) retained all of the language from the 1999 and 2015 sections. We added to the list of required elements of a conciliation agreement by creating a new provision in proposed paragraph (b) stating that the agreement “[a]ddress the legal and contractual obligations of the recipient”; we renumbered the paragraphs; and we proposed 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 inserted 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. CRC believed that these revisions would more accurately reflect its current practice and align with the rules issued by other nondiscrimination enforcement agencies in the Department.<sup>333</sup> We received one comment on proposed § 38.93.

*Comment:* A State agency commented that § 38.93(g) would allow CRC to publish conciliation agreements in the media as leverage against the State. The commenter argued that CRC should only be allowed to publish the agreement after all negotiating has been completed and the parties have signed the conciliation agreement.

*Response:* CRC does not publish conciliation agreements that have not been fully negotiated and executed. The purpose of § 38.93(g) is to ensure that all parties to the agreement understand that the agreement may be made public. For the reasons set forth above and in the NPRM and considering the comments received, CRC finalizes proposed § 38.93 without modification.

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

In proposed § 38.94, we retained the language in the 1999 and 2015 rules,<sup>334</sup> but updated its section number and revised its title. The only change to this section was adding “the Governor” to the list of other entities in paragraphs (a) and (b)(1), because the Governor may also be a recipient in violation of this part. We received one comment on proposed § 38.94.

*Comment:* A State agency commented that neither WIOA nor Title VI support the new authority that CRC seeks to assert over State Governors. The commenter suggested that the word “Governor” be removed from paragraphs (a) and (b)(1) in § 38.94.

*Response:* CRC disagrees. The Governors assume the obligations under Section 188 when they accept WIOA funds. Moreover, as mentioned earlier,

<sup>333</sup> For example, OFCCP has incorporated similar language into its conciliation agreements pursuant to its regulations at 41 CFR 60–1.34(d).

<sup>334</sup> 29 CFR 37.98 (1999 rule); 29 CFR 38.98 (2015 rule).

<sup>331</sup> 29 U.S.C. 3248(b).

<sup>332</sup> 29 CFR 37.97 (1999 rule); 29 CFR 38.97 (2015 rule).

CRC has the requisite authority to enforce the nondiscrimination and equal opportunity provisions of Section 188 of WIOA and this part as applied to Governors. As contemplated in subparts B and C, the Governor serves a unique role, sometimes serving as both the entity responsible for oversight and monitoring of all State Programs and as a recipient, and violations may occur in either role under Section 188.

For the reasons set forth above and in the NPRM and considering the comments received, CRC finalizes § 38.94 as proposed, with a grammatical correction to paragraph (b)(1) to change “be” to “been.”

**Enforcement When Voluntary Compliance Cannot Be Secured § 38.95, Contents of a Final Determination of a Violation § 38.96, and Notification of Finding of Noncompliance § 38.97**

Proposed §§ 38.95, 38.96, and 38.97 retained all of the existing language in the 2015 rule’s §§ 38.99, 38.100, and 38.101, and only updated their titles and section numbers. CRC received no comments on these sections and adopts §§ 38.95, 38.96, and 38.97 as proposed.

**Notification of Breach of Conciliation Agreement § 38.98**

Proposed § 38.98 merged the 2015 rule’s §§ 38.102 and 38.103 into one section. CRC received no comments on this provision and adopts § 38.98 as proposed, with a technical correction to the title of the section to match the term used in the text.

**Contents of Notification of Breach of Conciliation Agreement § 38.99 and Notification of an Enforcement Action Based on Breach of Conciliation Agreement § 38.100**

Proposed §§ 38.99 and 38.100 retained all of the existing language in the 2015 rule’s §§ 38.104 and 38.105, and only updated their titles and section numbers. CRC received no comments on these sections and adopts §§ 38.99 and 38.100 as proposed, with a technical correction to the title of § 38.99 to match the term used in the text.

*Subpart E—Federal Procedures for Effecting Compliance*

**Enforcement Procedures § 38.110**

Proposed § 38.110 generally retained the language in the 1999 and 2015 rules and made one additional update, adding language at the end of paragraph (a)(3) stating that the Secretary may take such action as may be provided by law “which may include seeking injunctive relief.” We added this provision to advise recipients that the Secretary may seek corrective actions that go beyond

make-whole relief, and provided injunctive relief as an example of such other actions.

*Comment:* Two individual commenters supported the proposal but questioned how it would be enforced.

*Response:* CRC is committed to enforcing the equal opportunity and nondiscrimination provisions of WIOA Section 188 and this part using the detailed enforcement procedures set forth in the final rule.

For the reasons set forth above and in the NPRM, and in consideration of the comments received, CRC finalizes proposed § 38.110 without modification.

**Hearing Procedures § 38.111**

Proposed § 38.111 retained the same requirements of the 1999 and 2015 rules, but made minor changes to their provisions. Proposed § 38.111(b)(3) only updated the current title and location of the Office of the Solicitor’s Division with which grant applicants or recipients must serve a copy of their filings under this section. Proposed § 38.111(d)(2) deleted the word “Uniform” as used in the 2015 rule’s § 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.

CRC received no comments on this provision and adopts § 38.111 as proposed.

**Initial and Final Decision Procedures § 38.112**

Proposed § 38.112 generally contained the same requirements as the 1999 and 2015 rules, but made a few modifications to its provisions. This proposed section replaced the word “Secretary” with the phrase “Administrative Review Board” (ARB) as it appears in various parts of § 38.112(b)(1) and (2). This replacement accurately reflects the ARB’s role in issuing final agency decisions in cases brought to enforce WIOA Section 188. As stated in the NPRM, the Secretary’s Order 2–96, issued in 1996, created the ARB and delegated to the ARB the Secretary’s authority to issue final agency decisions under 38 enumerated statutes, including 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. Additionally, Secretary’s Order 1–2002 included a delegation to the ARB for matters arising under Section 188 of the Workforce Investment Act,<sup>335</sup> as did

Secretary’s Order 02–2012.<sup>336</sup> These delegation orders also contain a catch-all provision to extend the delegation to subsequently enacted statutes or rules, including: “Any laws or regulations 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.”<sup>337</sup> Thus, absent a new delegation order, the ARB issues final agency decisions under Section 188 of WIOA.

Proposed paragraph (b) retained the 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, but included some modifications. Specifically, proposed paragraph (b)(1)(iii) deleted the sentence “[a]ny exception not specifically urged is waived” from this paragraph. The prior provisions did not accurately describe the ARB’s scope of review of initial decisions under the Administrative Procedure Act (APA). The APA provides that, on appeal from or review of the initial decision, the agency has all the power which it would have in making the initial decision except as it may limit the issues on notice or by rule.<sup>338</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>339</sup>

Finally, as noted in the preamble to the NPRM, we retained all of the 1999 and 2015 rules’ requirements in proposed paragraph (b)(2)(ii), and proposed adding “the Governor” as one of the listed entities to which this provision applied. Proposed § 38.112(b)(2)(ii) stated 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 for failure of the grant applicant or recipient to comply

<sup>336</sup> 77 FR 69376, Nov. 16, 2012.

<sup>337</sup> *Id.* at 63279.

<sup>338</sup> 5 U.S.C. 557(b).

<sup>339</sup> *Masek v. The Cadle Co.*, ARB No. 97–069, ALJ No. 1995–WPC–1, at 7 (ARB Apr. 25, 2000) (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 Sec., 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 Acad.*, ARB No. 98–056, ALJ No. 1997–CAA–2, at 9 (ARB Feb. 29, 2000).

<sup>335</sup> 67 FR 64272, Oct. 17, 2002.

with the required corrective and/or remedial actions. We announced in the preamble to the NPRM that the imposition of appropriate sanctions should also be applicable to Governors for their failure to comply. The regulatory text of the NPRM inadvertently did not insert the Governor into the list of other entities—grant applicants and recipients—to which these provisions apply. However, we have corrected that oversight in this final rule. We received one comment regarding this revision.

*Comment:* A State agency commented that neither WIOA nor Title VI support the new authority that the Department seeks to assert over State Governors. The commenter suggested that the word “Governor” be removed from § 38.112.

*Response:* For the reasons provided above, CRC has the requisite authority to enforce the nondiscrimination and equal opportunity provisions of Section 188 of WIOA and this part as applied to Governors. As contemplated in subparts B and C, the Governor serves a unique role, sometimes serving as both the one responsible for oversight and monitoring of all State Programs and as a recipient. Again, the Governor may be found in violation under Section 188 and this part in either role. Thus, we decline to adopt the commenter’s suggestion to exclude the Governor from this provision.

For the reasons stated in the proposed rule and considering the comments received, CRC finalizes § 38.112 as proposed, with the following modifications: Adding “Governor’s” to paragraph (b)(2)(ii) and changing “applicant” to “applicant’s” in the same paragraph for the sake of grammatical correctness and consistency.

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

Proposed § 38.113 generally retained the language in this section and revised its title. The proposed rule included a small technical update in paragraph (c) and replaced the term “Secretary” with “Administrative Review Board,” consistent with the reason set forth in § 38.112. CRC received no comments on this provision and adopts § 38.113 as proposed.

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

Proposed § 38.114 retained the language in this section and changed its title. CRC received no comments on this provision and adopts § 38.114 as proposed.

Post-Termination Proceedings § 38.115

Proposed § 38.115 retained the language in this section and changed its title. CRC received no comments on this provision and adopts § 38.115 as proposed.

### 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) This final rule is a “significant regulatory action” under Section 3(f)(4)

of E.O. 12866; therefore, OMB has reviewed this final rule.

(2) This final 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) This final rule would not impose an unfunded mandate on Federal, state, local, or tribal governments as defined by the Unfunded Mandates Reform Act.

The total undiscounted cost of this final rule is estimated to be \$120.0 million over the 10-year analysis period, which is equivalent to \$106.86 million at a discount rate of 3 percent or \$93.1 million at a discount rate of 7 percent. The Department estimates that this final rule will have an undiscounted first-year cost of \$21.0 million, second-year cost of \$10.2 million, and third-year cost of \$13.8 million. In the fourth through the tenth years, average annual costs will be \$10.7 million. The annualized cost of the proposed rule is estimated to be \$12.2 million at a discount rate of 3 percent or \$12.4 million at a discount rate of 7 percent. The annual burden hours are detailed in Table 3 and Table 4 presents a summary of the costs of this final rule. This final rule will not create significant new costs for Governors, recipients, or beneficiaries.

The primary cost burden created for affected entities by this final rule will be the cost of Governors’ oversight and monitoring responsibilities for State Programs. Over the 10-year analysis timeframe, the Department estimates this provision to cost \$57.3 million (undiscounted). The next two provisions with the highest costs over the 10-year analysis are the recipients’ obligation to publish the equal opportunity notice (\$31.2 million) and the required elements of a recipient’s complaint procedures (\$12.7 million). All provisions are discussed in the subject-by-subject analysis.

The Department was unable to quantify the benefits of this final rule due to data limitations or lack of existing data or evaluation findings. Many of the revisions to 29 CFR part 38 contained in this final rule, however, will improve readability and provide additional guidance to Governors, other recipients, and beneficiaries, in several instances in response to feedback from stakeholders, to their benefit. For example, additional clarifying 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 by providing better

programmatic guidance. Similarly, § 38.92 provides detail regarding the use of written assurances in the enforcement of nondiscrimination and equal opportunity requirements that resolves confusion that recipients raised about their use.

In addition, by including updates to the nondiscrimination provisions in Subpart A, this final rule 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; the Americans with Disabilities Act of 1990, as amended; and Section 504 of the Rehabilitation Act.

### 1. The Need for the Regulation

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, or political affiliation or belief, or, for beneficiaries, applicants, and participants only, because of 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. WIOA contains identical provisions of Section 188 as appeared in WIA.

### 2. Technical Update of Section 188 Versus Publication of a Simultaneous Final Rule

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 37, which implemented Section 188 of WIA; or (2) To do (1) and publish an additional final rule that updates part 38 consistent with current law and addresses its application to current workforce development and workplace practices and issues.

The Department considered these options in accordance with the provisions of E.O. 12866 and chose to publish in July 2015 a technically updated final rule implementing Section 188 of WIOA, as required, and additionally publish this final rule consistent with current nondiscrimination law that addresses its application to current workforce development and workplace practices and issues (*i.e.*, alternative (2)). The Department concluded that the 2015 rule, which only technically updated the 1999 rule, did 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 while not providing the full protections to which beneficiaries are entitled under current law.

### 3. Analysis Considerations

The Department derived its estimates by comparing the existing program

baseline, that is, the program benefits and costs of the 1999 and 2015 rules to the benefits and costs of the final rule.<sup>340</sup> For a proper evaluation of the benefits and costs of this final rule, the Department has explained how the newly required actions by States and recipients under the regulations at part 38 are linked to the expected benefits and estimated costs.

The Department made every effort, when feasible, to quantify and monetize the benefits and costs of this final rule. When the Department was unable to quantify them—for example, due to data limitations—the Department described 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 benefits and costs that accrue to citizens and residents of the United States associated with this final rule.

Table 1 presents the estimated annual number of recipients expected to experience an increase in level of effort (workload) due to this final rule. These estimates are used extensively throughout this document to estimate the costs of each provision. Note that several recipients are counted under multiple categories because they receive more than one source of WIOA Title I financial assistance, that is, they receive funds under multiple programs. For example, the Texas Workforce Commission is both a recipient of a Senior Community Service Employment Program Grant and an Adult WIOA Title I grantee. However, the Department included it in both categories in an effort to be overinclusive, rather than risking underestimating the costs of this final rule.

<sup>340</sup> As previously noted, the 2015 rule (the original regulations implementing Section 188 of WIOA at 29 CFR part 38) made no substantive changes to the 1999 rule (the regulations implementing Section 188 of WIA at 29 CFR part 37).

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

	Recipients	Beneficiaries	Non-federal full-time employees of recipients
States <sup>341</sup> .....	342 57	.....	.....
Adult Program (Title I of WIOA) .....	(345)	.....	343 65,655
Dislocated Worker Program (Title I of WIOA) .....	(345)	.....	(346)
Youth Program (Title I of WIOA) .....	(345)	344 193,130	(346)
Wagner-Peyser Act Program (Wagner-Peyser Act, as amended by Title III of WIOA) .....	(345)	345 16,619,943	(346)
Adult Education and Literacy Program (Title II of WIOA) .....	(345)	346 2,012,163	347 67,293
Vocational Rehabilitation Program .....	(345)	348 573,086	349 68,000
Trade Adjustment Assistance Program .....	(345)	350 51,133	(346)
Unemployment Compensation Program .....	(345)	351 2,451,464	352 62,138
Local Veterans' Employment Representatives and Disabled Veterans' Outreach Program .....	(345)	353 450,843	354 2,700
Career and Technical Education (Perkins) .....	(345)	355 12,052,217	(346)
Community Service Block Grants .....	(345)	356 16,000,000	(346)
Temporary Assistance for Needy Families (TANF) .....	(345)	357 4,417,000	(346)
State and Local Workforce Development Boards .....	358 580	.....	359 9,280
Service Providers, Including Eligible Training Providers and On-the-Job Training Employers <sup>360</sup> .....	361 11,400	362 122,693	363 439,936
One-Stop Career Centers <sup>364</sup> .....	365 2,481	366 864,936	367 2,481
National Programs Include:			
Job Corps Operators (i.e., national contractors) .....	368 18	369 370 109,523	371 372 3,050
Job Corps Outreach and Admissions Operators .....	373 24	(374)	(376)
Job Corps National Training Contractors/Career Transition Services Operators .....	374 21	(374)	(376)
Senior Community Service Employment Grants .....	375 71	376 67,123	(346)
National Emergency Grants <sup>377</sup> .....	378 125	379 26,221	380 9,280
Reintegration of Ex-Offenders—Adult Grants <sup>381</sup> .....	382 28	383 6,800	384 555
H-1B Technical Skills Training Grants <sup>385</sup> .....	386 36	387 22,543	388 774
H-1B Jobs and Innovation Accelerator Challenge Grants <sup>389</sup> .....	390 30	391 3,500	392 183
Indian and Native American Programs .....	393 178	394 35,735	395 994
National Farmworker Jobs Program .....	396 69	397 41,300	398 60,965
YouthBuild .....	399 82	400 36,997	401 2,408
Registered Apprenticeship Program .....	402 19,259	403 197,500	404 85,317
Total .....	34,459	56,355,850	881,009

Table 2 presents the compensation rates for the occupational categories expected to experience an increase in level of effort (workload) due to this final rule. The Department used median hourly wage rates from the Bureau of Labor Statistics (BLS) Occupational Employment Statistics (OES) program for private, State, and local employees<sup>405</sup> as well as the federal

<sup>341</sup> The 57 state entities are the recipients for the twelve programs below.

<sup>342</sup> This number includes the 50 states as well as the District of Columbia, American Samoa, Guam, Northern Mariana Islands, Puerto Rico, Palau, and U.S. Virgin Islands. These 57 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>343</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>344</sup> U.S. Department of Labor, Employment and Training Administration, *Workforce System Results: For the Quarter ending June 30, 2015*, [https://www.doleta.gov/performance/results/pdf/DOL\\_Workforce\\_Rprt\\_JUN\\_2015.pdf](https://www.doleta.gov/performance/results/pdf/DOL_Workforce_Rprt_JUN_2015.pdf). (hereinafter "*Workforce System Results*").

<sup>345</sup> U.S. Department of Labor, Employment and Training Administration, *National—Wagner-Peyser: Program Year 2013*, <http://www.doleta.gov/performance/results/pdf/WagnerPeyserPY2013.pdf>.

<sup>346</sup> U.S. Department of Education, Office of Vocational and Adult Education, *Adult Education and Family Literacy Act of 1998: Annual Report to Congress Program Year 2010–2011* (May 2013), <http://www2.ed.gov/about/offices/list/ovae/resource/aefla-report-to-congress-2010.pdf>.

<sup>347</sup> National Reporting System, *Adult Education Personnel*, [http://www.nrsweb.org/docs/NRS\\_Fast\\_Facts\\_508\\_rev.pdf](http://www.nrsweb.org/docs/NRS_Fast_Facts_508_rev.pdf).

<sup>348</sup> U.S. Department of Education, Office of Special Education and Rehabilitative Services, *Annual Report Fiscal Year 2012* (2014), <http://www2.ed.gov/about/reports/annual/rfa/2012/rfa-2012-annual-report.pdf>.

<sup>349</sup> This is an estimate based on the average number of employees at state-level Department of Labor equivalents.

<sup>350</sup> *Workforce System Results*, *supra* note 344, at 3.

<sup>351</sup> *Id.*

<sup>352</sup> This is an estimate based on the average number of employees at state-level Department of Labor equivalents.

<sup>353</sup> U.S. Department of Labor, Veterans' Employment & Training Service, *Annual Report to Congress: Fiscal Year 2013*, [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). This number is for PY 2012. *Id.*

<sup>354</sup> U.S. Department of Veterans Affairs, *LVER and DVOP Fact Sheet*, [http://www.benefits.va.gov/VOW/docs/LVER\\_DVOP\\_Factsheet.pdf](http://www.benefits.va.gov/VOW/docs/LVER_DVOP_Factsheet.pdf).

<sup>355</sup> U.S. Department of Education, *Carl D. Perkins Career and Technical Education Act of 2006: Report to Congress on State Performance Program Year 2010–2011*, 2014, [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).

<sup>356</sup> U.S. Department of Health and Human Services, Administration for Children & Families, *Fiscal Year 2015: Justification of Estimates for Appropriations Committees*, [https://www.acf.hhs.gov/sites/default/files/olab/fy\\_2015\\_congressional\\_budget\\_justification.pdf](https://www.acf.hhs.gov/sites/default/files/olab/fy_2015_congressional_budget_justification.pdf).

<sup>357</sup> U.S. Department of Health and Human Services, *Welfare Indicators and Risk Factors: Thirteenth Report to Congress* (March 2014), [http://aspe.hhs.gov/hsp/14/indicators/rpt\\_indicators.pdf](http://aspe.hhs.gov/hsp/14/indicators/rpt_indicators.pdf).

<sup>358</sup> From the burden analysis contained in the ETA WIOA Final Rule, *supra* note 309.

<sup>359</sup> This number is an estimate based on the average number of full-time employees from fourteen local boards multiplied by the number of recipients. The fourteen local boards include three from North Carolina, three from West Virginia, one from Virginia, three from Washington, three from Wisconsin, and one from Illinois.

<sup>360</sup> U.S. Department of Labor, Employment and Training Administration, *PY 2012 WIA Trends Over Time* (December 2013), <http://www.doleta.gov/performance/results/pdf/PY2012WIA Trends.pdf> (hereinafter “WIA Trends over Time”).

<sup>361</sup> From the burden analysis contained in the ETA WIOA Final Rule, *supra* note 309.

<sup>362</sup> *WIA Trends over Time*, *supra* note 360, at 26.

<sup>363</sup> This number is an estimate based on the average number of employees at five different community colleges multiplied by 57 (the 50 states, the District of Columbia, and American Samoa, Guam, Northern Mariana Islands, Puerto Rico, Palau, and U.S. Virgin Islands). One college each came from the following states: Alabama, North Carolina, Virginia, Kentucky, and Colorado.

<sup>364</sup> *WIA Trends over Time*, *supra* note 360, at 26.

<sup>365</sup> From the burden analysis contained in the ETA WIOA Final Rule, *supra* note 309.

<sup>366</sup> *WIA Trends over Time*, *supra* note 360, at 26.

<sup>367</sup> This is an estimate based on the assumption that there is usually one point of contact per one-stop. U.S. Department of Labor, Employment and Training Administration, *Regional, State, and Local Contacts* (updated February 2016), <http://wdr.doleta.gov/contacts/>.

<sup>368</sup> U.S. Department of Labor, Job Corps, *PY 08: U.S. Department of Labor Job Corps Annual Report*, <http://www.jobcorps.gov/Libraries/pdf/py08report.sflb> (hereinafter “PY 08”).

<sup>369</sup> *Workforce System Results*, *supra* note 344, at 3.

<sup>370</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>371</sup> This number is an estimate based on the assumption that there twenty-five employees at each of the Job Corps centers.

<sup>372</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>373</sup> *PY 08*, *supra* note 368, at 13.

<sup>374</sup> *PY 08*, *supra* note 368, at 13.

<sup>375</sup> U.S. Department of Labor, Employment and Training Administration, *Senior Community Service Employment Program* (updated March 2016), <http://www.doleta.gov/seniors/>.

<sup>376</sup> *Workforce System Results*, *supra* note 344, at 3.

<sup>377</sup> *WIA Trends over Time*, *supra* note 360, at 26.

<sup>378</sup> This number was calculated based on the total active National Emergency Grant Awards by state (as of August 2014) obtained from the Workforce Investment Act Standardized Record Data (WASRD) system by the Employment and Training Administration of the U.S. Department of Labor.

<sup>379</sup> *WIA Trends over Time*, *supra* note 360, at 26.

<sup>380</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>381</sup> U.S. Department of Labor, Employment and Training Administration, *Notice of Availability of Funds and Solicitation for Grant Applications for Reintegration of Ex-Offenders (REXO) Adult Generation 5* (January 2012), [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) (hereinafter “PY 2011”).

<sup>382</sup> U.S. Department of Labor, Employment and Training Administration, *Reentry Employment Opportunities (REO)* (updated April 2015), [http://www.doleta.gov/REO/trainingtowork\\_grantees.cfm](http://www.doleta.gov/REO/trainingtowork_grantees.cfm).

<sup>383</sup> *PY 2011*, *supra* note 381, at 6.

<sup>384</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>385</sup> U.S. Department of Labor, Employment and Training Administration, *Overview of the H-1B Technical Skills Training (TST) Grants* (May 2012), [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>386</sup> U.S. Department of Labor, Employment and Training Administration, *Overview of the H-1B Technical Skills Training (TST) Grants* (May 2012), [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). 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>387</sup> *Id.* This number is an estimate based on the total number of each grantee's projections.

<sup>388</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>389</sup> Mathematica Policy Research, *Evaluation of the Jobs and Innovation Accelerator Challenge Grants: Interim Findings on Multiagency Collaboration and Cluster Process* (August 2015), <https://www.mathematica-mpr.com/our-publications-and-findings/publications/evaluation-of-the-jobs-and-innovation-accelerator-challenge-grants-interim-findings-on-multiagency> (hereinafter “Mathematica JIAC”).

<sup>390</sup> U.S. Department of Labor Employment and Training Administration, *Overview of the H-1B Jobs and Innovation Accelerator Challenge (Jobs Accelerator) Grants*, [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).

<sup>391</sup> Mathematica JIAC, *supra* note 389, at x.

<sup>392</sup> This number is an estimate based on the average number of full-time employees at six grantees.

<sup>393</sup> U.S. Department of Labor, Employment and Training Administration, *FY 2015 Congressional Budget Justification*, <http://www.dol.gov/dol/budget/2015/PDF/CBJ-2015-V1-04.pdf>.

<sup>394</sup> *Workforce System Results*, *supra* note 344, at 3. 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>395</sup> This number is an estimate based on the assumption that American Indian and Alaskan Natives make up 1.6 percent of the total number of non-Federal full-time employees as with the total population.

<sup>396</sup> U.S. Department of Labor, Employment and Training Administration, *National Farmworker Jobs Program* (updated February 2016), [http://www.doleta.gov/Farmworker/html/NFJP\\_factsheet.cfm](http://www.doleta.gov/Farmworker/html/NFJP_factsheet.cfm).

<sup>397</sup> *Workforce System Results*, *supra* note 344, at 3.

<sup>398</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>399</sup> U.S. Department of Labor, Employment and Training Administration, *FY 2016 Department of Labor Budget in Brief*, <http://www.dol.gov/dol/budget/2016/PDF/FY2016BIB.pdf>.

<sup>400</sup> *Workforce System Results*, *supra* note 344, at 3.

minimum wage. 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 1.57, which represents the ratio of average total compensation to average wages in 2015.<sup>406</sup> The Department multiplied the loaded wage factor by each occupational category's median wage rate to calculate an hourly compensation rate. The Department used the hourly compensation rates presented in Table 2 extensively throughout this document to estimate the labor costs of each provision. The Department assumes that beneficiaries would be paid at least the federal minimum wage and therefore, we used the Federal minimum wage rate to calculate the estimated costs to beneficiaries throughout this analysis.<sup>407</sup> However, the Department did not multiply the loaded wage factor by the federal minimum wage to calculate an hourly compensation rate for beneficiaries because they are not considered to be employed.

The Department assumes Equal Opportunity Officers are managers as a proxy for their specific wage rates. This

<sup>401</sup> This number is based on the average number of employees at twenty-three grantees multiplied by the number of grantees.

<sup>402</sup> This number was provided by the Apprenticeship Program Office at the Department of Labor.

<sup>403</sup> U.S. Department of Labor, Employment and Training Administration, *Registered Apprenticeship National Results: Fiscal Year 2015* (updated December 2016), <http://doleta.gov/oa/data/statistics.cfm>. In FY 2015, more than 197,500 individuals nationwide entered the apprenticeship system. We estimate in FY 2015, 7.1 percent (14,023 active female apprentices/197,500 total active apprentices in the Registered Apprenticeship Partners Information Management Data System (RAPIDS) database) of active apprentices were women.

<sup>404</sup> U.S. Census Bureau, *Statistics about Business Size (including Small Business) from the U.S. Census Bureau* (updated August 2015), <http://www.census.gov/econ/smallbus.html>. This number is an estimate based on the average number of paid employees per firm (4.43) multiplied by the number of recipients.

<sup>405</sup> Department of Labor, Bureau of Labor Statistics, *May 2015 National Occupational Employment and Wage Estimates* (updated March 2016), [http://www.bls.gov/oes/current/oes\\_nat.htm](http://www.bls.gov/oes/current/oes_nat.htm).

<sup>406</sup> Discerning the number of State and local-sector employees and private-sector employees at the local level is difficult; therefore, the Department used the State and local-sector loaded wage factor (1.57) instead of the private-sector wage factor (1.43) for all the employees to avoid underestimating the costs. For the State and local multiplier see Department of Labor, Bureau of Labor Statistics, *Employer Cost and Employee Compensation* (June 2016), <http://www.bls.gov/news.release/eecc.nr0.htm>.

<sup>407</sup> The cost to beneficiaries may be underestimated because some of beneficiaries are in the States that have a higher State minimum wage than the federal minimum wage.

assumption is based on our experience with recipients combined with the language in this final rule 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>408</sup> Furthermore, the

Department is aware that administrative support workers may perform some of the functions where the need for computer programmers is indicated. However, because there are 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 of computer programmers in estimating this final rule costs, thereby providing an upper bound of cost for these functions.

TABLE 2—HOURLY COMPENSATION RATES  
[2015 Dollars]

Position	Median hourly wage A	Loaded wage factor B	Hourly compensation rate C = A × B
Managers <sup>409</sup> .....	\$46.99	1.57	\$73.77
Computer Programmers <sup>410</sup> .....	38.24	.....	60.04
Beneficiaries <sup>411</sup> .....	7.25	.....	7.25

4. Subject-by-Subject Benefit-Cost Analysis

The Department derives its estimates below by comparing the existing program baseline, that is, the program benefits and costs estimated as a part of the 1999 and 2015 rules to the new requirements of the final rule.<sup>412</sup> Calculated cost estimates may not replicate or sum due to rounding.

The Department emphasizes that many of this final rule provisions are also existing requirements under WIOA. 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 ground 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. This final rule 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, pregnancy and citizenship status to aid recipients in meeting their obligations.<sup>413</sup> Accordingly, this regulatory analysis focuses on “new” costs that can be attributed to revisions of existing

obligations and new requirements contained in this final rule.

Discussion of Impacts

In this section, the Department presents the costs associated with the new requirements of the regulations. This final rule revises 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 34,459 recipients annually who will serve approximately 56,355,850 beneficiaries annually with approximately 881,009 non-federal employees of recipients annually based on our informed estimates.<sup>414</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>415</sup> Based on its experience with recipients’ compliance with the laws the Civil Rights Center enforces, and the mandate of the existing and revised regulations that each recipient has an EO Officer,<sup>416</sup> the Department 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 each EO Officer to read the rule. The Department estimates that each recipient will have one EO Officer that will become familiar with the new requirements. Consequently, the estimated burden for rule familiarization for these EO Officers is 137,836 hours (34,459 × 4 hours).<sup>417</sup> The Department calculates the total estimated cost as \$10,168,754 (137,836 × \$73.77/hour, difference due to rounding).<sup>418</sup>

The following is a description of additional costs and burdens resulting from this final rule. It follows the organization of this final rule for ease of reference.

Subpart A—General Provisions

Discrimination Prohibited Based on Pregnancy § 38.8

The final rule includes § 38.8 titled “Discrimination prohibited based on pregnancy.” One of the requirements of this section is—in addition to requiring that recipients not discriminate against an individual based on pregnancy, childbirth or related medical conditions—to require that recipients in certain situations provide reasonable accommodations or modifications to a pregnant applicant or participant or employee who is temporarily unable to participate in some portions of a WIOA Title I-financially assisted training

<sup>408</sup> See §§ 38.28–38.31.

<sup>409</sup> U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Employment Statistics* (May 2015), 11–1021 General and Operations Managers, <http://www.bls.gov/oes/current/oes111021.htm>.

<sup>410</sup> U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Employment Statistics* (May 2015), 15–1131 Computer Programmers, <http://www.bls.gov/oes/current/oes151131.htm>.

<sup>411</sup> This is the current federal minimum wage. 29 U.S.C. 206(a)(1)(C).

<sup>412</sup> As previously noted, the 2015 rule (the original regulations implementing Section 188 of WIOA at 29 CFR part 38) made no substantive changes to the 1999 rule (the regulations implementing Section 188 of WIA at 29 CFR part 37).

<sup>413</sup> See §§ 38.9, 38.7, and 38.11.

<sup>414</sup> See Table 1 for a breakdown of these numbers.

<sup>415</sup> See 5 CFR 1320.3(b)(1)(i).

<sup>416</sup> See 29 CFR 38.23 (2015 rule); § 38.28 (this final rule).

<sup>417</sup> This estimate is high because there are some exceptions to the EO Officer requirement. See, e.g., § 38.33 (service providers are not required to designate a recipient-level EO Officer, but are instead monitored by the EO Officer of the Governor or local area grant recipient).

<sup>418</sup> Throughout this final rule, the Department assumes that EO Officers are managers.

program or activity because of pregnancy, childbirth, 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 determine the burden of this accommodation provision, the Department estimated the number of beneficiaries and the number of employees of recipients who may need an accommodation during pregnancy in a given year. No specific data sets detail the characteristics of these beneficiaries and employees relating to pregnancy.

Thus, the Department relied on the data sets available from the Employment and Training Administration (ETA) for beneficiaries of WIOA Title I financially assisted training programs, including the Job Corps Program, and estimated the number of recipients' employees based on data sets available for the general population and general labor force. The Department concluded 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 concluded that 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 concluded will incur little to no additional cost in most cases.

For those who do have such conditions, however, 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 occupational 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. As stated above, providing light duty or accommodation for pregnancy typically 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 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>419</sup>

Because these data about employees of recipients or participants in training programs do not indicate gender demographics, the Department used data from the BLS that indicate that about 47 percent of the workforce is female.<sup>420</sup> Therefore, the Department estimates that 57,666 ( $122,693 \times .47$ ) adult women are beneficiaries of eligible training providers and on the job training employers annually.<sup>421</sup> In addition, the Department estimates that 7.1 percent of active beneficiaries in Registered Apprenticeship programs are female, for a total of 14,023 ( $197,500 \times .071$ ) adult women in program year 2015.<sup>422</sup> Moreover, the Department estimates that there are 43,809 girls and women who are annual beneficiaries of the Job Corps program ( $109,523 \times .40$ ).<sup>423</sup>

In addition, the Department estimates the number of individuals employed by recipients 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. Using these assumptions, there are 248,302 ( $528,303 \times .47$ ) adult women non-federal employees of recipients.

<sup>419</sup>This analysis is similar to that conducted by OFCCP in its final sex discrimination rule. OFCCP based this estimate on data from the Employer Information Report EEO-1. See OFCCP Sex Discrimination Final Rule, *supra* note 19, at 39145-46.

<sup>420</sup>U.S. Department of Labor, Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey* (updated February 2016), <http://www.bls.gov/cps/cpsaat11.htm>.

<sup>421</sup>From the burden analysis contained in the ETA WIOA Final Rule, *supra* note 309.

<sup>422</sup>In 2015, 7.1 percent of active beneficiaries in the Registered Apprenticeship program were female. Registered Apprenticeship Partners Information Management Data System (RAPIDS) managed by Department of Labor staff only.

<sup>423</sup>Forty percent of the students benefiting from Job Corps programs annually are girls and young women. See Department of Labor, Job Corps, Student Outcomes/Who Job Corps Serves (August 2015), [http://www.jobcorps.gov/libraries/pdf/who\\_job\\_corps\\_serves.sflb](http://www.jobcorps.gov/libraries/pdf/who_job_corps_serves.sflb).

Based on these data, the Department estimates the approximate number of female 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 estimate similar costs, the Department turned to data from the U.S. Census. The U.S. Census American Fact Finder does not report on pregnancy, but does report on births. Census data also show whether the mother was in the labor force. The definition of labor force used by the Census includes individuals in the civilian labor force who are employed or unemployed, and the term unemployed, as used by the 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 available to use to estimate the percentage of female 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 who are pregnant in a given year.

As the Department concludes these are the best data available, the Department used the ratio of women in the labor force who gave birth within the last year to the total female labor force as an approximate pregnancy rate of women in the workforce. Based on this approach, the Department estimates that the pregnancy rate for women in the workforce is approximately 4.7 percent.<sup>424</sup>

#### Training Program Beneficiaries

As calculated above, approximately 57,666 women annually participate in eligible training provider or on-the-job training programs that receive WIOA title I financial assistance. Of this number, using the pregnancy rate data above, 2,710 women might be pregnant annually ( $57,666 \times .047$ ). The Department estimates that no more than 21 percent, or 569 women ( $2,710 \times .21$ ), would be participating in job training categories likely to require

<sup>424</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, 2011 to 2013 American Community Survey 3-Year Estimates*, [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_11\\_3YR\\_B13012&prodType=table#](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_3YR_B13012&prodType=table#). The data table reports birth rates for women in the labor force at 4.7 percent.

accommodations that might involve more than a *de minimis* cost.

#### Registered Apprenticeship Beneficiaries

As calculated above, approximately 14,023 women benefit annually from Registered Apprenticeship programs. Of this number, using the pregnancy rate data above, 659 (14,023 × .047) women might be pregnant in a given year. Of this number, the Department estimates that no more than 21 percent, or 138 women (.21 × 659), would participate in job training categories likely to require accommodations that might involve more than a *de minimis* cost.

#### Job Corps Program Participants

Job Corps serves youth and young adults between the ages of 16 and 24.<sup>425</sup> Forty percent of Job Corps students (approximately 43,809) are female.<sup>426</sup> Applying the .047 rate of pregnancies used above to all female Job Corps students indicates that approximately 2,059 of them may become pregnant in a given year (43,809 × .047). 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 will participate in technical training and will be most likely to need accommodations that might involve more than *de minimis* costs.<sup>427</sup>

At any given time, no more than a third of students are in the Career Development Period; thus, approximately 679 (2,059 × .33) pregnant young women are in this part of their educational experience annually. Of this number, the Department estimates that no more than 21 percent participate in job training

that requires physical exertion or standing for long periods of time, so at most 143 (679 × .21) Job Corps students may be participating in jobs training categories likely to require accommodation that might involve more than *de minimis* cost.

#### Non-Federal Employees of Recipients

The Department determined that there are approximately 528,303 non-federal employees who work for recipients that operate or otherwise provide training programs, Job Corps Programs, and Registered Apprenticeship programs. Because these data do not indicate gender demographics, the Department used data from the BLS that indicate that 47 percent of the workforce is female.<sup>428</sup> Because approximately 248,302 of the employees of recipients are women, 11,670 (248,302 × .047) may be pregnant annually based on the data described above. The Department anticipates that no more than 21 percent,<sup>429</sup> or 2,451 women (.21 × 11,670) 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 3,301 women (569 + 138 + 143 + 2,451, difference due to rounding) 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 by the National Institutes of Health indicate that the incidence of medical conditions during pregnancy that require accommodations ranges from 0.5 percent (placenta previa) to 50 percent (back issues).<sup>430</sup> Thus, the Department estimates that of the approximately 3,301 (569 job training beneficiaries + 138 Registered Apprenticeship beneficiaries + 143 Job Corps beneficiaries + 2,451 non-federal employees of recipients, difference due to rounding) women beneficiaries and employees in positions that may require physical exertion or standing according

to our previous estimations, 50 percent (1,651) may require some type of an accommodation or light duty.<sup>431</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>432</sup> Reports by the W.K. Kellogg Foundation on women's child bearing experiences and the National Women's Law Center on accommodating pregnant workers show that the costs associated with accommodating pregnant workers are minimal and generally involve schedule adjustments or modified work duties.<sup>433</sup>

One study found that, when faced with a pregnancy-related need for accommodation, between 62 percent to 74 percent of pregnant women asked their employers to address their needs. The study further found that 87 percent to 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 sought to address their needs.<sup>434</sup> Based on this study, the Department concluded 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 associated with this final rule, the Department considered the types of light duty or accommodations needed for both participants in WIOA Title I programs and activities, and employees of recipients. Generally, providing light duty or accommodation for pregnancy involves adjusting work schedules or allowing more frequent breaks. The Department concludes that providing these accommodations will result in little to no additional cost.

<sup>431</sup> These are the same data used in the OFCCP Sex Discrimination NPRM, *supra* note 102.

<sup>432</sup> Stephen Bernard, Professor of Sociology, Indiana University, *Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities: Meeting of the U.S. Equal Employment Opportunity Commission* (February 15, 2012), <http://www.eeoc.gov/eeoc/meetings/2-15-12/transcript.cfm>.

<sup>433</sup> National Women's Law Center & A Better Balance, *It Shouldn't Be a Heavy Lift: Fair Treatment for Pregnant Workers* (2013), [http://www.nwlc.org/sites/default/files/pdfs/pregnant\\_workers.pdf](http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf).

<sup>434</sup> Eugene Declerq et al., W.K. Kellogg Foundation, *Listening to Mothers III: New Mothers Speak Out*, 36 (2013).

<sup>425</sup> U.S. Department of Labor, Job Corps, *Eligibility Information* (June 2013), [http://www.jobcorps.gov/AboutJobCorps/program\\_design.aspx](http://www.jobcorps.gov/AboutJobCorps/program_design.aspx).

<sup>426</sup> U.S. Department of Labor, Employment & Training Administration, *Workforce System Results for the Quarter Ending June 30, 2013*, available at [https://www.doleta.gov/performance/results/pdf/workforcesystemresultsjune20\\_2013.pdf](https://www.doleta.gov/performance/results/pdf/workforcesystemresultsjune20_2013.pdf). Annual data for the four quarters ending in June 2013. Includes the number of students active on the start date, students enrolled during the timeframe, graduates separated before the start date and in the placement service window during the time frame, and former enrollees separated before the start date and in the placement service window during the period.

<sup>427</sup> Therefore, we focused on estimating the cost of providing accommodations during the Job Corps Career Development Period. Although participants may need accommodations during the Career Preparation and Career Transition Periods as well, we expect most substantial accommodation requests in the Career Development Period.

<sup>428</sup> U.S. Department of Labor, Bureau of Labor Statistics, *Women in the Labor Force: A Databook* (Feb. 2013), <http://www.bls.gov/cps/wlf-databook-2012.pdf>.

<sup>429</sup> See OFCCP Sex Discrimination NPRM, *supra* note 102, at 5262.

<sup>430</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), <http://www.ncbi.nlm.nih.gov/pubmed/22632586>.

Additional accommodations may involve either modifications to work and training environments (e.g., providing a stool for sitting rather than standing) or to job duties (e.g., lifting restrictions). In making such accommodations, recipients have discretion regarding how they would make such modifications. For example, a recipient may provide an employee or participant with an existing stool, or a recipient may have others assist when heavy lifting is required. To determine the cost of such accommodations, the Department referred to the Job Accommodation Network (JAN), which reports that the average cost of accommodation is \$500.<sup>435</sup>

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 1,040 women ( $1,651 \times .63$ ) who may require accommodations would have made such a request, and 91 percent, or 946 of those requests ( $1,040 \times .91$ ) would have been addressed. Thus, this final rule requires recipients to accommodate the remaining 9 percent of pregnant women whose needs were not addressed. The Department calculates that the cost, accounting for pregnant women who made requests and the additional women who could make requests, will be \$47,000 ( $(1,040 - 946 = 94) = 94 \times \$500$ , difference due to rounding). This is a first-year cost and a recurring cost.

The Department concludes that this cost estimate may be an overestimate because recipients with 15 or more employees are covered by a similar requirement in Title VII of the Civil Rights Act; because 36 States have requirements that apply to employers with fewer than 15 employees;<sup>436</sup> and

<sup>435</sup> Beth Loy, Job Accommodation Network, *Workplace Accommodations: Low Cost, High Impact* (updated September 2015), <http://askjan.org/media/lowcosthighimpact.html>. Given that there are not accommodation cost data for pregnancy, the Department uses this as an approximation because it involves modification to work environments including lifting restrictions and other relevant factors.

<sup>436</sup> The following States have laws that cover employers with one employee: Alaska, Colorado, Hawaii, Maine, Michigan, Minnesota, Montana, New Jersey, North Dakota, Oklahoma, Oregon, South Dakota, Vermont, and Wisconsin. One State has laws that cover employers with two employees: Wyoming. One State has laws that cover employers with three employees: Connecticut. The following States have laws that cover employers with four employees: Delaware, Iowa, Kansas, New Mexico, New York, Ohio, Pennsylvania, and Rhode Island. The following States have laws that cover employers with five employees: California and Idaho. The following States have laws that cover employers with six employees: Indiana,

because only employees employed in the administration of or in connection with WIOA Title I programs or activities are covered by this rule.<sup>437</sup> Moreover, to the extent a pregnancy-related medical condition is a disability, recipients with 15 or more employees are also already covered by similar requirements in the ADA, as amended by the ADAAG.

CRC received one comment that addressed the economic analysis of this provision in the NPRM. A coalition of eighty-six women's, workers', and civil rights organizations agreed with the Department's estimation of the burdens on recipients of accommodating pregnant applicants, participants, and employees.

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

This final rule includes language regarding the limited circumstances when limited English proficient (LEP) individuals may elect to use their own interpreters and how that choice must be documented by the recipient. In § 38.9(f)(2)(ii), this final 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 agrees to provide assistance, and reliance on that adult for such assistance is appropriate under the circumstances." This final rule goes on to state that "[w]hen 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 are currently no data available regarding the number of LEP individuals who are beneficiaries of recipients and the Department was unable to determine how often an LEP individual will request that an accompanying adult provide language assistance, the accompanying adult agrees to provide it, and when reliance on that adult is appropriate. However, the Department concludes that all of these conditions will be met infrequently, creating a *de minimis* cost.

Massachusetts, Missouri, New Hampshire, and Virginia. The following States have laws that cover employers with eight or more employees: Kentucky, Tennessee, and Washington. One State has laws that cover employers with nine or more employees: Arkansas. One State has laws that cover employers with 12 or more employees: West Virginia. In addition, the District of Columbia and Puerto Rico's laws cover employers with one employee.

<sup>437</sup> See § 38.2(a)(3).

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 take 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. The requirement to take reasonable steps to provide services and information in appropriate languages was contained in the DOL LEP Guidance issued in 2003<sup>438</sup> and was also required by the 1999 and 2015 rules, which addressed a recipient's language access obligations.<sup>439</sup>

The Department was unable to assess what information each recipient will determine is vital, and thus needs to be translated, or what languages they would be translated into, because both factors are based on individual recipient assessments. Furthermore, as discussed in the preamble to § 38.9, the Department has not defined "significant number or portion of the population."

The Department received several public comments that addressed the economic analysis of this provision in the NPRM. The NPRM requested comment on the potential burden of the requirement to provide language services for LEP individuals in their preferred language based on a threshold (e.g., 5 percent of the population or 1,000 speakers). Several State government commenters indicated that depending on what threshold is selected, it could result in a significant cost burden. However, the commenters did not provide any specific cost

<sup>438</sup> DOL LEP Guidance, *supra* note 28.

<sup>439</sup> See 29 CFR 37.35 (1999 rule); 29 CFR 38.35 (2015 rule).

information as they indicated that the cost would significantly vary with the level of language assistance services provided and the frequency with which languages would be encountered.

As discussed in the preamble to § 38.9 above, CRC considered setting thresholds which would trigger a requirement to translate standardized vital documents into particular languages but has not adopted such thresholds in this final rule. Although thresholds may improve access for some national origin populations, the approach does not comprehensively effectuate WIOA's prohibition of national origin discrimination affecting LEP individuals. Setting thresholds would be both under-inclusive and over-inclusive, given the diverse range, type, and sizes of entities covered by Section 188 and the diverse national origin populations within the service areas of recipients' respective programs and activities. For instance, a threshold requiring all covered entities, regardless of type or size, to provide language assistance services in languages spoken by 5 percent of a county's LEP population could result in the provision of language assistance services in more languages than the entity would otherwise be required to provide under its obligation in § 38.9(g). This threshold would apply regardless of the number of individuals with limited English proficiency who are eligible to be served or likely to be encountered by the recipient's programs or activities and regardless of the recipient's operational capacity. Similarly, this threshold could leave behind significant numbers of individuals with limited English proficiency served by the recipient's programs or activities, who communicate in a language that constitutes less than 5 percent of the county's limited English proficient population.

Although some federal regulations set thresholds, those regulations address entities or programs of similar sizes and types.<sup>440</sup> In comparison, WIOA and this part regulate more diverse types of recipients with potentially more diverse limited English proficient populations. CRC is concerned that significant limited English proficient populations might receive no or inadequate language assistance services under a threshold-based regulation. CRC is also concerned about the burden an across-the-board

translation threshold might place on small covered entities.

Moreover, we value the flexibility inherent in the contextualized approach we have chosen to assess compliance with the requirement to take reasonable steps to provide meaningful access. This provision is intended to be a flexible standard specific to the facts of each situation. CRC could not determine what information each recipient will determine is vital, and thus needs to be translated, or what languages they would be translated into, because both factors are based on individual recipient assessments. Providing additional specificity, at least in this final rule, would apply rigid standards across-the-board to all recipients and thus jeopardize that very goal. Accordingly, this rule imposes no new obligations in this regard.

The NPRM proposed that recipients take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with other individuals. One commenter suggested that this requirement may impose additional costs and result in providers not listing their training programs.

Although proposed § 38.15 revised the title of § 38.9 in the 2015 rule to "Communications with individuals with disabilities" and revised paragraph (a) and (b) to be consistent with DOJ's ADA Title II regulations, no new substantive requirements were outlined from those contained in the 1999 and 2015 rules. As with WIA Section 188, a recipient must take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others. A recipient must furnish appropriate auxiliary aids and services where necessary to accomplish this. The type of auxiliary aid or service necessary to ensure effective communication varies 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 type of auxiliary aid and service is necessary, a recipient must give primary consideration to the request of an individual with a disability. Thus, the provision of auxiliary aids and services is always individually based and depends on a number of factors.

The Department recognizes changes to WIOA expanded the applicability of CRC's requirements to cover additional entities, and that there may be new entities not previously covered. However, the requirements of this final

rule with respect to auxiliary aids and services are generally not new to these entities. Other federal statutes such as the ADA and the Rehabilitation Act already contain the same requirements regarding the provision of auxiliary aids and services for individuals with disabilities. Consequently, CRC does not agree that it imposes any additional costs.

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

##### Equal Opportunity Officers

##### Designation of Equal Opportunity Officers § 38.28

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 State Program-wide coordination of compliance with the equal opportunity and nondiscrimination requirements.

Several commenters indicated this requirement would not only increase monitoring efforts, but also require increases in staffing. They also indicated that the requirement to designate an individual who reports directly to the Governor is an unfunded mandate.

The Department disagrees with the assertion that this requirement would result in an increase in staffing or that it is an unfunded mandate. Governors retain flexibility as to whom to designate as the State-level EO Officer, which includes the ability to restructure the current EO Officer position to meet the requirements of §§ 38.28 through 38.31. The requirement that recipients, including Governors, designate an EO Officer is longstanding and exists under the 2015 rule, just as it existed under the 1999 rule. In practice, most Governors have empowered a designee, typically, the director(s) of a State cabinet agency or agencies that oversee(s) labor and workforce programs, to appoint an EO Officer often times referred to as the State EO Officer. That EO Officer reported to the State agency cabinet director and, in practice, often limited oversight to the EO Officer's own specific agency. However, the Governor has obligations beyond the duties of a recipient to ensure nondiscrimination and equal opportunity across all State Programs including State Workforce Agencies. Indeed, under certain circumstances the Governor can be held jointly and severally liable for all violations of these nondiscrimination and equal opportunity provisions under § 38.52, which includes State Workforce Agencies as defined in § 38.4(III), and

<sup>440</sup> See 45 CFR 155.205(c)(2)(iii), (iv) (regarding HHS's regulation of health care exchanges); 26 CFR 1.501(r)-4(b)(5)(ii) (Department of the Treasury's regulation regarding hospital organizations and financial assistance policies); 7 CFR 272.4(b) (Department of Agriculture's Supplemental Nutrition Assistance Program).

State Programs as defined in § 38.4(kkk). The final rule's requirement serves to emphasize the importance of the Governor's obligations, and ensure that a State-level EO Officer can carry out those obligations—with authority flowing from the Office of the Governor and with the staff and resources sufficient to carry out those requirements.

The changes in the rule do not impede the flexibilities available for a Governor to determine how the equal opportunity program works in the State, and is described in the Governor's Nondiscrimination Plan. For example, the Governor can designate a new State-level EO Officer or restructure the current EO Officer position as the Governor's State-level EO Officer. As noted above, the rule does not change the definition of "Governor," and an individual designated to act on the Governor's behalf may also carry out the responsibilities of the Governor under this part. In that case, the Governor's authority to ensure equal opportunity would flow to the Governor's designee and, in turn, to the State-level EO Officer. The State-level EO Officer would then have the authority necessary to carry out the Governor's equal opportunity obligations.

#### Recipients' Obligations To Publish an Equal Opportunity Notice § 38.36

This final rule includes 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>441</sup> The changes include notice that communications with individuals with disabilities must be as effective as communications with others and of the right to request auxiliary aids and services at no cost; a statement that discrimination on the basis of sex includes discrimination on the basis of pregnancy, childbirth and related medical conditions, sex stereotyping, transgender status, and gender identity; and that discrimination on the basis of national origin may include discrimination on the basis of limited English proficiency.<sup>442</sup> Because this notice and other notices throughout this final rule 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. This final rule also requires the inclusion of language in the

poster stating that the CRC will accept complaints via U.S. mail and email at an address provided on the CRC Web site.<sup>443</sup>

This final rule requires that the notice be placed in employee and participant handbooks, including electronic and paper forms if both are available, provided to each employee and placed in each employee's file (both paper and electronic, if both are available).<sup>444</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 and posting it on appropriate Web pages on the recipient's Web site. Consequently, the estimated first-year dissemination burden is 17,230 hours (34,459 recipients × 1 EO Officer × .5 hours). The Department calculates the total estimated first-year and dissemination cost for the EO Officers as \$1,271,094 (17,230 hours × \$73.77/hour). The Department also estimates that each EO Officer will make 30 copies of the notice (assuming 10 copies each in three languages) for posting in the EO Officer's establishment for a first-year operational and maintenance cost of \$82,702 (34,459 × \$.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 recipients' Web sites to be an additional 17,230 hours (34,459 × 1 programmer × .5 hours) and the first-year costs for recipients to update their Web sites to be an additional \$1,034,404 (17,230 × \$60.04/hour, difference due to rounding). The Department also assumes that 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 employee files. The Department calculates an additional first-year burden for dissemination to be 17,230 hours (34,459 × .5 hours) and an additional first-year cost of \$1,271,094 (17,230 × \$73.77/hour, difference due to rounding).

Moreover, there is a recurring burden each time an employee is hired. The Department assumes an 18.9 percent<sup>445</sup>

employee hires rate per year for a total of 166,511 new employees in the second and future years (881,009 (total number of recipients' employees) × .189). The Department estimates that it will take an EO Officer 15 minutes to disseminate the notice to recipients' new employees each year, which equates to a burden of 41,628 hours (166,511 × .25 hours) and the total recurring cost to be \$3,070,879 (41,628 hours × \$73.77, difference due to rounding). 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 copies) and the second and future years' operation and maintenance cost is \$26,642 (166,511 new employees × \$0.08 × 2 copies) for copies made for new employees each year.

#### Data and Information Collection, Analysis, and Maintenance § 38.41

Paragraph (a)(2) adds "limited English proficiency" and "preferred language" to the list of categories of information that each recipient must collect about each applicant, registrant, participant, and terminee. The rule does not apply these data collection obligations to applicants for employment and employees of recipients because the obligation regarding limited English proficient (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 concludes that these terms best capture this information as to LEP individuals and are also used by several States with language access laws.<sup>446</sup>

The 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. Furthermore, the Department estimates that, on average, it will take beneficiaries 5 seconds to provide LEP information including preferred language, where applicable, voluntarily. This equates to an annual cost of \$567,472 (56,355,850 × 5 seconds = 281,779,250/60 = 4,696,320 minutes/60 = 78,272 hours × \$7.25/hour). This provision will go into effect in the third year.

<sup>443</sup> *Id.*

<sup>444</sup> § 38.36(b).

<sup>445</sup> U.S. Department of Labor, Bureau of Labor Statistics, *state and local government "hires" data for annual average* (2015), <http://www.bls.gov/jlt/#news>.

<sup>446</sup> See *supra* note 228 and accompanying text.

<sup>441</sup> §§ 38.35, 38.36(a)(1).

<sup>442</sup> § 38.35.

For recipients that are not already collecting this information,<sup>447</sup> the Department estimates that there will be a one-time cost in the third year to each recipient of 1.5 hours of a computer programmer's time to incorporate these new categories into an online form for data collection. The Department concludes that all recipients use computer-based data collection methods, and the one-time burden is \$3,103,212 (34,459 recipients × 1 programmer × 1.5 hours × \$60.04/hour, difference due to rounding).

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

This final rule includes 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 will be to identify additional files that a recipient must retain beyond 3 years if they receive notice of a complaint or are under a compliance review. The Department further assumes this cost to be *de minimis*.

#### Subpart C—Governor's Responsibilities To Implement the Nondiscrimination and Equal Opportunity Requirements of the Workforce Innovation and Opportunity Act (WIOA)

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

Section 38.51(b) of the final rule requires the Governor to monitor on an annual basis the compliance of State Programs with WIOA Section 188 and this part. Under the 2015 rule, Governors were required to "periodically" monitor compliance of recipients. The new 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 the Department's regulations requiring annual oversight of one-stop career

<sup>447</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.

centers;<sup>448</sup> and (3) establish a consistent state-level practice nationwide. It is anticipated that this change will represent a burden to 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>449</sup> Thus, the Department estimates that the burden will be imposed on 29 of the 57 States subject to this requirement that currently do not annually monitor their recipients for compliance with Section 188 of WIOA. Of the States that do not conduct annual monitoring, the Department is aware that the monitoring is conducted every 3 years on average. Thus, 29 States will need to increase their monitoring from once every 3 years to yearly.

Based on the Department's experience and interaction with several States with varying populations and geographic sizes, the average amount of time that it takes each State's EO Officer and similar managers to conduct this annual monitoring is approximately 4,000 hours in total carried out by multiple people. The additional burden on each of the 29 States that previously conducted monitoring every 3 years versus every year is estimated to be 2,680 hours (4,000 hours × .67)<sup>450</sup> per State annually or 77,720 for all 29 States (2,680 hours × 29 States) annually. The Department calculates the total estimated annual cost for States at \$5,733,739 (29 States × 2,680 hours × \$73.77/hour, difference due to rounding).

##### 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 § 38.54 to "Nondiscrimination Plan," but retains the definition and contents of the document. Since the contents of the Plan did not change, the change of the title of the document was presumed to be incurred in the total cost of the issuance of the Plan.

<sup>448</sup> ETA WIOA Final Rule, *supra* note 309.

<sup>449</sup> This is based on CRC's records of reporting and discussions with EO Officers for the States over the past few years.

<sup>450</sup> This is based on information from CRC's experience working with the States and asking several EO Officers these questions.

#### Subpart D—Compliance Procedures

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

The new language in § 38.66(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 made this change to expand the circumstances in which the Director may issue a Notice to Show Cause. This final rule 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 or initial determination, the Governor or other recipients may 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 § 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 because it is currently described and contained in the implementing regulations found at 29 CFR 38.67, so these changes are slight, and the language is 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. Based on this, the Department estimates the burden incurred to be *de minimis*.

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

This final rule adds a paragraph obligating recipients to give complainants a copy of the equal opportunity notice in § 38.35, along with other notices already required by the 1999 and 2015 rules, including written acknowledgement that the recipient has received a complaint and notice of the complainant's right to representation. This new 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 if they file initially with the recipient.

The Department anticipates that this requirement, which has 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 on complaint log data from 2003 to 2008, the Department estimates that, on average, each recipient will receive one Section 188 complaint each year. The Department assumes that EO Officers will handle the complaints for recipients and that it will take them approximately 30 additional minutes to process each

complaint. This burden is calculated at 17,230 hours (34,459 recipients × .5 hours) for a first-year total cost of \$1,271,094 (17,230 hours × \$73.77/hour, difference due to rounding). Additionally, the Department calculates that there are first-year and recurring operation and maintenance costs of \$2,757 (\$0.08 × 34,459) to copy the equal opportunity notice for complainants.

TABLE 3—ANNUAL BURDEN HOURS

Provision	Year 1	Year 2	Year 3	Year 4–10 (annual average)
Cost of regulatory familiarization .....	137,836	0	0	0
Discrimination prohibited based on pregnancy (§ 38.8) .....	0	0	0	0
Recipients' obligations to publish equal opportunity notice (§ 38.36) .....	51,689	41,628	41,628	41,628
Data and information collection, analysis, and maintenance (§ 38.41) .....	0	0	129,961	78,272
Governor's oversight and monitoring responsibilities for state programs (§ 38.51) .....	77,720	77,720	77,720	77,720
Required elements of a recipient's complaint processing procedures (§ 38.72) .....	17,230	17,230	17,230	17,230
Operation and maintenance costs .....	NA	NA	NA	NA
<b>Total .....</b>	<b>284,474</b>	<b>136,577</b>	<b>266,538</b>	<b>214,849</b>

TABLE 4—ANNUAL COSTS

Provision	Year 1	Year 2	Year 3	Year 4–10 (annual average)	10 Year total	Annualized with 3%	Annualized with 7%
Cost of regulatory familiarization .....	\$10,168,754	\$0	\$0	\$0	\$10,168,754	\$1,157,367	\$1,353,86
Discrimination prohibited based on pregnancy (§ 38.8) .....	47,000	47,000	47,000	47,000	47,000	47,000	47,000
Recipients' obligations to publish equal opportunity notice (§ 38.36) .....	3,576,593	3,071,053	3,071,053	3,071,053	31,216,066	3,128,591	3,138,321
Data and information collection, analysis, and maintenance (§ 38.41) .....	0	0	3,670,684	567,472	7,642,989	773,099	782,056
Governor's oversight and monitoring responsibilities for state programs (§ 38.51) .....	5,733,739	5,733,739	5,733,739	5,733,739	57,337,386	5,733,739	5,733,739
Required elements of a recipient's complaint processing procedures (§ 38.72) .....	1,271,094	1,271,094	1,271,094	1,271,094	1,271,094	1,271,094	1,271,094
Operation and maintenance costs .....	226,420	29,398	29,398	29,398	491,006	51,823	55,615
<b>Total (Undiscounted) .....</b>	<b>21,023,600</b>	<b>10,152,284</b>	<b>13,822,968</b>	<b>10,719,756</b>	<b>120,037,144</b>	<b>12,162,713</b>	<b>12,380,910</b>
<b>Total with 3% discounting .....</b>	<b>21,023,600</b>	<b>9,856,586</b>	<b>13,029,473</b>	<b>8,993,323</b>	<b>106,862,919</b>	.....	.....
<b>Total with 7% discounting .....</b>	<b>21,023,600</b>	<b>9,488,116</b>	<b>12,073,516</b>	<b>7,208,598</b>	<b>93,045,418</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>451</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

<sup>451</sup> See 44 U.S.C. 3506(c)(2)(A).

collection of information that does not display a valid Control Number.<sup>452</sup> The Department obtains approval for Nondiscrimination Compliance Information Reporting under Control Number 1225-0077.

The information collections in this final rule are summarized in the section-by-section discussion of this final rule in Section II. The Department has identified that the following proposed sections contain information collections: 29 CFR 38.14, 38.16(f), 38.25, 38.27, 38.29, 38.34-38.36, 38.38, 38.39-38.43, 38.51, 38.52-38.54, 38.55, 38.69, 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 final 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.

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 rule in accordance with Executive Order

13132 regarding federalism, and has determined that it does not have “federalism implications.” This rule will not “have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

### D. Unfunded Mandates Reform Act of 1995

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this rule does not include any federal mandate that may result in excess of \$100 million in increased expenditures by State, local, and tribal governments in the aggregate, or by the private sector of \$100 million or more.

### E. Plain Language

The Department drafted this final rule in plain language.

### F. Effects on Families

The undersigned hereby certifies that the final rule would not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act of 1999. To the contrary, by better ensuring that beneficiaries, including job seekers and applicants for unemployment insurance, do not suffer illegal discrimination in accessing programs, services, and activities financially assisted by the Department, the final rule 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 WIOA program and will likely continue to do so as articulated in this final rule. Having made these determinations and pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Department 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

This final 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; (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 Workforce Development 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 workforce development boards will be fully financed through federal transfer payments to States. The Department has highlighted costs that are new to implementation of this final rule. Therefore, the Department expects that

<sup>452</sup> See 44 U.S.C. 3512; 5 CFR 1320.5(a), 1320.6.

this final rule 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 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

#### *I. Executive Order 13175 (Indian Tribal Governments)*

This rule does not have tribal implications under Executive Order 13175 that require a tribal summary impact statement. The 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 rule 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 rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the federal court system. The final rule 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 rule 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,**

*Acting Assistant Secretary for Administration and Management, U.S. Department of Labor.*

■ For reasons set forth in the preamble, the Department revises 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.
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- 38.18 Employment practices covered.
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- 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 Officers.
- 38.29 Recipients' obligations regarding Equal Opportunity Officers.
- 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 and Maintenance**

- 38.41 Collection and maintenance of equal opportunity data and other information.
- 38.42 Information to be provided to the Civil Rights Center (CRC) by grant applicants and recipients.
- 38.43 Required maintenance of records by 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 the Workforce Innovation and Opportunity Act (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.
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#### **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.  
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 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.  
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#### Breaches of Conciliation Agreements

- 38.98 Notification of Breach of Conciliation Agreement.  
 38.99 Contents of Notification 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 alternate 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 (29 U.S.C. 3248). Section 188 prohibits discrimination on the basis of race, color, religion, sex, national origin, age, disability, or political affiliation or belief, or, for beneficiaries, applicants, and participants only, on the basis of 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) *Applicability.* 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 U.S. Department of Labor (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 adopted by this part. 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 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. “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;

(5) Cash, loans, or other financial assistance to individuals; and

(6) 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.

(c) *Applicant* means an individual who is interested in being considered for any 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 any 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, 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, 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:

- (i) The duration of the risk;
- (ii) The nature and severity of the potential harm;
- (iii) The likelihood that the potential harm will occur; and
- (iv) The imminence of the potential harm.

(q) *Disability*—(1) *General*.

“Disability” means, with respect to an individual:

(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment as described in paragraph (q)(7) of this section.

(2) *Rules of construction*. (i) The definition of “disability” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by Federal disability nondiscrimination law and this part.

(ii) An individual may establish coverage under any one or more of the three prongs of the general definition of disability in paragraph (q)(1) of this section, the “actual disability” prong in paragraph (q)(1)(i) of this section, the “record of” prong in paragraph (q)(1)(ii) of this section, or the “regarded as”

prong in paragraph (q)(1)(iii) of this section.

(iii) Where an individual is not challenging a recipient's failure to provide reasonable accommodations or reasonable modifications under § 38.14(a) or (b), 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. An individual may choose, however, to proceed under the "actual disability" or "record of" prong regardless of whether the individual is challenging a recipient's failure to provide reasonable accommodations, or reasonable modifications.

(3) *Physical or mental impairment.* (i) "Physical or mental impairment" means—

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(B) Any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) "Physical or mental impairment" includes, but is not limited to, contagious and noncontagious diseases and conditions such as the following: Orthopedic, visual, speech and hearing impairments, and cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, pregnancy-related medical conditions, dyslexia and other specific learning disabilities, Attention Deficit Hyperactivity Disorder, Human Immunodeficiency Virus infection (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(iii) "Physical or mental impairment" does not include homosexuality or bisexuality.

(4) *Major life activities.* (i) Major life activities include, but are not limited to:

(A) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting,

reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, writing, communicating, interacting with others, and working; and

(B) The operation of a "major bodily function," such as 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.

(ii) *Rules of construction.* (A) In determining whether an impairment substantially limits a major life activity, the term "major" shall not be interpreted strictly to create a demanding standard.

(B) 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" shall 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) The primary object of attention in disability cases brought under WIOA Section 188 should be whether recipients 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.

(C) An impairment that substantially limits one major life activity does not need to limit other major life activities in order to be considered a substantially limiting impairment.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E) An impairment is a disability within the meaning of this section 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 does not need to prevent, or significantly or severely restrict, the

individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(F) 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" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADA Amendments Act of 2008 (ADAAA).

(G) 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 (q)(5)(i)(G) is intended, however, to prohibit or limit the presentation of scientific, medical, or statistical evidence in making such a comparison where appropriate.

(H) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall 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.

(I) The six-month "transitory" part of the "transitory and minor" exception in paragraph (q)(7)(ii) of this section 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 paragraph (q)(5)(i) for establishing an actual disability or a record of a disability.

(ii) *Predictable assessments.* (A) The principles set forth in paragraph (q)(5)(i) of this section 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 recipients with rights and responsibilities with respect to avoiding discrimination on the basis of disability.

(B) Applying these principles, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of

coverage under paragraph (q)(1)(i) of this section (the “actual disability” prong) or paragraph (q)(1)(ii) (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 these principles, it should easily be concluded that the types of impairments set forth in paragraphs (q)(5)(ii)(C)(1) through (11) of this section will, at a minimum, substantially limit the major life activities indicated. The types of impairments described in paragraphs (q)(5)(ii)(C)(1) through (11) may substantially limit additional major life activities (including major bodily functions) not explicitly listed in paragraphs (q)(5)(ii)(C)(1) through (11).

(1) Deafness substantially limits hearing;

(2) Blindness substantially limits seeing;

(3) Intellectual disability substantially limits brain function;

(4) Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function;

(5) Autism substantially limits brain function;

(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 each substantially limits 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 each substantially limits brain function.

(iii) *Condition, manner, or duration.*

(A) At all times taking into account the principles in paragraph (q)(5)(i) of this section, 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 the individual must spend to read, write, speak, or learn compared to most people in the general population.

(D) Given the rules of construction set forth in paragraph (q)(5)(i) of this section, it may often be unnecessary to conduct an analysis involving most or all of the facts related to condition, manner, or duration. This is particularly true with respect to impairments such as those described in paragraph (q)(5)(ii)(C) of this section, which by their inherent nature should be easily found to impose a substantial limitation on a major life activity, and for which the individualized assessment should be particularly simple and straightforward.

(iv) *Mitigating measures* include, but are not limited to:

(A) 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;

(B) Use of assistive technology;

(C) Reasonable modifications of policies, practices, and procedures, or auxiliary aids or services;

(D) Learned behavioral or adaptive neurological modifications; or

(E) Psychotherapy, behavioral therapy, or physical therapy.

(6) *Has a record of such an impairment.* (i) 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 shall 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 (q)(5)(i) of this section 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.* The following principles apply under the “regarded as” prong of the definition of “disability” (paragraph (q)(1)(iii) of this section):

(i) Except as set forth in paragraph (q)(7)(ii) of this section, 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, even if the recipient asserts, or may or does ultimately establish, a defense to the action prohibited by WIOA Section 188 and this part.

(ii) An individual is not “regarded as having such an impairment” if the recipient demonstrates that the impairment is, objectively, both “transitory” and “minor.” A recipient may not defeat “regarded as” coverage of an individual simply by demonstrating that it subjectively believed the impairment was transitory and minor; rather, the recipient must demonstrate that the impairment is (in

the case of an actual impairment) or would be (in the case of a perceived impairment), objectively, both “transitory” and “minor.” For purposes of this section, “transitory” is defined as lasting or expected to last six months or less.

(iii) Establishing that an individual is “regarded as having such an impairment” does not, by itself, establish liability. Liability is established only when an individual proves that a recipient discriminated on the basis of disability within the meaning of federal nondiscrimination law and 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 executive of a State or an outlying area, 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 identity disorders 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 (ff)(2)(i) or (ii) of this section 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 the individual 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) *LWDA (Local Workforce Development Area) grant recipient* means the entity that receives WIOA Title I financial assistance for a local area directly from the Governor and disburses those funds for workforce development 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 (or up to 75 percent as provided in WIOA section 134(c)(3)(H)), 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 or by similar means—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, or political affiliation or belief, or for beneficiaries, applicants, and participants 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 development 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 recipient is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the "actual disability" prong (paragraph (q)(1)(i) of this section) or the "record of" a disability prong (paragraph (q)(1)(ii) of this section), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the "regarded as" prong (paragraph (q)(1)(iii) of this section).

(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 Development Boards;
- (4) LWDA 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 LWDA 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 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.

(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 (rrr)(1)(ii) of this section.

(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, or political affiliation or belief, or, for beneficiaries, applicants, and participants only, on the basis of 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, and political affiliation and belief, and, for beneficiaries, applicants, and participants only, citizenship and 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 (d) 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 any 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 Department 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 683.255 and 683.285. 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 another 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;

(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 any aid, benefit, service, or training on the basis of pregnancy (see also § 38.8);

(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 may provide separate or single-user restrooms or changing facilities; and

(9) Denying individuals access to the restrooms, locker rooms, showers, or similar facilities consistent with the gender with which they identify.

(c) A recipient's policies or practices that have the effect of discriminating on the basis of sex and that lack a

substantial legitimate justification constitute sex discrimination in violation of WIOA and this part. Such unlawful sex-based discriminatory practices include, but are not limited to, the following:

(1) Height or weight qualifications that lack a substantial legitimate justification and that negatively affect women substantially more than men.

(2) Strength, agility, or other physical requirements that lack a substantial legitimate justification and that negatively affect women substantially more than men.

(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, any 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 other 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 an applicant, 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-based assumption that she has (or will have) family caretaking responsibilities, and that those responsibilities will interfere with her ability to access any 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, any 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, any 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, failing to provide information about, or otherwise subjecting the individual to adverse treatment in accessing, any 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.

(10) Adverse treatment of an applicant, participant, or beneficiary of a WIOA Title I-financially assisted program or activity based on sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes.

#### **§ 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 any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity. In their covered employment practices, recipients must treat people of childbearing capacity and those affected by pregnancy, childbirth, or related medical conditions the same for all employment-related purposes, including receipt of benefits under fringe-benefit programs, as other persons not so affected but similar in their ability or inability to work. 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; and

(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 similarly situated applicants or participants.

#### **§ 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, including limited English proficiency. 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 any 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 accurate, 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 these language assistance services 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 take 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 in appropriate languages 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 meaningful 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 assistance 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 rule, and States must take reasonable steps to provide meaningful access to LEP individuals served or encountered in their 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 as to 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, 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, or political affiliation or belief, or, for beneficiaries, applicants, and participants only, based on 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 basi(e)s 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; harassment based on failure to comport with sex stereotypes; harassment based on pregnancy, childbirth, and 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, including meaningful opportunities to seek employment and work in competitive integrated settings;

(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 is as effective as those provided to others, and consistent with the requirements of the Rehabilitation Act as amended by WIOA, including those provisions that prioritize opportunities in competitive integrated employment;

(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 any aid, benefit, service, training, program, or activity being offered.

(j) Nothing in this part prohibits a recipient from providing any 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 any 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 the applicable ADA Standards for Accessible Design.

(b) *Programmatic accessibility.* All WIOA Title I-financially assisted programs and activities must be programmatically 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 any 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, after consultation with an individual with a disability (or individuals with disabilities), 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 any 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) *Communications with individuals with disabilities.* (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) *Auxiliary aids and services.* (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) *Interpreters.* (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 the individual's 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) *Electronic and information technology.* 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) Are consistent with modern accessibility standards, such as Section 508 Standards (36 CFR part 1194) and W3C's Web Content Accessibility Guidelines (WCAG) 2.0 AA; 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 Standards for Accessible Design under the Americans with Disabilities Act. 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. See 36 CFR part 1191, appendix B, section 103.

(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/registant, 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 the individual's 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 the individual's 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) *Employment practices covered.* 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) *Section 504 of the Rehabilitation Act.* 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 adopted by this part. Therefore, recipients must comply with the requirements set forth in those regulatory sections as well as the requirements listed in this part.

(e) *Employers, employment agencies, or other entities.* (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) *Immigration and Nationality Act.* 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) *State and local requirements.* 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, 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 Interpretation 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 any 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) *Grant applicant's obligation to provide a written assurance.* (1) Each application for financial assistance, under Title I of WIOA, as defined in § 38.4, must include the following assurance:

(i) 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:

(A) 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 (including limited English proficiency), age, disability, or political affiliation or belief, or against beneficiaries on the basis of either citizenship status or participation in any WIOA Title I-financially assisted program or activity;

(B) Title VI of the Civil Rights Act of 1964, as amended, which prohibits discrimination on the bases of race, color and national origin;

(C) Section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination against qualified individuals with disabilities;

(D) The Age Discrimination Act of 1975, as amended, which prohibits discrimination on the basis of age; and

(E) Title IX of the Education Amendments of 1972, as amended, which prohibits discrimination on the basis of sex in educational programs.

(ii) 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 in such grants, cooperative agreements, contracts, or other arrangements by reference.

(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 Officers.**

(a) *Governors.* Every Governor must designate an individual as a State-level Equal Opportunity Officer (State-level EO Officer), who reports directly to the Governor and is responsible for State Program-wide 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 for State Programs. The State-level EO Officer must have staff and resources sufficient to carry out these requirements.

(b) *All recipients.* Every recipient except small recipients and service providers, as defined in § 38.4(hhh) and (ggg), must designate a recipient-level Equal Opportunity Officer (recipient-level EO Officer), who reports directly to the individual in the highest-level position of authority for the entity that is the recipient, such as the Governor, the Administrator of the State Department of Employment Services, the Chair of the Local Workforce Development Board, the Chief Executive Officer, the Chief Operating Officer, or an equivalent official. The recipient-level EO Officer must have staff and resources sufficient to carry out the requirements of this section and § 38.31. The responsibilities of small recipients and service providers are described in §§ 38.32 and 38.33.

#### **§ 38.29 Recipients' obligations regarding Equal Opportunity Officers.**

All recipients have the following obligations related to their EO Officers:

(a) Ensuring that the EO Officer is a senior-level employee reporting directly to the individual in the highest-level position of authority for the entity that is the recipient, such as the Governor, the Administrator of the State Department of Employment Services, the Chair of the Local Workforce Development Board, the Chief Executive Officer, the Chief Operating Officer, or an 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 appear 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, the EO Officer 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 in § 38.31, 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 LWDA 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, or political affiliation or belief, or, against any beneficiary of, applicant to, or participant in programs financially assisted under Title I of the Workforce Innovation and Opportunity Act, on the basis of the individual's citizenship status or 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.

Recipients of federal financial assistance must take reasonable steps to ensure that communications with individuals with disabilities are as effective as communications with others. This means that, upon request and at no cost to the individual, recipients are required to provide appropriate auxiliary aids and services to qualified individuals with disabilities.

*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 January 3, 2017, 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 LWDA 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, videophone, or captioned telephone 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. Beginning on January 3, 2019, each recipient must also record the limited English proficiency and preferred language of each applicant, registrant, participant, and terminee. 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, and 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 LWDA grant recipient, as provided in the State's Nondiscrimination Plan.

**§ 38.42 Information to be provided to the Civil Rights Center (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, and related medical conditions, transgender status, and gender identity), national origin (including limited English proficiency), age, disability, or political affiliation or belief, or, for beneficiaries, applicants, and participants only, on the basis of 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 its hours of operation 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 the Workforce Innovation and Opportunity Act (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)(1) 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(kkk). 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 paragraph (c) of this section 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) Sections 38.25 through 38.27 (Assurances);

(ii) Sections 38.28 through 38.33 (Equal Opportunity Officers);

(iii) Sections 38.34 through 38.39 (Notice and Communication);

(iv) Sections 38.41 through 38.45 (Data and Information Collection and Maintenance);

(v) Section 38.40 (Affirmative Outreach);

(vi) Section 38.53 (Governor's Oversight Responsibility Regarding Recipients' Recordkeeping);

(vii) Sections 38.72 and 38.73

(Complaint Processing Procedures); and

(viii) Sections 38.51 and 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 January 3, 2017, 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, 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, the Governor 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 WIOA Title I-financial assistance to determine the ability to comply with the nondiscrimination and equal opportunity provisions of WIOA and this part and may conduct post-approval compliance reviews of recipients to determine 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 information referenced in paragraph (b) of this section, 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 paragraph (b) of this section. 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.

(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, the Director 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 §§ 38.92 and 38.93; 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 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 §§ 38.91 and 38.93; 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 § 38.63;

(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 and 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 the person's 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, and 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's EO Officer (or the person the recipient has designated for this purpose) 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) and (i), 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 received 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) The complainant may attempt ADR at any time after the complainant has filed a written complaint with the recipient, but before a Notice of Final Action has been issued.

(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; and

(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 LWDA 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 § 38.72. 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 in paragraphs (b)(1) through (4) of this section, 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, the Director 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, the Director 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 § 38.64, § 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 may 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 § 38.64, §§ 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 § 38.64, §§ 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, the Governor 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 the Director 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 Notification 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 Notification 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) *Judicial process.* 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) *Exceptions.* 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) *Transmittal of record and initial decision by Administrative Law Judge.* 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) *Specificity required when filing exceptions.* A party filing exceptions

must specifically identify the finding or conclusion to which exception is taken.

(iv) *Reply.* 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.* 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) *Review by Administrative Review Board on its own motion.* 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 without review by Administrative Review Board.* (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) *Final Decision and Order after review by Administrative Review Board.* 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's, Governor's, 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 paragraph (b) of this section 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, the

Director 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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