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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 §37.112(b) (1) and (2) must remain in effect.

(c) The Director must issue a written decision on the petition for restoration.

(1) If the Director determines that the grant applicant or recipient has not brought itself into compliance, he or she must issue a decision denying the petition.

(2) Within 30 days of its receipt of the Director's decision, the recipient or grant applicant may file a petition for review of the decision by the Secretary, 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 Division.

(4) The Director may file a response to the petition within 14 days.

(5) The Secretary must issue the final agency decision denying or granting the recipient's or grant applicant's request for restoration to eligibility.

PART 38—IMPLEMENTATION OF THE NONDISCRIMINATION AND EQUAL OPPORTUNITY PROVISIONS OF THE WORKFORCE INNOVATION AND OPPORTUNITY ACT

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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.*

SOURCE: 81 FR 87211, Dec. 2, 2016, unless otherwise noted.

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 WOIA 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/registrants, applicants for employment and employees, or invitees, as relevant, are allowed to go.

(2) *Use of service animals in food preparation areas.* An employee, applicant or beneficiary with a disability who needs to use a service animal in a food preparation area must be allowed to do so unless the employer recipient, after an individualized assessment, can demonstrate, that the presence of the service animal presents a direct threat to health or safety that cannot be eliminated or reduced by a reasonable accommodation to the employee, applicant or beneficiary.

(h) *Surcharges.* A recipient must not ask or require an individual with a disability to pay a surcharge because of 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*.

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 in accordance with 29 CFR part 18.

(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.

[81 FR 87211, Dec. 2, 2016, as amended at 86 FR 1785, Jan. 11, 2021]

§ 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.

(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, in accordance with 29 CFR part 26.

(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 in accordance with 29 CFR part 26.

(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) *Decision and Order after review by Administrative Review Board.* In any case reviewed by the Administrative Review Board under this paragraph, a decision must be issued within 180 days of the notification of such review. If the Administrative Review Board fails to issue a 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.

[81 FR 87211, Dec. 2, 2016, as amended at 85 FR 13033, Mar. 6, 2020; 85 FR 30619, May 20, 2020; 86 FR 1785, Jan. 11, 2021]

§ 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 decision issued by the Administrative Review Board has become final, 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.

[81 FR 87211, Dec. 2, 2016, as amended at 85 FR 13033, Mar. 6, 2020; 85 FR 30619, May 20, 2020]

§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 a decision denying or granting the recipient's or grant applicant's request for restoration to eligibility.

[81 FR 87211, Dec. 2, 2016, as amended at 85 FR 13033, Mar. 6, 2020; 85 FR 30619, May 20, 2020]

PART 42—COORDINATED ENFORCEMENT

Sec.

42.1 General statement.
42.2 Purpose.
42.3 National Committee.