



LEAD CENTER

POLICY BRIEF

Section 188 of the Workforce Innovation and Opportunity Act (Nondiscrimination and Equal Opportunity): *Summary Review of the DOL Final Rule, from a Disability Perspective*

December 2016

INTRODUCTION

*The purpose of this policy brief is to provide a summary of the U.S. Department of Labor's (DOL) recently published final rule revising the regulations implementing the nondiscrimination and equal opportunity provisions of Section 188 of the Workforce Innovation and Opportunity Act (WIOA) **from a disability perspective**. This policy brief is not intended to be comprehensive, but rather to highlight select provisions in order to assist people with disabilities and other interested stakeholders better understand the policies included in the lengthy rule. The final rule updates DOL regulations consistent with current law and addresses its application to current workforce development and workplace practices and issues. On several occasions, the section-by-section analysis accompanying the final rule makes reference to DOL's recent guidance Promising Practices in Achieving Universal Access and Equal Opportunity: A Section 188 Disability Reference Guide.*

On December 2, 2016, the Department of Labor (DOL) published in the *Federal Register* a **final rule**¹ revising the regulations implementing the nondiscrimination and equal opportunity provisions of Section 188 of the Workforce Innovation and Opportunity Act (WIOA). Signed by President Obama on July 22, 2014, WIOA supersedes the Workforce Investment Act of 1998 (WIA) as DOL's primary mechanism for providing financial assistance for a comprehensive system of job training and placement services for adults and eligible youth.

Section 188 of WIOA prohibits the exclusion of an individual from participation in, denial of the benefits of, discrimination in, or denial of employment in the administration of or in connection with, any programs and activities funded or otherwise financially assisted in whole or in part under Title I of WIOA because of race, color, religion, sex, national origin, age, **disability**, or political affiliation or belief, or for beneficiaries, applicants, and participants only, on the basis of citizenship status, or participation in a program or activity that receives financial assistance under Title I of WIOA.

WIOA contains the identical provisions of Section 188 as appeared in WIA, and these WIOA provisions took effect on July 1, 2015. To ensure no regulatory gap while this final rule was prepared, DOL issued an "interim" final rule implementing Section 188 of WIOA [29 CFR part 38], which applies until this final rule takes effect. The interim final rule issued separately in July 2015

¹ <https://www.gpo.gov/fdsys/pkg/FR-2016-12-02/pdf/2016-27737.pdf>

retained the provisions in 29 CFR part 37 (1999 WIA rule), but simply substituted all references to WIA with references to WIOA to reflect the proper statutory authority.

In sum, this final rule revises the 2015 interim rule and generally carries over the policies and procedures found in the 1999 and 2015 interim rules, which implemented the equal opportunity and nondiscrimination provisions of WIA and WIOA, respectively. Like the interim final rule issued separately in July 2015, this final rule is organized by the same subparts A through E.

The final rule is effective January 3, 2018. Also, § 38.55(a) [Schedule of the Governor's obligation regarding Nondiscrimination Plan] specifies that within 180 days of either January 3, 2017, or of the date on which the Governor is required to review and update their Methods of Administration, whichever is later, a Governor must develop and implement a Nondiscrimination Plan consistent with the requirements of the new rule. Further, § 38.36(d) [Recipient's obligations to publish equal opportunity notice] gives recipients up to 90 days of either January 3, 2017, or of the date this rule applies to the recipient, whichever comes later, to comply with the new equal opportunity notice requirements in §§ 38.34 and 38.35. **Note:** The following symbol (e.g., § 38.4) is used to reference a particular section in the regulations.

I. PURPOSE OF THE REGULATORY ACTION

A. PURPOSE OF REGULATORY ACTION AND MAJOR REVISIONS [81 FR 87130-87132]

The Civil Rights Center (CRC) of DOL enforces Section 188 of WIOA, which incorporates the prohibitions against discrimination in programs and activities that receive Federal financial assistance under certain civil rights laws, including laws applicable to **discrimination on the basis of disability** such as Section 504 of the Rehabilitation Act. CRC interprets the nondiscrimination provisions of WIOA consistent with the principles of:

- The Americans with Disabilities Act (ADA), as amended by the Americans with Disabilities Act Amendments Act (ADAAA);
- Section 501 of the Rehabilitation Act, as amended, which is enforced by the Equal Employment Opportunity Commission (EEOC); and
- Section 503 of the Rehabilitation Act, as amended, which is enforced by DOL's Office of Federal Contract Compliance Programs (OFCCP).

This final rule updates the Section 188 regulations to address current compliance issues in the workforce system, and to reflect existing law under Title VI and Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, **the ADA, and the Rehabilitation Act** as related to WIOA Title I-financially assisted programs and activities. This final rule also incorporates developments and interpretations of existing law by the Department of Justice (DOJ), the Equal Employment Opportunity Commission (EEOC), the Department of Education (ED), and

DOL's corresponding interpretation of Title VII and the Rehabilitation Act, as amended, into the workforce development system. The final rule is intended to reflect current law and legal principles applicable to a recipient's obligation to refrain from discrimination and to ensure equal opportunity. Three of the most significant updates to the disability policy framework involve:

- Changes to the **definition of disability** reflected in the passage of the ADAAA;
- Consistent application of **nondiscrimination and equal opportunity provisions** across Federal programs to reflect updates included in revised regulations implementing Title II (State and local governments) and Title III of the ADA; and
- Increased provision of services using **information and communication technology**, including the internet.

B. MODIFICATIONS TO THE DEFINITION OF DISABILITY AS A RESULT OF THE ADAAA [81 FR 87133-87134]

One of the most significant modifications to existing disability-rights law occurred when Congress passed the ADAAA, amending the ADA and the Rehabilitation Act, both of which apply, in distinct ways, to different groups of recipients of WIOA Title I-financial assistance. Consistent with Executive Order 13563's instruction to Federal agencies to coordinate rules across agencies and harmonize regulatory requirements where appropriate, this final rule adopts regulatory language that is consistent with the ADA, as amended by the ADAAA and corresponding revisions to EEOC regulations implementing Title I of the ADA and the final revised rule issued by DOJ implementing Title II and Title III of the ADA.

C. CONSISTENT APPLICATION OF DISCRIMINATION AND EQUAL OPPORTUNITY OBLIGATIONS ACROSS PROGRAMS [81 FR 87133]

This final rule promotes consistent application of nondiscrimination obligations across Federal enforcement programs and accordingly enhances compliance among entities subject to WIOA Section 188 and the various titles of the ADA. CRC has reviewed DOJ final rule implementing ADA Titles II and III.

Title I of the ADA prohibits private employers, State and local governments, employment agencies, and labor unions with 15 or more employees from discriminating in employment against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. Title I applies to WIOA Title I-financially assisted programs and activities because WIOA Section 188 prohibits discrimination in employment in the administration of or in connection with WIOA Title I-financially assisted programs and activities. EEOC issued final regulations implementing the amendments to Title I of the ADA in March 2011.

Title II of the ADA applies to State and local government entities, many of which may also be recipients of WIOA Title I-financial assistance, and, in subtitle A, protects qualified individuals

with disabilities from discrimination on the basis of disability in services, programs, and activities provided by State and local government entities. Title II extends the prohibition against discrimination established by Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, to all activities of State and local governments regardless of whether these entities receive financial assistance and requires compliance with the ADA Standards of Accessible Design. DOL is responsible for implementing the compliance procedures of Title II for components of State and local governments that exercise responsibilities, regulate, or administer services, programs, or activities in “relating to labor and the work force.” DOJ “refreshed” the ADA Title II regulations on September 15, 2010.

Title III, enforced by DOJ, prohibits discrimination on the basis of disability in the full enjoyment of the goods, services, facilities, privileges or advantages, or accommodations of any place of public accommodation by a person who owns, leases, or operates that place of public accommodation. Title III applies to businesses that are generally open to the public and that fall into one of 12 categories listed in the ADA, such as restaurants, day care facilities, and doctor’s offices, and requires newly constructed or altered places of public accommodation – as well as commercial facilities (privately owned, nonresidential facilities such as factories, warehouses, or office buildings) – to comply with the ADA Standards for Accessible Design. Many recipients of WIOA Title I-financial assistance are places of public accommodation and thus are subject to Title III of the ADA and its accessible design standards. DOJ “refreshed” the Title III ADA regulations on September 15, 2010.

D. INCREASED PROVISION OF SERVICES USING INFORMATION AND COMMUNICATION TECHNOLOGY, INCLUDING THE INTERNET [81 FR 87136]

The increased turn toward the integration of, and in some instances complete shift to, online service delivery models in the public workforce development system since 1999 requires that the Section 188 regulations be updated to address the nondiscrimination and equal opportunity implications raised by these changes to information and communication technology.

II. SECTION-BY-SECTION ANALYSIS

A. SUBPART A – GENERAL PROVISIONS (DEFINITIONS) [81 FR 87137-87145]

The final rule retains the majority of the *definitions* contained in § 38.4.

Revisions in § 38.4 include updating existing definitions consistent with applicable law, such as the definition of “*disability*” and its component definitions, as reflected in regulations implementing the ADAAA, as promulgated by EEOC and DOJ. This final rule incorporates the rules of construction set out in the ADAAA that specify that the definition of “disability” is to be interpreted broadly, that the primary inquiry should be whether covered entities have complied with their statutory obligations, and that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis. This final rule also revises the definition of

“disability” and its component parts, including “qualified individual,” “reasonable accommodation,” “major life activity,” “regarded as having a disability,” and “physical or mental impairment” based on specific provisions in the ADAAA, as well as EEOC’s final and DOJ’s final implementing regulations. For example, the final rule expands the definition of “major life activities” by providing a non-exhaustive list of major life activities, which specifically includes the operation of major bodily functions. The final rule also adds rules of construction that should be applied when determining whether an impairment substantially limits a major life activity.

This final rule also revises the definition of “**auxiliary aids or services**” to include new technology alternatives that have become available since the Section 188 regulations were drafted in 1999, such as “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.” This provision mirrors the language in DOJ regulations implementing Title II of the ADA, which prohibits discrimination on the basis of disability by public entities, some of which are also recipients of WIOA Title I-financial assistance.

This final rule adds a definition for “**direct threat**.” This term is used in the context of determining whether the employment of or program participation by an individual with a disability poses a health or safety risk such that the employer or recipient can lawfully exclude the individual from employment or participation.

The final rule revises the definition of “**individual with a disability**” to be consistent with the ADAAA and implementing regulations issued by EEOC and proposed by DOJ.

This final rule adds a definition for “**other power-driven mobility device**.” The term is used in the final rule in § 38.17. This definition mirrors the definition in DOJ ADA Title II regulations. This definition is updated because, as the technology available for mobility devices advances, devices with new capabilities, such as the Segway[®], are increasingly used by individuals with mobility impairments.

The final rule adds a definition for “**programmatic accessibility**.” WIOA states in no fewer than ten places in Title I that recipients will comply with Section 188, if applicable, and applicable provisions of the ADA, regarding the physical and programmatic accessibility of facilities, programs, services, technology, and materials, for individuals with disabilities. However, WIOA does not define programmatic accessibility for this purpose. The final rule defines the term to mean “policies, practices, and procedures providing effective and meaningful opportunity for persons with disabilities to participate in or benefit from aid, benefits, services, and training.” It is important to note that the term “programmatic accessibility” in this context has a different meaning than the similar term “program accessibility” that is used in this rule and Title II and Title III of the ADA to mean access to existing facilities.

This final rule revises the title of the definition of “**qualified individual with a disability**” to match the definition of “qualified” in EEOC regulations implementing Title I of the ADA, as amended by the ADAAA.

This final rule revises the existing definition of “**qualified interpreter**” to reflect the existence of new technologies used by interpreters. The revised language states that interpreting services may be provided “either in-person, through a telephone, a video remote interpreting (VRI) service or via internet, video, or other technological methods.” The final rule also adds two new definitions to further explain the different meanings of “qualified interpreter” when working with individuals with disabilities and with individuals who are limited English proficient. The first new definition specifies that “qualified interpreter for an individual with a disability” includes “sign language 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.” The final rule also describes the essential functions required to be performed by a qualified interpreter for a deaf or hard of hearing individual.

The final rule revises the definition of “**reasonable accommodation**” to add a new paragraph which reads as follows: “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 or the ‘record of’ a disability prong, but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the ‘regarded as’ prong.” This change to the definition of reasonable accommodation makes it consistent with the ADAAA and regulations issued by EEOC and DOJ interpreting the ADA.

Because of the importance of the term, below is the actual reasonable accommodation language, in its entirety:

(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;

(iii) Modifications or adjustments that enable a qualified individual with a disability to enjoy the same benefits and privileges of the aid, benefits, services, training, or employment as are enjoyed by other similarly situated individuals without disabilities.

(2) Reasonable accommodation includes, but is not limited to:

(i) Making existing facilities used by applicants, registrants, eligible applicants/registrants, participants, applicants for employment, and employees readily accessible to and usable by individuals with disabilities; and

(ii) Restructuring of a job or a service, or of the way in which aid, benefits, services, or training is/are provided; part-time or modified work or training schedules; acquisition or modification of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation, it may be necessary for the recipient to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(4) A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who has an “actual disability” or “record of” a disability, but is not required to provide a reasonable accommodation to an individual who is only “regarded as” having a disability.

This final rule adds a definition for “**service animal**.” This provision is drawn from DOJ ADA Title II regulations at 28 CFR 35.104 and is intended to provide uniformity.

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

The final rule adds a definition for “**wheelchair**” to read as follows: “a manually operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor or of both indoor and/or outdoor locomotion.” This definition mirrors the definition in DOJ ADA Title II regulations at 28 CFR 35.104. CRC has a separate definition for “wheelchair” to distinguish it from other “power-driven mobility devices.”

B. SUBPART A – GENERAL PROVISIONS (DISCRIMINATION PROHIBITED) [81 FR 87167-87173]

1. Discrimination prohibited based on disability (§ 38.12).

The final rule retains much of the language from the current part 38 section and adds paragraph § 38.12(p) to address claims of no disability. The paragraph states that “nothing in this part provides the basis for a claim that an individual without a disability was subject to discrimination because of a lack of disability, including a claim that an individual with a disability was granted auxiliary aids or services, reasonable modifications, or reasonable accommodations that were denied to an individual without a disability.” This new subsection incorporates the ADAAA’s prohibition on claims of discrimination because of an individual’s lack of disability. The ADAAA expressly prohibits claims that “an individual without a disability was subject to discrimination because of the lack of disability.”

2. Accessibility requirements (§ 38.13).

The final rule adds a new § 38.13 titled “Physical and programmatic accessibility requirements” to address the new emphasis Congress has placed on ensuring programmatic and physical

accessibility to WIOA Title I-financially assisted services, programs, or activities. In no less than ten provisions of Title I of WIOA, Congress referred to recipients' obligation to make WIOA Title I-financially assisted programs and activities physically and programmatically accessible.

Paragraph (a) addresses physical accessibility requirements and proposed paragraph (b) addresses programmatic accessibility requirements.

Paragraph (a) states the **physical accessibility** requirements for existing facilities, as well as those for new construction or alterations under Title II of the ADA. Recipients that receive Federal financial assistance are also responsible for meeting their accessibility obligations under Section 504.

Paragraph (b) describes the obligations of recipients to ensure **programmatic accessibility** to WIOA Title I-financially assisted programs and activities for individuals with disabilities. Congress included this description of how to achieve programmatic accessibility in 2005 in the context of considering amendments to WIA in an effort to improve accessibility to the workforce development system for individuals with disabilities. Therefore, DOL includes it here:

“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.”

3. Reasonable accommodations and reasonable modifications for individuals with disabilities (§ 38.14).

The title of § 38.14 is revised to “Reasonable accommodations and reasonable modifications for individuals with disabilities.” § 38.14(a) specifies that “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 an undue hardship.”

The section retains the existing text from § 38.8, including policies and processes governing undue hardship determinations.

4. Communications with individuals with disabilities (§ 38.15).

The title of § 38.15 revises the § 38.9 title to read as follows, “Communications with individuals with disabilities” and revises the text for paragraph (a) and (b) of § 38.15 to be consistent with DOJ’s ADA Title II revised regulations, which have been updated since the current WIA regulations

were promulgated in 1999. These changes provide that the communication requirements apply to “beneficiaries, registrants, applicants, eligible applicants/registrants, participants, applicants for employment, employees, members of the public, and their companions.”

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.

The final rule adds a new subparagraph (a)(1) addressing the obligation that recipients currently have, under § 38.9 and this section, as well as the ADA, to take appropriate steps to ensure that communications with individuals with disabilities are as **effective** as communications with others.

This responsibility to ensure effective communication includes the provision of **auxiliary aids and services** to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity. 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 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. A recipient must give primary consideration to the requests of individuals with disabilities.

With respect to **information and communication technology**, the final rule specifies that “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.”

The final rule also states that “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. 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. 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.”

The section also provides detailed descriptions of circumstances under which recipients must not require an individual with a disability to bring another individual to interpret for him or her or rely on an adult accompanying an individual with a disability to interpret or facilitate communication except in specified circumstances or rely on a minor child to interpret or facilitate communication except in specified circumstances. Also, the final rule specifies requirements for telecommunications in paragraph (b) and communications of information and signage in paragraph (c). It also explains the limitations of fundamental alterations in paragraph (d), i.e., that a recipient is not required to take action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity. CRC has drawn these provisions from the ADA Title II regulations to ensure that recipients' responsibilities under this part are consistent with those under the ADA.

5. Service animals (§ 38.16).

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

6. Mobility aids and devices (§ 38.17).

The final rule adds a new § 38.17 entitled "Mobility aids and devices" to provide direction to recipients regarding the use of wheelchairs and manually-powered mobility aids by program participants and employees. This language is taken from DOJ ADA Title II regulations at 28 CFR 35.137. This new section is being added in direct response to the inclusion of disability accessibility obligations throughout Title I of WIOA. EEOC has not addressed whether or not this definition would apply to employers and employment agencies covered under Title I of the ADA or Section 501 of the Rehabilitation Act.

7. Employment practices (§ 38.18).

The final rule retains (with only technical changes) existing policies prohibiting unlawful employment practices.

C. SUBPART B – RECORDKEEPING AND OTHER AFFIRMATIVE OBLIGATIONS OF RECIPIENTS [81 FR 87173-87187]

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

1. Designation of Equal Opportunity Officers (§ 38.28; § 38.29-.33).

The final rule includes several changes to the 1999 rule and the 2015 rule. First, every Governor must designate a State-level EO Officer, who reports directly to the Governor or his or her designee, and who is responsible for Statewide coordination of compliance with the nondiscrimination and equal opportunity requirements in WIOA and that the State-level EO Officer have staff and resources sufficient to carry out these requirements. Second, each recipient, with the exception of small recipients and service providers, must designate a recipient-level EO officer, who must have staff and resources sufficient to carry out the requirements of part 38. An individual could serve as both the State-level EO Officer and as a recipient-level EO officer provided there is no conflict of interest and the individual has sufficient staff and resources to properly perform both functions.

§ 38.29 specifies the recipients' responsibilities regarding EO Officers; § 38.30 specifies the requisite skills and authority of the EO Officer; § 38.31 specifies the EO Officer responsibilities; § 38.32 specifies the small recipient EO Officer obligations; and § 38.33 specifies the service provider EO Officer responsibilities.

2. Notice and Communication (§ 38.34).

§ 38.34 of the final rule (Recipients' obligations to disseminate equal opportunity notice) retains the language from current § 38.29 and makes clear in minor revisions to subparagraphs (a) (6) and (b) that recipients have an existing obligation to take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others. 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.

3. Publications, broadcasts, and other communications (§ 38.38).

§ 38.38 of the final rule generally contains the same requirements as current § 38.34. This rule revises the title to "Publications, broadcasts, and other communications." § 38.38(a) also provides that, "where materials indicate that the recipient may be reached by voice telephone, the materials must also prominently provide the telephone number of the text telephone (TTY) or equally effective telecommunication system, such as a relay service, videophone, or captioned telephone used by the recipient, as required by § 38.15(b)." This section is updated to reflect current technology used by individuals with hearing impairments.

4. Communication of notice in orientations (§ 38.39).

§ 38.39 of the final rule generally contains the same requirements as current § 38.36. This rule includes a revised title, "Communication of notice in orientations." The final rule adds language stating that orientations provided not just in-person, but also remotely over the internet or using other technology, are subject to these notice requirements. § 38.39 also is revised to be consistent with current law to ensure equal opportunity for individuals with disabilities. The language included in the final rule states that the information contained in the notice must be communicated

in accessible formats as required in § 38.15 of this part. These requirements are consistent with the recipient’s obligation to provide accessible communications to individuals with disabilities under the ADA.

5. Affirmative outreach (§ 38.40).

§ 38.40 generally contains the same requirements as the 1999 (29 CFR § 37.42) and 2015 rules (29 CFR § 38.42). However, the rule changed the title of this section from requiring “universal access” to requiring “affirmative outreach” to more descriptively explain the requirements in the section.

6. Data and information collection and maintenance (§ 38.41-45).

The final rule limits changes and additions to the sections covering data and information collection and maintenance to provide additional direction to recipients regarding the already existing obligations related to data and information collection, and maintenance.

The final rule adds new language in § 38.41(b)(3) specifically explaining a recipient’s responsibilities to keep the medical or **disability-related information** it collects about a particular individual on a separate form, and in separate files. The paragraph also lists the range of persons who may have access to such files. Similarly, new language in paragraph (b)(3) of this section contains information about the persons who may be informed that a particular individual is an individual with a disability, and the circumstances under which this information may be shared. These requirements have been separated to emphasize that the range of persons who may be permitted to have access to files containing medical and disability-related information about a particular individual is narrower than the range of persons who may be permitted to know generally that an individual has a disability. The final rule does not limit when individuals with disabilities may voluntarily self-identify, but governs how the recipient should treat such information once it is received.

These changes make the regulations consistent with DOL’s regulations implementing § 504 of the Rehabilitation Act and with EEOC’s regulations implementing Title I of the ADA. The change is also intended to provide recipients with information necessary to enable them to develop protocols that are consistent with these requirements.

D. SUBPART C– GOVERNOR’S RESPONSIBILITIES TO IMPLEMENT THE NONDISCRIMINATION AND EQUAL OPPORTUNITY REQUIREMENTS OF WIOA [81 FR 87187-87191]

1. Governor’s oversight and monitoring responsibilities for State Programs (§ 38.51).

§ 38.51(b) of the final rule requires the Governor to monitor on an **annual** basis the compliance of State Programs with WIOA Section 188 and this part. Under current § 38.54(d)(2)(ii), the requirement to “periodically” monitor was ambiguous and led to infrequent monitoring. Moving the monitoring obligations from the Methods of Administration section at § 38.54(d)(2) to this section does not change the Governor’s oversight responsibilities but underscores the importance of the Governor’s monitoring responsibilities and highlights that monitoring is more than just a paper responsibility.

2. Governor’s obligation to develop and implement Nondiscrimination Plan (§ 38.54).

§ 38.54 of the final rule generally retains the language of current § 38.54. The final rule adds a new title for § 38.54, “Governor’s obligations to develop and implement a Nondiscrimination Plan.” § 38.54(a) specifies that “each Governor must establish and implement [rather than “establish and adhere to”] a Nondiscrimination Plan for State programs.” CRC encourages as a best practice, but does not require, that the Nondiscrimination Plan be publically available on the Governor’s or State Workforce Agency’s Website. However, if the Plan is available on the Governor’s Website, it must be in an accessible format for individuals with disabilities.

E. SUBPART D – COMPLIANCE PROCEDURES [81 FR 87191-87197]

1. Evaluation of compliance (§ 38.60).

§ 38.60 of the final rule retains the same language of current § 38.60, with the exception of the title and a minor technical edit.

2. Compliance Reviews—Authority and procedures for pre-approval compliance reviews (§ 38.62).

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

3. Compliance reviews—Authority and procedures for conducting post-approval compliance reviews (§ 38.63); procedures for concluding post-approval compliance reviews (§ 38.64); authority to monitor the activities of the Governor (§ 38.65); and notice to show cause issue to a recipient (§ 38.66).

§§ 38.63 and 38.64 of the final rule retain the exact same language of current §§ 38.60 and 38.61, with the exception of the titles, and add provisions regarding “show cause.”

4. Complaint filing (§ 38.69).

The final rule combines existing §§ 38.70, 38.71 and 38.72 into § 38.69 titled “Complaint filing,” with revisions to the text. DOL merges these sections to improve readability. DOL also makes several changes to improve the processing of complaints.

5. Notice at conclusion of complaint investigation (§ 38.86).

The final rule retains most of existing language relating to notice at conclusion of complaint investigation and includes technical and conforming changes.

6. Enforcement Procedures—Post-violation procedures (§ 38.91).

The final rule retains all of the existing language in the § 38.95, and includes technical and conforming changes. The changes include bringing the regulations in line with current practice and with other nondiscrimination enforcement agencies in DOL. For example, OFCCP has incorporated similar language into their conciliation agreements pursuant to their regulations at 41 CFR 60-1.34(d).

7. When voluntary compliance cannot be secured (§ 38.94).

The final rule retains the language in current § 38.98 in § 38.94 and makes technical and conforming changes.

8. Enforcement when voluntary compliance cannot be secured (§ 38.95).

The final rule retains the language of current § 38.99 in § 38.95 titled “Enforcement when voluntary compliance cannot be secured” and makes technical and conforming changes.

9. Notice of breach of conciliation agreement (§ 38.98).

The final rule merges and retains the language in current § § 38.102 and 38.103 in new § 38.98 titled “Notice of breach of conciliation agreement” and includes technical and conforming changes.

10. Contents of notice of breach of conciliation agreement (§ 38.99).

The final rule retains the language in current § 38.104 in § 38.99 titled “Contents of notice of breach of conciliation agreement” and includes technical and conforming changes.

11. Notification of an enforcement action based on breach of conciliation agreement (§ 38.100).

The final rule retains the language in current § 38.105 in § 38.100 titled “Notification of an enforcement action based on breach of conciliation agreement” and includes technical and conforming changes.

F. SUBPART E - FEDERAL PROCEDURES FOR EFFECTING COMPLIANCE [81 FR 87197-87198]

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

ADDITIONAL RESOURCES

TRAINING AND EMPLOYMENT NOTICE NO. 20-16²: Announcing the publication and effective date of the Section 188 WIOA Nondiscrimination and Equal Opportunity Regulations (29 CFR Part 38) Final Rule in the Federal Register

FACT SHEET³: Ensuring Equal Access to the Nation’s Workforce Development System Final Rule to promote nondiscrimination and equal opportunity in WIOA Title I—financially assisted programs and activities

QUESTIONS AND ANSWERS⁴: Final Rule: WIOA Section 188 Nondiscrimination and Equal Opportunity Regulations (29 CFR Part 38)

² https://wdr.doleta.gov/directives/attach/TEN/TEN_20-16_acc.pdf

³ <https://www.dol.gov/crc/188rule/fact-sheet.htm>

⁴ <https://www.dol.gov/crc/188rule/questions-and-answers.htm>