



LEAD CENTER

POLICY BRIEF

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

INTRODUCTION

*The purpose of this policy brief is to provide a summary of the Department of Labor's recently published Notice of Proposed Rulemaking (NPRM) implementing the nondiscrimination and equal opportunity provisions of Section 188 of the Workforce Innovation and Opportunity Act (WIOA) **from a disability perspective**. The following symbol is used to reference a particular section in the proposed and current regulations (e.g., §38.4) 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 to access and assess proposed policies included in the lengthy NPRM.*

On January 26, 2016, The U.S. Department of Labor (DOL) published in the *Federal Register* a **Notice of Proposed Rulemaking**¹ (NPRM) 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 the Department's primary mechanism for providing financial assistance for a comprehensive system of job training and placement services for adults and eligible youth.

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

Most of the provisions of WIOA, including Section 188, took effect on July 1, 2015. WIOA contains the identical provisions of Section 188 as appeared in WIA. To ensure no regulatory gap while this proposed rulemaking progresses toward a final rule, the Department issued an "interim" final rule implementing Section 188 of WIOA [29 CFR part 38], which applies until issuance of the final rule based on this NPRM. The final rule issued separately in July 2015 retains the provisions in 29 CFR part 37 (WIA), but substitutes all references to WIA with references to WIOA to reflect the proper statutory authority.

¹ <https://www.gpo.gov/fdsys/pkg/FR-2016-01-26/pdf/2016-01213.pdf>

In sum, this NPRM proposed revisions to the interim final rule [29 CFR part 38] issued in July 2015 and generally implements the equal opportunity and nondiscrimination provisions of Section 188 of WIOA. Like the interim final rule issued separately in July 2015, this rule is organized by the same subparts A through E, and refers to “changes” or “revisions” made to the “interim” final rule. Certain sections in each subpart include significant revisions.

To be assured of consideration, comments must be received on or before March 28, 2016. Comments may be submitted, identified by Regulatory Information Number (RIN) 1291-AA36, by any one of the following methods:

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

CRC requests that comments be submitted by only one method. Receipt of comments will not be acknowledged; however, the Department will post all comments received on www.regulations.gov without making any change to the comments, including any personal information provided.

In preparing comments regarding the proposed rule, it may be helpful to review [*Promising Practices in Achieving Universal Access and Equal Opportunity: A Section 188 Disability Reference Guide*](#)², which provides updated information and technical assistance to help American Job Centers/One-Stops meet the nondiscrimination and accessibility requirements for individuals with disabilities in Section 188.

I. PURPOSE OF THE REGULATORY ACTION

A. OVERVIEW [81 FR 4494³]

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

² <http://www.dol.gov/oasam/programs/crc/Section188Guide.pdf>

³ <https://www.gpo.gov/fdsys/pkg/FR-2016-01-26/pdf/2016-01213.pdf>

Section 188 of WIOA incorporates the prohibitions against discrimination in programs and activities that receive Federal financial assistance under certain civil rights laws including the following laws applicable to ***discrimination on the basis of disability***:

- 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);
- Section 503 of the Rehabilitation Act, as amended,¹⁰ which is enforced by the DOL's Office of Federal Contract Compliance Programs (OFCCP); and
- Section 504 of the Rehabilitation Act, which are enforced by each Federal funding agency, including DOL.

This NPRM proposes to update the regulations to address current compliance issues in the workforce system, and to reflect existing law under Title VI and Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, ***the ADA and the Rehabilitation Act*** as related to WIOA Title I-financially assisted programs and activities. This NPRM also incorporates developments and interpretations of existing law by the Department of Justice (DOJ), the EEOC, the Department of Education, and this Department's corresponding interpretation of Title VII and the ***Rehabilitation Act***, as amended, into the workforce development system. The proposed rule is intended to reflect current law and legal principles applicable to a recipient's obligation to refrain from discrimination and to ensure equal opportunity. Three of the most significant updates to the disability policy framework involve:

- Changes to the ***definition of disability*** reflected in the passage of the Americans with Disabilities Education Act;
- Consistent application of ***nondiscrimination and equal opportunity provisions*** across federal programs to reflect updates included in revised regulations implementing Titles II (state and local governments) and Title III of the Americans with Disabilities Act; and
- Increased provision of services using ***technology***, including the internet.

B. MODIFICATIONS TO THE DEFINITION OF DISABILITY AS A RESULT OF THE ADAAA [81 FR 4497-4498]

One of the most significant modifications to existing disability-rights law occurred when Congress passed the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), amending the Americans with Disabilities Act (ADA) and the Rehabilitation Act, both of which apply, in distinct ways, to different groups of recipients of WIOA Title I-financial assistance. Consistent with Executive Order 13563's instruction to Federal agencies to coordinate rules across agencies and harmonize regulatory requirements where appropriate, this rule proposes, where appropriate, to adopt regulatory language that is consistent with the ADAAA and corresponding revisions to the

EEOC regulations implementing Title I of the ADA and the NPRM issued by the DOJ implementing Title II and Title III of the ADA.

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

The DOJ issued an NPRM in January 2014 that would implement amendments to Title II and Title III of the ADAAA. The DOJ is responsible for handling complaints of noncompliance with Title III. This rule proposes making revisions to part 38 consistent with the ADA Amendments Act of 2008 (ADAAA) and the implementing regulations issued by the EEOC and the proposed regulations issued by the DOJ.

C. CONSISTENT APPLICATION OF DISCRIMINATION AND EQUAL OPPORTUNITY OBLIGATIONS ACROSS PROGRAMS [81 FR 4497-4498]

This NPRM promotes consistent application of nondiscrimination obligations across Federal enforcement programs and accordingly enhance compliance among entities subject to WIOA Section 188 and the various titles of the ADA. If the DOJ changes its proposal in its final rule implementing ADA Titles II and III, the Department will review those changes to determine their impact on this proposal and take appropriate action.

Title I of the ADA prohibits private employers, State and local governments, employment agencies and labor unions with 15 or more employees from discriminating in employment against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, 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. The 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. The Department is responsible for implementing the compliance procedures of Title II for components of State and local governments that exercise responsibilities, regulate, or administer services, programs, or activities in “relating to labor and the work force.” DOJ “refreshed” the ADA Title II regulations on September 15, 2010.

Title III, enforced by the DOJ, prohibits discrimination on the basis of disability in the full enjoyment of the goods, services, facilities, privileges or advantages, or accommodations of any place of public accommodation by a person who owns, leases, or operates that place of public accommodation. 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 TECHNOLOGY, INCLUDING THE INTERNET [81 FR 4501]

The increased turn toward the integration of, and in some instances complete shift to, online service delivery models in the public workforce development system since 1999 requires that the part 38 regulations be updated to address the nondiscrimination and equal opportunity implications raised by these changes.

II. SECTION-BY-SECTION ANALYSIS

A. SUBPART A – GENERAL PROVISIONS (DEFINITIONS) [81 FR 4502-4507]

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

Revisions in proposed § 38.4 include updating existing definitions consistent with applicable law, such as the definition of “*disability*” and its component definitions, as reflected in regulations implementing the ADA Amendments Act of 2008, as promulgated by EEOC and DOJ.

This NPRM also revises the definition of “*auxiliary aids or services*” to include new technology alternatives that have become available since the current regulations were drafted in 1999,

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

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

This NPRM adds a definition for “**other power-driven mobility device**” The term is used in the proposed rule in § 38.17, setting out the programmatic and physical accessibility requirements applicable to individuals with disabilities. This definition mirrors the definition in the DOJ ADA Title II regulations. 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 NPRM adds a definition for “**programmatic accessibility**” WIOA states in no fewer than ten places in Title I that recipients will comply with section 188, if applicable, and applicable provisions of the Americans with Disabilities Act of 1990, regarding the physical and programmatic accessibility of facilities, programs, services, technology, and materials, for individuals with disabilities. However, WIOA does not define programmatic accessibility for this purpose. The Department’s proposed definition, “policies, practices, and procedures providing effective and meaningful opportunity for persons with disabilities to participate in or benefit from aid, benefit, service and training,” provides needed direction for recipients and beneficiaries. It is important to note that the term “programmatic accessibility” in this context has a different meaning than the similar term “program accessibility” that is used in Title II of the ADA.

This NPRM revises the title of the definition of “**qualified individual with a disability**” to match the definition of “qualified” in the EEOC regulations implementing Title I of the ADAAA.

This NPRM amends the existing definition of “**qualified interpreter**” to reflect the existence of new technologies used by interpreters. The revised language states that interpreting services may be provided “either in-person, through a telephone, a video remote interpreting (VRI) service or via internet, video, or other technological methods. The proposed 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 interpreters, oral transliterators, and cued language transliterators, and describes the essential functions required to be performed by a qualified interpreter for a deaf or hard of hearing individual. This language is taken from the ADA Best Practices Tool Kit for State and Local Governments.

Recipients are strongly encouraged to use certified interpreters where individual rights depend on precise, complete and accurate translations. Such situations may include, e.g., a hearing on eligibility for unemployment insurance benefits or a test for obtaining certification or credentials. A certified interpreter may be someone who has been certified by the federal courts to be a qualified interpreter for legal purposes, or someone who has been certified by a national interpreter association. Certification indicates a particular level of expertise in the specific skill of interpretation, which is distinct from being bilingual.

This NPRM revises the definition of “**reasonable accommodation**” to add a new paragraph which reads as follows: “A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who has an ‘actual disability’ or ‘record of’ a disability, but is not required to provide a reasonable accommodation to an individual who is only ‘regarded as’ having a disability.” This change to the definition of reasonable accommodation makes it consistent with the ADA and regulations issued by the EEOC and proposed by the 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; or

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

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

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

(ii) Restructuring of a job or a service, or of the way in which aid, benefits, services, or training is/are provided; part-time or modified work or training schedules; acquisition or modification of equipment or

devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of readers or interpreters; and other similar accommodations for individuals with disabilities.

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

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

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

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

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

B. SUBPART A – GENERAL PROVISIONS (DISCRIMINATION PROHIBITED) [81 FR 4515-4516]

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

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

2. Accessibility requirements (§ 38.13)

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

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

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

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

Proposed paragraph (b) describes the obligations of recipients to ensure ***programmatic accessibility*** to WIOA Title I-financially assisted programs and activities for individuals with disabilities. Congress included this description of how to achieve programmatic accessibility in 2005 in the context of considering amendments to WIA in an effort to improve accessibility to the workforce development system for individuals with disabilities. Therefore, the Department proposes to include 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.”

The Department welcomes comments on this section.

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.” The section retains the existing text from § 38.8.

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

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

This rule proposes a new subparagraph (a)(5) addressing the obligation that recipients currently have, under § 38.9 and this proposed section, as well as the ADA, to take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others. This responsibility includes, for example, the provision of auxiliary aids and services to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program or activity.

For example, the proposed language states that “when developing, procuring, maintaining, or using electronic and information technology, a recipient must utilize electronic and information technologies, applications, or adaptations which incorporate accessibility features for individuals with disabilities, comply with applicable accessibility guidelines and standards, including any web accessibility standards under Title II of the Americans with Disabilities Act (ADA), and 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 proposed language 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 defines the term “**companion**” for the purposes of this part and provides detailed descriptions of requirements for telecommunications in subpart (b) and communications of information and signage in subpart (c). It also explains the limitations of fundamental alterations in subpart (d), i.e., that a recipient is not required to take action that it can demonstrate would result in a fundamental alteration in the nature of a service, program or activity. CRC has drawn these provisions from the ADA Title II regulations to ensure that recipients’ responsibilities under this part are consistent with those under the ADA.

5. Service animals (§ 38.16)

This NPRM adds a new § 38.16 entitled “Service animals” to provide direction to recipients regarding their obligation to modify their policies, practices or procedures to permit the use of a service animal by an individual with a disability. This proposed section tracks the ADA Title II regulations issued by the DOJ found at 28 CFR part 35.136 because applicants, beneficiaries of

and participants in WIOA Title I financially-assisted programs include individuals with disabilities with service animals. The Department's discussions with recipients' EO Officers demonstrate that there has been some confusion on the part of recipients as to what constitutes a service animal and what constitutes a pet. This section is intended to resolve that confusion. This provision as to service animals is also in direct response to the inclusion of disability accessibility obligations throughout Title I of WIOA.

6. Mobility aids and devices (§ 38.17)

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

C. SUBPART B – RECORDKEEPING AND OTHER AFFIRMATIVE OBLIGATIONS OF RECIPIENTS [81 FR 4516-4520]

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

1. Notice and Communication [§ 38.34]

Proposed § 38.34 (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.

Similarly, proposed changes to paragraph (b) of § 38.36 require that this notice must be provided in appropriate formats for registrants, applicants, eligible applicants/registrants, applicants for employment and employees and participants with visual impairments. The prior rule at § 37.31(b), due to oversight or error, only required that notice in an accessible format be provided to participants. This rule expands the categories of individuals for whom notice must be provided in alternate formats because each category of individuals listed above is protected under the WIOA nondiscrimination obligation.

2. Publications, broadcasts, and other communications (§ 38.38 Proposed).

§ 38.38 generally contains the same requirements as current § 38.34. This rule proposes revising the title to, "Publications, broadcasts, and other communications." Proposed § 38.38(a) also

provides that, where materials indicate that the recipient may be reached by voice telephone, the materials must also prominently provide the telephone number of the text telephone (TTY) or equally effective telecommunication system such as a relay service used by the recipient. This proposal updates this section to reflect current technology used by individuals with hearing impairments.

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

Proposed § 38.39 generally contains the same requirements as current § 38.36. This rule proposes a revised title, “Communication of notice in orientations.” The proposed rule adds language stating that orientations provided not just in person but also remotely over the internet or using other technology are subject to these notice requirements. Proposed § 38.39 also revises this section consistent with current law to ensure equal opportunity for individuals with disabilities. This rule proposes language stating 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 as provided in § 38.15 of this part.

4. Data and information collection and maintenance (§ 38.41-.44).

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

This NPRM proposes 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.

These changes make the regulations consistent with DOL’s regulations implementing § 504 of the Rehabilitation Act and with the EEOC’s regulations implementing Title I of the ADA. 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 4520-4522]

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

Proposed § 38.51(b) requires the Governor to monitor on an *annual* basis the compliance of State Programs with WIOA Section 188 and this part. Under current § 38.54(d)(2)(ii), the requirement to “periodically” monitor was ambiguous and led to infrequent monitoring.

Proposed § 38.51(b) incorporates the Governor’s monitoring responsibilities currently required by § 38.54(d)(2). Moving the monitoring obligations from the Methods of Administration section at § 38.54(d)(2) to this section does not change the Governor’s oversight responsibilities but underscores the importance of the Governor’s monitoring responsibilities and highlights that monitoring is more than just a paper responsibility.

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

Proposed §38.54 generally retains the language of current §38.54. The NPRM proposes a new title for §38.54, “Governor’s obligations to develop and implement a Nondiscrimination Plan.” Proposed §38.54(a) requires Governors to “establish and implement,” rather than “establish and adhere to” a Nondiscrimination Plan for State programs.

E. SUBPART D – COMPLIANCE PROCEDURES [81 FR 4522-4526]

1. Evaluation of compliance (§ 38.60).

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

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

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

CRC has received feedback from recipients and advocacy organizations asking for clarity regarding the possible ramifications of the preaward review. This addition provides transparency

about the possible consequences if an applicant or recipient is found to be unlikely to comply with the nondiscrimination and equal opportunity requirements of this part and Section 188 of WIOA.

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).

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

4. Complaint filing (§ 38.69).

The NPRM combines existing §§ 38.70, 38.71 and 38.72 into proposed § 38.69 titled “Complaint filing,” with revisions to the text. The Department proposes merging these sections to improve readability. The Department also proposes making several changes to improve the processing of complaints.

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

The NPRM proposes to retain most of existing language and include technical and conforming changes.

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

The NPRM proposes retaining all of the existing language in the § 38.95, and includes technical and conforming changes. The changes included bring 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 NPRM proposes retaining the language in current § 38.98 in proposed § 38.94 and makes technical and conforming changes.

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

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

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

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

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

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

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

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

F. SUBPART E - FEDERAL PROCEDURES FOR EFFECTING COMPLIANCE [81 FR 4526]

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