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Comments on the Notice of Proposed Rulemaking
Implementing the Nondiscrimination and Equal Opportunity
Provisions of the Workforce Innovation and Opportunity Act
RIN: 1291-AA36

The Florida Department of Economic Opportunity ("DEO") urges USDOL to reconsider its plan to adopt disparate impact regulations pursuant to § 188 of WIOA because in enacting § 188 Congress did not proscribe policies and practices that have a disparate impact on protected categories. DEO also urges USDOL to reconsider its estimate of the costs of implementing the proposed regulations because USDOL's stated estimate woefully understates the actual costs. DEO further urges USDOL to reconsider its plan to require that the state Equal Opportunity Officer report directly to the governor as an unneeded and unwarranted intrusion on the elected governors' prerogative to organize staff in the most effective and efficient manner possible. Moreover, DEO urges USDOL to reconsider its proposed regulatory changes to the data collection and monitoring requirements under WIOA as the proposed changes are unduly burdensome and unsupported by additional funding.

USDOL Lacks the Statutory Authority to Promulgate Disparate Impact Regulations

In its notice of proposed rulemaking (NPRM), USDOL's Civil Rights Center (CRC) seeks to, among other things, promulgate rules prohibiting policies and practices that have a disparate impact on certain protected classes. As discussed below, § 188 of WIOA does not grant USDOL the authority to promulgate disparate impact regulations. While WIOA gives USDOL the authority to "adopt standards for determining discrimination,"[1] those standards must arise from a reasonable construction of the statute.[2] USDOL unreasonably interprets § 188 of WIOA to grant itself rulemaking authority to prohibit neutral policies and practices that are otherwise permissible under the statute.[3]

USDOL relies heavily on Lau v. Nichols, 414 U.S. 563 (1974), as the basis for its authority to promulgate disparate impact regulations.[4] However, in relying on Lau, USDOL ignores more recent Supreme Court case law that expressly repudiates Lau on this very point.

In Lau, the U.S. Supreme Court accepted, without discussion or explanation, an agency regulation that interpreted Title VI to provide that "[d]iscrimination is barred which has the *effect* even though no purposeful design is present[.]"[5] On that understanding, the Court held that the disparate impact

[1] 29 U.S.C. § 3248(e).
[2] See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).
[3] See Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act, 81 Fed. Reg. 4493, 4495 (proposed Jan. 26, 2016) (to be codified at 29 C.F.R. pr. 38).
[4] See, e.g., id. at 4497.
[5] Lau, 414 U.S. at 568 (emphasis added).

regulations at issue in that case simply "[made] sure that recipients of federal aid . . . conduct[ed] any federally financed projects consistently with § 601 [of Title VI]."[6]

After its decision in Lau over 40 years ago, the Supreme Court decided Alexander v. Sandoval, 532 U.S. 275 (2001), in which it expressly addressed whether § 601 of Title VI makes disparate impact discrimination illegal. This analysis is highly relevant as the operative language in § 601 of Title VI is identical to the language in § 188(a)(2) of WIOA. The Court stated clearly and emphatically that it is "beyond dispute—and no party disagrees—that [Title VI] prohibits only intentional discrimination."[7] The Court made clear that it "rejected Lau's interpretation of [Title VI] as reaching beyond intentional discrimination."[8] The Court then acknowledged the "considerable tension" between its rejection of Lau and the assertion that "regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on [a protected class], even though such activities are permissible under § 601."[9]

Simply put, § 602 of Title VI authorizes federal agencies to promulgate regulations to effectuate the provisions of § 601—which only proscribes intentional discrimination. The only interpretation of Title VI that eliminates the "considerable tension" identified in Sandoval requires an understanding that agencies may not create new rights through regulation. Therefore, regulations promulgated under § 602 may not prohibit neutral policies and practices that may have a discriminatory effect because that sort of activity is permissible under § 601. This is as true of Title VI as it is of § 188 of WIOA.[10]

The Supreme Court has interpreted certain nondiscrimination statutory provisions as prohibiting policies and practices that have a disparate impact on protected classes. However, all such statutory provisions have one thing in common—they all *explicitly* prohibit such policies and practices. For example, in Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court found that in section 703(a)(2)[11] of Title VII, Congress "proscribe[d] not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[12] Because "Congress directed the thrust of section 703(a)(2) to the consequences of employment practices, not simply the motivation," the Court held that section 703(a)(2) of Title VII explicitly prohibits disparate impact policies and practices.[13] Again, in Smith v. City of Jackson, 544 U.S. 228 (2005), a plurality of the Supreme Court concluded that the reasoning used in Griggs pertained to section 4(a)(2)[14] of the Age

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[6] Lau, 414 U.S. at 566-67.

[7] Sandoval, 532 U.S. at 280; see also Alexander v. Choate, 469 U.S. 287, 293 (1985) ("Title VI itself directly reaches only instances of intentional discrimination.").

[8] Sandoval, 532 U.S. at 285.

[9] Id. at 281-82 (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) and Guardians Assn. v. Civil Serv. Comm'n of New York City, 463 U.S. 582 (1983)).

[10] DEO finds USDOL's continued reliance on *Lau* as unpersuasive as the dissenting opinion in *Sandoval*.

[11] It shall be an unlawful employment practice for an employer—

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities ***or otherwise adversely affect*** his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(2) (emphasis added).

[12] Griggs, 401 U.S. at 431

[13] Id. at 432, 436.

[14] It shall be unlawful for an employer—

Discrimination in Employment Act of 1967 (ADEA).[15] As the plurality observed, the text of §§ 703(a)(2) of Title VII and 4(a)(2) of the ADEA "focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer" and therefore explicitly prohibits disparate impact policies and practices.[16] Likewise, in Texas Dep't of Housing and Community Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015), the Supreme Court found that § 804(a)[17] of the Fair Housing Act (FHA) explicitly prohibits policies and practices that have a disparate impact on protected classes.[18] The Court focused on the similarities between the phrase "otherwise make unavailable"—found in § 804(a) of the FHA—and "otherwise adversely affect"—found in §§ 703(a)(2) of Title VII and 4(a)(2) of the ADEA.[19] In drawing this comparison, the Court found that, while Congress may not have reiterated the exact same language found in §§ 703(a)(2) of Title VII and 4(a)(2) of the ADEA, both phrases focus on "the consequences of an action rather than the actor's intent."[20]

The Supreme Court's holding in Inclusive Communities Project is important not only for what it said, but also for what it did not say. In finding that § 804(a) of the FHA explicitly prohibits policies and practices that have a disparate impact on protected classes, the Supreme Court only compared that provision to two other nondiscrimination statutory provisions—§§ 703(a)(2) of Title VII and 4(a)(2) of the ADEA—to the exclusion of other nondiscrimination statutory provisions, like § 601 of Title VI. The Court's exclusion of § 601 and other nondiscrimination statutes from its analysis illustrates the Court's understanding that disparate impact regulations are only permissible when Congress, through the text of a nondiscrimination statute, explicitly prohibits policies and practices that have a disparate impact on protected classes. Additionally, the Court noted that a common theme among the nondiscrimination statutory provisions that explicitly prohibit neutral practices with a disparate impact on protected classes is that they are either directed at employers or "a sector of our Nation's economy,"[21] not at state and local agencies receiving Federal financial assistance.

When Congress wishes to explicitly prohibit policies and practices that have a disparate impact on protected classes, it uses precise language not present in WIOA.[22] Importantly, "[w]hen a statute

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> (2) To limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities ***or otherwise adversely affect*** his status as an employee, because of such individual's age.

29 U.S.C. § 623(a)(2) (emphasis added).

[15] Smith, 544 U.S. at 235.

[16] Id. at 236.

[17] [I]t shall be unlawful—

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, ***or otherwise make unavailable*** or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604(a) (emphasis added).

[18] Inclusive Communities Project, 135 S. Ct. at 2518-19.

[19] Id.

[20] Id.

[21] Id. at 2521.

[22] Id. at 2518-19; see also Kamps, 592 F. App'x at 285 (holding that when Congress wants to prohibit policies and practices that have a disparate impact on protected classes, it uses particular language).

limits a thing to be done in a particular mode, it includes the negative of any other mode."[23] Courts will not read language into a statute that Congress intentionally left out—and neither should USDOL.[24]

As with the other nondiscrimination statutory provisions, Congress granted rulemaking authority to USDOL to implement § 188 of WIOA.[25] "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."[26] This maxim prevents agencies from promulgating rules that go beyond the authority explicitly delegated by Congress. "If congressional silence is a sufficient basis upon which an agency may build a rulemaking authority, the relationship between the executive and legislative branches would undergo a fundamental change and 'agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with Chevron and quite likely the Constitution as well.'"[27] Regarding an agency's lack of authority to promulgate regulations related to matters that are not specifically authorized by statute, the Supreme Court said it best in Sandoval: "Agencies may play the sorcerer's apprentice but not the sorcerer himself."[28]

In summary, Congress has explicitly prohibited policies and practices that have a disparate impact on protected classes in some nondiscrimination statutory provisions, but not in § 601 of Title VI or § 188 of WIOA. Therefore, USDOL may not lawfully promulgate disparate impact regulations. Should USDOL promulgate such regulations, the result would be an unacceptable expansion of the administrative state and would constitute an unconstitutional usurpation of Congress' sole authority.

DEO strongly recommends that USDOL review the applicable case law and *decline* to issue regulations proscribing disparate impact discrimination purportedly authorized by § 188 of WIOA.

USDOL's Proposed LEP Thresholds Result in Exorbitant Translation Costs

USDOL has specifically requested comment on the thresholds triggering a requirement to translate standardized vital information. For the reasons discussed above, DEO should not be *required* to translate standardized vital information into any other languages, even though DEO has voluntarily taken such actions for Spanish and Haitian Creole. However, assuming that USDOL intends to promulgate this requirement anyway, DEO recommends that no specific threshold be mandated. States are in the best position to assess local translation needs.

The NPRM provides examples of the thresholds CRC may consider when formulating this policy. These include:

(1) Languages spoken by at least 5% of LEP individuals;

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[23] Nat'l R. R. Passenger Corp. v. Nat'l Ass'n of R. R. Passengers, 414 U.S. 453, 458 (1974) (quoting Botany Worsted Mills v. United States, 278 U.S. 282, 289 (1929)).
[24] Sandoval, 532 U.S. at 287 ("Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink.").
[25] 29 U.S.C. § 3248(e).
[26] Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).
[27] Bayou Lawn & Landscape Services v. Sec'y of Labor, 713 F.3d 1080, 1085 (11th Cir. 2013) (quoting Ethyl Corp. v. EPA, 51 F.3d 1053, 1060 (D.C. Cir. 1995)).
[28] Sandoval, 532 U.S. at 291.

(2) Languages spoken by at least 1,000 LEP individuals; and,
(3) The top ten languages spoken by LEP individuals within a state.[29]

DEO has reviewed these proposals and worked with the 24 local workforce development boards in Florida. Using the most recent available data from the U.S. Census Bureau's American Community Survey, DEO estimates the total initial cost of translating all vital information for languages spoken under the "1,000 individuals" and "top ten" thresholds to be approximately **$16,952,472** and **$5,845,680**, respectively.

USDOL estimated the total cost of implementing the proposed regulations across the nation to be $28,250,547 for the first year.[30] If USDOL implements any of its proposed thresholds, then the implementation cost in the NPRM appears to be grossly underestimated.

DEO recommends that USDOL cease requiring the translation of vital information into multiple languages, and instead allow states to determine the most appropriate translation policy. If USDOL determines that a threshold for triggering the translation of vital information into other languages is necessary despite the foregoing, then a threshold based on the percentage of LEP individuals state-wide is the most workable policy approach. To the extent that USDOL establishes a threshold based on anything other than a percentage of LEP individuals state-wide, DEO strongly recommends that USDOL explicitly exempt state-level information systems and documents from the requirement.

USDOL Requires the Creation of an Unnecessary and Unfunded "State Level Equal Opportunity Officer"

USDOL proposes amending section 38.28 to require every Governor to "designate an individual as a State Level Equal Opportunity Office (EO Officer), **who reports directly to the Governor**."[31] This new requirement directs Governors to create a new position and organize their staff in a specific and direct way without any additional resources. The current regulations require the designation of an "Equal Opportunity Officer" for each recipient of WIOA funds and do not dictate how a State must organize this function. Currently, states may structure equal opportunity staff as appropriate for their state structure. The proposal inserts an additional level of Equal Opportunity Officer – a "State Equal Opportunity Officer," and requires that the individual "reports directly to the Governor." This new position is not required under WIOA, and imposes additional staff without additional funding. Every recipient must also have "an EO Officer," as is the current requirement, and this alone is sufficient to enforce the requirements of WIOA. Having a state level EO officer overseeing a state agency-level EO officer would be duplicative and inefficient. The proposed regulation adding a "State Level Equal Opportunity Officer" will divert much needed funding away from direct job training and toward additional administrative costs for duplicative functions.

The preamble of the proposed regulations appears to justify the added "State Level Equal Opportunity Officer" because of a perceived lack of authority by the EO Officers. The current

[29] 81 Fed. Reg. 4493, 4514.
[30] Id. at 4528.
[31] Id. at 4559.

regulations make it clear that an EO Officer must be a "senior-level" employee and must report "directly to the appropriate official." The prior regulations also specified that the Equal Opportunity Officer must have "sufficient staff and resources" and "support of top management." DOL has authority, under the existing regulations, to make sure that the Equal Opportunity Officers have the authority and resources to do their jobs.

It is the states—not the federal government—that are in the best position to organize state staff in the most effective and efficient manner possible. Section 38.28(a) should be deleted.

Additional Data Collection Requirements not Supported by Additional Resources or WIOA

Proposed section 38.41 adds two new data elements to be collected by all WIOA grant recipients. Recipients must now "record the limited English proficiency and preferred language of an individual."[32] These new elements must now be included as part of the monitoring conducted by the Governor under section 38.51. Adding these requirements to existing systems will involve a cost. Without additional funding, it is unknown as to how changes to data collection and maintenance systems can be implemented. These new data collection requirements arguably are outside of the scope of WIOA, as neither data element is mentioned in section 188 which authorizes the nondiscrimination regulations.

USDOL should delete the following sentence from section 38.41(b)(2): "For applicants, registrants, participants, and terminees, each recipient must also record the limited English proficiency and preferred language of an individual." USDOL should also decline to include the following from section 38.51(b)(1), "limited English proficiency, preferred language."

Increased Monitoring not Supported by WIOA

The proposed regulations specify in section 38.51 that WIOA grant recipients must be monitored **annually**.[33] This is a significant change from the current regulations in section 38.54 which requires "periodic monitoring." Many states currently conduct WIOA grant recipient monitoring once every two years. The proposed regulations are doubling the workload and travel expenses for many states, and there is no additional funding. States are in the best position to determine when monitoring is appropriate, and WIOA does not require annual monitoring. In fact, section 121 of WIOA requires monitoring at least **every three years** in the area of accessibility of one-stop centers. Requiring monitoring of grant recipients every year will force states to reduce the quality of these reviews.

The proposed policy that monitoring be conducted annually is overly burdensome and states are in the best position to determine how frequent monitoring should occur to ensure compliance. DEO urges USDOL to replace the word "annual" with the word "periodic" in section 38.51(b).

[32] 81 Fed. Reg. at 4561.
[33] Id. at 4563.