

PUBLIC SUBMISSION

As of: March 29, 2016
Tracking No. 1k0-8or9-i9sb
Comments Due: March 28, 2016

Docket: [DOL-2016-0001](#)

Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act

Comment On: [DOL-2016-0001-0001](#)

Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act

Document: [DOL-2016-0001-0343](#)

Comment from Brett Williams, Michigan Developmental Disabilities Council

Submitter Information

Name: Brett Williams

Organization: Michigan Developmental Disabilities Council

General Comment

See attached file(s)

Attachments

NPRM Comments



RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
MICHIGAN
DEVELOPMENTAL DISABILITIES COUNCIL
LANSING

KRISTEN E. COLUMBUS
CHAIRPERSON
VENDELLA M. COLLINS
EXECUTIVE DIRECTOR

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES
NICK LYON, DIRECTOR
320 S. WALNUT STREET • LANSING, MICHIGAN 48913
(517) 335-3158 Voice • (517) 335-2751 Fax
WWW.MICHIGAN.GOV

[Type the abstract of the document here. The abstract is typically a short summary of the contents of the document.
Type the abstract of the document here. The abstract is typically a short summary of the contents of the document.]



RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
MICHIGAN
DEVELOPMENTAL DISABILITIES COUNCIL
LANSING

KRISTEN E. COLUMBUS
CHAIRPERSON
VENDELLA M. COLLINS
EXECUTIVE DIRECTOR

March 28, 2016

Naomi Barry-Perez, Director Civil Rights Center
U.S. Department of Labor
200 Constitution Avenue, NW, Room N-4123
Washington DC 20210

Dear Ms. Barry-Perez

The Michigan Developmental Disabilities Council is a twenty- one member group appointed by the governor to advocate for people with developmental disabilities to achieve their life dreams.

Please find attached, our comments on the Notice of Proposed Rule Making (NPRM) for the Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act (WIOA), RIN 1291-AA36. With a thoughtfully coordinated and carefully crafted implementation, WIOA has the ability to help eliminate many barriers to employment and education for people with disabilities.

Thank you for allowing the Council the opportunity to provide the Department with comments pertaining to the regulations being considered; see attached. Should any clarity be needed, please feel free to contact me at collinsv1@michigan.gov or 517-335-3158.

Sincerely,

Vendella M. Collins, Executive Director
Michigan Developmental Disabilities Council

The Michigan Developmental Disabilities Council (Michigan DD Council) submits the following comments, concerns, and suggestions.

Proposed revision to the definition of “disability”

The Michigan DD Council advocates for people with developmental disabilities and supports regulatory actions that promote greater employment and employee protections, complete inclusiveness at work and in the community, as well as ensuring people with disabilities are able to live the life they choose.

The following points are examples of areas of support.

The Michigan DD Council supports the expanded definition of “disability” that develops WIOA regulations to incorporate definitions established within the ADA Amendments Act (ADAAA). These expanded definitions clarify areas of ambiguity as well as provide guidance for the implementation of non-discriminatory procedures within WIOA.

Page 39, “The ADAAA incorporates into the statutory language a non-exhaustive list of major life activities that includes, but is not limited to, “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” We agree with the position that with an expanded, non-exhaustive list, will help guide courts to look towards congressional intent rather than a very narrow focus on minimalized definitions.

Page 41, we support the additions of paragraph “[w]hether an individual has a record of an impairment that substantially limited a major life activity must be construed broadly to the maximum extent permitted by Federal disability nondiscrimination law and this part and should not demand extensive analysis.”

The Michigan DD Council supports the updating of “other power-driven mobility devices” to incorporate new technology and alternative modes of mobility. However, we suggest that a slight change to §38.4(nn) (page 203) language from “Other power-driven mobility device means any mobility device powered by batteries, fuel, or other engines” to “Other power-driven mobility device means any mobility device powered by batteries, fuel, or other engines, *“motors, or methods of propulsion.”* This change will accommodate future technology of energy and propulsion, and it will clarify the distinct differences between an engine and a motor. This will prevent any disagreements between users and recipients.

Michigan DD Council applauds the Department of Labor (DOL) for clearly defining harassment and recognizing harassment is a form of discrimination and prior omissions from current 29 CFR part 38 will be corrected with §38.10.

Page 232, “Harassment of an individual based on race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries, applicants and participants only, citizenship status or participation in any WIOA Title I-financially assisted program or activity is a violation of the non-discrimination provisions of WIOA and this part.”

We also support the inclusion of the ADAAA provision “The ADAAA expressly prohibits claims that “an individual without a disability was subject to discrimination because of the lack of disability.” As

explained, this language will prohibit a person without a disability from filing a claim of harassment if that person is refused the same accommodations or workplace modifications as someone with a disability has received applicable to their disability.

Use of a Service Animal

The Michigan DD Council recommends changes to the definition of service animal to include miniature horses. Even though current ADA requirements only recognize dogs as service animals, it also outlines the use of miniature horses as a service animal in certain circumstances. The ADA regulations explicitly states:

“In addition to the provisions about service dogs, the Department’s revised ADA regulations have a new, separate provision about miniature horses that have been individually trained to do work or perform tasks for people with disabilities. (Miniature horses generally range in height from 24 inches to 34 inches measured to the shoulders and generally weigh between 70 and 100 pounds.) Entities covered by the ADA must modify their policies to permit miniature horses where reasonable. The regulations set out four assessment factors to assist entities in determining whether miniature horses can be accommodated in their facility. The assessment factors are (1) whether the miniature horse is housebroken; (2) whether the miniature horse is under the owner’s control; (3) whether the facility can accommodate the miniature horse’s type, size, and weight; and (4) whether the miniature horse’s presence will not compromise legitimate safety requirements necessary for safe operation of the facility.”

Being that recipients of WIOA funds must be in compliance with ADA regulations, it is only fitting miniature horses be included in the definition of service animals.

Accessibility Requirements

The Michigan DD Council fully supports the requirements for accessibility as set forth in §38.13. Both the physical and programmatic accessibility is extremely important to people with disabilities. The provisions outlined in the aforementioned section promotes accessibility in both of these areas.

§38.14, addresses reasonable accommodations and reasonable modifications. One concern rest in the how final determination of whether the recipient has met the threshold of proof that the requested modification would place undue hardship on the recipient. The proposed regulations does an excellent job in providing the exact parameters that need to be addressed, however, it would be extremely helpful to modify the language to incorporate EEOC’s role in how they evaluate the evidence presented on behalf of the recipient to determine the validity of their claim of undue hardship.

The Michigan DD Council supports the language drafted in §38.4(q)(5)(i)(D) The proposed language modifies the term “substantially limits” by requiring “a lower degree of functional limitation” than used prior to ADA Amendments Act of 2008 (ADAAA).

We strongly support §38.12(6)(d) “A recipient must administer WIOA Title I-financially assisted programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”

Access to Information

§38.44 reads “Each grant applicant and recipient must permit access by the Director or the Director’s designee during normal business hours to its premises and to its employees and participants, to the extent that such individuals are on the premises during the course of the investigation, for the purpose of conducting complaint investigations, compliance reviews, or monitoring activities associated with a State’s development and implementation of a Nondiscrimination Plan, and for inspecting and copying such books, records, accounts and other materials as may be pertinent to ascertain compliance with and ensure enforcement of the nondiscrimination and equal opportunity provisions of WIOA or this part.”

The Michigan DD Council request that the term “normal business hours” be stricken and replaced with “hours of operation.” This change would allow access to a recipient’s facilities and the employee who filed the complaint regardless of the assigned shift. Second, it would promote higher levels of compliance by the recipients knowing that investigations could occur at any time, day or night.

Complaint Processing Procedures

The Michigan DD Council appreciates the comprehensive explanation of the complaint process as well as the peripherals surrounding this course. The following are several areas that the Michigan DD Council would like to suggest additional guidance or language:

- Draft language that forwards “reasonable accommodations” into the entire complaint process
- The NPRM establishes time parameters for petitioners filing a complaint, the recipients responding to the complaints, moving the complaint to the level of the director, and response to the director seeking information.

The component that is missing is there is not an established timeframe that the director must follow. The Michigan DD Council request added guidance and language that addresses this issue. We also request that the process the director must follow, including timeframes, procedures, standards of investigations and determinations are published within these rules

- §38.69 (2)(b) expand language to include the recipient, *the designated EO officer of the recipient*, or the director
- §38.72, as well as all other sections related to communications with a complainant, the Michigan DD Council suggest that all communications directed to the complainant are done so in a format that is acceptable to the complainant. We also suggest that communications are set at a level reflective of the complainant’s ability to understand all materials presented
- §38.72 (2)(ii) It is imperative that all complaint investigations conducted by the recipient have a strict conflict of interest component that protects the complainant’s rights to a full and unbiased investigation. The Michigan DD Council believes additional guidance and language is warranted in this subsection. The language should include strict protections against a recipient’s influence over any investigation such as providing for an independent facilitator to investigate complaints. This would be available to both small and large recipients

- §38.72 should also include guidance and language to establish comprehensive standards of investigations to ensure due diligence on behalf of the recipient investigating a complaint
- §38.74 if it is found that the recipient does not have jurisdiction over the complaint, we suggest that in addition to notifying the complainant that they have the right to file with the Civil Rights Center (CRC), the notice must also provide guidance on the steps required to file with the CRC. This would include all pertinent information such as required steps and procedures, required forms, addresses, phone numbers, etc.

Private Right of Action

For a person who has been victimized by discriminatory practices, the ability for that person to recoup damages should not be jeopardized through ambiguous language. Even though the NPRM has done a good job in describing the complaint process and procedures, with a strong emphasis on the recipient, language that would explain what protections are available to the individual are almost non-existent. In conjunction, the NPRM has not adequately described, from the complainant's side, what are the procedures that would be taking place once a complaint is filed.

Suggestions:

Additional language that clearly defines the relationship between specific types of entities and what federal protections govern them so that individuals and recipients have a clear understanding of the federal governance for individual protections. People need to understand their rights and this should be well communicated within this NPRM.

Office of Disability Employment Policy (ODEP) has done a great service in explaining these relationships in a very easily understandable format. Below is an excerpt, and with minimal modifications to incorporate WIOA, it would be a standard to follow.

Individuals with disabilities are protected from discrimination in employment primarily by two federal laws.

The Americans with Disabilities Act (P.L. 101-336), enacted into law on July 26, 1990, prohibits private sector employers who employ 15 or more individuals and all State and local government employers from discriminating against qualified individuals with disabilities in all aspects of employment.

The Rehabilitation Act of 1973 (P.L. 93-112), as amended, prohibits discrimination in employment in three areas.

Section 501 of the Rehabilitation Act prohibits federal executive branch agencies, including the U.S. Postal Service and the Postal Rate Commission, from discriminating against qualified individuals with disabilities. It requires executive branch agencies to take affirmative action in the hiring, placing and advancing of individuals with disabilities.

Section 503 of the Rehabilitation Act requires contractors who have a contract with the federal government for \$10,000 or more, and their subcontractors who have subcontracts satisfying

the same criteria, to take affirmative action to employ and to advance in employment qualified individuals with disabilities.

Section 504 prohibits recipients of federal financial assistance from discriminating against qualified individuals with disabilities in employment and in their programs and activities.

Section 188 of the Workforce Investment Act of 1998 (WIA) forbids disability-based discrimination, in employment or in provision of services, by any organization or other entity that receives Federal financial assistance under WIA, and by any program or activity that is provided as part of the nation's One-Stop job training system by a One-Stop partner.

Veterans with disabilities are protected further by 38 U.S. Code 4212 of the Vietnam Veterans Readjustment Assistance Act of 1974 (VEVRAA).

VEVRAA requires that contractors or subcontractors who have a contract with the federal government for \$25,000 or more take affirmative action to employ, advance in employment, and otherwise treat covered veterans without discrimination.

Individuals with disabilities also may be protected by their state anti-discrimination laws, some of which are more stringent than the federal laws. To learn more about rights under state laws, contact the State Human Rights Commission or its equivalent, or contact the State Governor's Committee on People with Disabilities.¹

The Michigan DD Council also strongly encourages providing guidance language that outlines procedures of the compliant process from the perspective of the complainant. This outline should be as detailed as that of the recipient outline with dates, procedures, how to check the progress of your complaint, contact information of the entity investigating the complaint, as well as all other related information.

¹ <http://www.dol.gov/odep/pubs/fact/rights.htm>