STATE OF WASHINGTON
EMPLOYMENT SECURITY DEPARTMENT
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March 28, 2016

Civil Rights Center
U.S. Department of Labor
Docket No. DOL-2016-0001
RIN 1291-AA36

RE: Comments on proposed rules for Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act

The Washington State Employment Security Department appreciates the opportunity to comment on the proposed rules for Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act (WIOA), published by the U.S. Department of Labor (DOL), Civil Rights Center (CRC).

§189 provides that the Secretary may prescribe rules only to the extent necessary to administer and ensure compliance. This rule making authority must comply with Chapter 5 of Title 5, United States Code. As described in more detail below, Washington State argues that some of the proposed rules are not necessary to ensure compliance, exceed the rule making authority granted in §189, are arbitrary and capricious, and are overly burdensome to recipients.

1. State EO Officer reporting directly to the Governor and adding state workforce agency EO Officer:

Proposed section 38.28(a) provides:

> *Every Governor must designate an individual as a State Level Equal Opportunity Officer (EO Officer),* ***who reports directly to the Governor*** *and is responsible for statewide coordination of compliance with the equal opportunity and nondiscrimination requirements in WIOA and this part, including but not limited to §§ 38.51, 38.53, 38.54 and 38.55. The State Level EO Officer must have staff and resources sufficient to carry out these requirements.* (emphasis mine)

The monitoring of any programs, such as those provided in WIOA, is not an appropriate function of a governor's office. As state managers, governors are responsible for implementing state laws and overseeing the operation of the state executive branch. As state leaders, governors advance and pursue new and revised policies and programs using a variety of tools; however, the direct

oversight of a small portion of a larger program is not appropriate for a governor's office to oversee.

Under the rules, each governor is still responsible for developing a Nondiscrimination Plan, which requires a governor to designate a State Level EO Officer and imbuing that officer with the requisite authority to ensure compliance with the nondiscrimination requirements of §188. That section provides no authority for DOL to prescribe the reporting structure for the individual designated by the governor to serve as the State Level EO Officer. If the CRC is not in agreement with the EO Officer designation in the Nondiscrimination Plan, the CRC can reject that plan.

According to the summary, this proposed rule change is intended to provide the State Level EO Officer with sufficient authority to carry out the required responsibilities. In reality, a State Level EO Officer reporting directly to a governor has no more authority than the EO Officer who is designated by a governor and reporting to a senior official of the state workforce agency (SWA). In fact, this new requirement that the State Level EO Officer report directly to the governor would weaken the position and make the position vulnerable to politics and political pressure, which would be detrimental to the program and undermine the EO Officer's authority. If the CRC is concerned that certain states are not meeting their EO obligations because of a lack of support, the CRC should deal with those states individually under its current authority instead of imposing an inefficient requirement on all states. If the CRC believes it does not have sufficient authority to ensure compliance, then the CRC should petition Congress for sufficient statutory authority.

In Washington State, all staff who are appointed by, and report directly to the governor, are "at-will" and serve at the pleasure of the governor, without civil service protection. The governor may terminate the employment of these individuals for any or no reason. Civil service protection is important in this type of compliance position. Without it, the incumbent might be less inclined to take unpopular stands about non-compliance because of fear of losing their position.

If the State Level EO Officer position is directly reporting to a governor, the position would be subject to constant turnover each time there is a change in the administration. This constant turnover would negatively impact performance and continuity of a complicated and important program. In addition, a governor's office typically does not have expertise in the complex area of equal opportunity and non-discrimination that is found in an SWA. SWAs have this historical knowledge and expertise built into their agencies, and it is the function of a state agency to monitor programs it is responsible for – not the governor's office. SWAs deal with equal opportunity related issues daily, and would be better prepared to perform the equal opportunity functions.

In addition, moving the EO monitoring function directly under the governor would split the EO and program compliance monitoring between two different governmental entities, leading to less efficiency in overall program monitoring and economic inefficiencies.

As a recipient, the SWA would still be required to have an EO Officer, so moving the State Level EO Officer to a governor's office, and adding an SWA EO officer would be duplicative and inefficient, and would divert much needed funding away from direct job training and toward additional administrative costs for duplicative functions. It is more efficient for the EO Officer to work in the SWA where they have ready access to the program experts and staff, can maintain positive relationships and provide technical expertise in order to assure compliance. This is consistent with the integrated services model implemented with WIOA.

- Washington State recommends revising proposed section 38.28(a) to strike "***who reports directly to the Governor.***"

2. Definition of "Governor" conflicts with the WIOA statute:

The definition of governor in the WIOA rules in §38.4 provides: *"(aa) Governor means the chief elected official of any State or the Governor's designee."*

This definition is in direct conflict with the WIOA statutory definition of Governor and is therefore inconsistent with the statute and in violation of Section 5 of Title 5 of the United States Code.

- Washington State recommends that the rule definition match the statutory definition.

3. Additional data collection and monitoring requirements not supported by additional resources:

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." These new elements must now be included as part of the monitoring conducted by the Governor under §38.51. Adding these requirements to existing systems will involve a cost. Without additional funding, it is unknown 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 element is mentioned in section 188 which authorizes the nondiscrimination regulations.

- Washington State recommends deleting the following sentence from section 38.41: "For applicants, registrants, participants, and terminees, each recipient must also record the limited English proficiency and preferred language of an individual."
- Washington State recommends deleting the inclusion of "limited English proficiency, preferred language" from section 38.51(b)(1).

4. Increased monitoring is not supported by WIOA:

The proposed regulations specify [in section 38.51] that WIOA grant recipients must be monitored annually. This is a change from the prior regulations which required "periodic monitoring." [old section 37.54]. States should have flexibility in monitoring frequency, and are in the best position to determine when monitoring is appropriate. In addition, the statute does not require annual monitoring. There was no statistical justification in the summary as to why monitoring annually was the most effective option, thus making this rule arbitrary. Washington State currently conducts WIOA grant recipient monitoring once every two years, and our experience with this level of monitoring has been highly successful and the biennial monitoring schedule would coincide with the timing of the Non-discrimination Plan that is required every two years. In addition, the proposed monitoring frequency coupled with the additional monitoring requirements would more than double the staffing required for EO monitoring without additional funding.

- Washington State recommends that the phrase "annual" be replaced with "biennial" in section 38.51(b).

5. Notification to the CRC of lawsuits and complaints:

§38.42 requires each grant applicant or recipient to promptly notify the Director when any administrative enforcement actions or lawsuits are filed against it alleging discrimination. Although not significantly changed from the previous rule, 29 C.F.R. § 37.38, this requirement is overly burdensome and unrelated to determining equal opportunity compliance with §188.

The summary for proposed §38.42 provides that the intent is for recipients to notify the Director when administrative enforcement actions or lawsuits are filed against them on any basis prohibited under §188 and the CFR and modified the language to include additional protected characteristics. The actual language in this section, however, requires a much broader action by recipients by requiring notification for <u>any</u> administrative actions or lawsuits based on any discrimination claim. Because DOL only has jurisdiction over violations of §188 - discrimination related to WIOA, requiring such notification serves no legitimate purpose and is arbitrary. Furthermore, no other federal agency with authority to enforce discrimination laws requires state agencies to provide such information.

The fact that an administrative action or lawsuit is commenced alleging discrimination does not mean that discrimination has actually occurred. These cases are generally not resolved until years after the events leading to the claim, and the CRC could be drawing negative inferences about a recipient merely on the basis of an allegation of discrimination that is not related to WIOA participation. In our experience, a vast majority of these actions are dismissed. There appears to be no mechanism for the CRC to determine if the allegation has merit, so merely requiring states

to provide copies of all claims filed is unrelated to WIOA EO compliance. Using this filing information to judge a recipient is arbitrary and capricious because the CRC is only seeking the filing, not the resolution.

In addition, this requirement is overbroad, because a state can be a recipient outside the context of the SWA. Since the regulation did not limit its reach to merely the SWA, the state would be required to notify the CRC of all such actions filed against any state agency, again making this an arbitrary requirement because the CRC only has jurisdiction over §188 complaints.

- Washington State recommends that the requirement to provide these documents be removed in its entirety, or modified to only include administrative actions or lawsuits involving complaints specifically related to discrimination in services offered under WIOA.

Sincerely,

Ron Marshall
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Washington State Employment Security Department