March 28, 2016

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

Via online submission

RE: RIN 1291-AA36 – Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act

Dear Ms. Barry-Perez:

On behalf of the 86 undersigned organizations, we write to express our strong support for the Department of Labor's (DOL) proposal to update the nondiscrimination and equal opportunity regulations implementing Section 188 of the Workforce Innovation and Opportunity Act (WIOA) to align with current law and address its application to current workforce issues. This rule has the potential to increase women's, LGBT persons', and other underrepresented groups' access to services, benefits, training, programs, and employment in and through the workforce development system. It also has the potential to ensure that workforce development programs help end—not reinforce—occupational gender segregation and the gender pay gap.

Our comments below provide an issue-by-issue analysis of the problem, a discussion of DOL's proposed solutions, and suggestions for how the rule may be strengthened.

I. Sex Discrimination in the Workplace and in the Workforce Development System Remains a Serious and Pervasive Barrier to Equality.

Women still face many types of sex discrimination in the workplace. In 2014, women working full time, year round typically made only 79 percent of the wages made by men working full time, year round.[1] This pay gap has barely budged in a decade.[2] And the gap in wages is far worse for women of color—African American women and Hispanic women typically made only 60 percent[3] and 55 percent,[4] respectively, of the wages made by white, non-Hispanic men for full-time, year-round work in 2014. One cause of this wage gap is that women workers are clustered in low-wage fields and face barriers to entry into higher-paid, nontraditional fields. In

[1] NAT'L WOMEN'S LAW CTR., THE WAGE GAP OVER TIME (Sept. 2015), *available at* http://nwlc.org/wp-content/uploads/2015/08/wage_gap_over_time_overall_9.21.15.pdf.
[2] *Id.*
[3] NAT'L WOMEN'S LAW CTR., THE WAGE GAP OVER TIME: AFRICAN AMERICAN WOMEN (Sept. 2015), *available at* http://nwlc.org/wp-content/uploads/2015/08/wage_gap_over_time_african_american_9.21.15.pdf.
[4] NAT'L WOMEN'S LAW CTR., THE WAGE GAP OVER TIME: HISPANIC WOMEN (Sept. 2015), *available at* http://nwlc.org/wp-content/uploads/2015/08/wage_gap_over_time_hispanic_9.21.15.pdf.

fact, women make up two-thirds of low-wage workers[5] and, for example, only 2.6 percent of highly paid construction and extraction workers.[6]

Whether in high-paying or low-paying fields, women continue to encounter high rates of harassment. Pregnant workers, too, face discrimination. Too often they are pushed out of their job when all they need is a simple accommodation that would keep them working, and instead are forced to choose between the safety of their pregnancy and their paycheck. Yet women's paychecks are more critical to their families than ever, as women today are the sole or primary breadwinners in 41 percent of families with children, and they are co-breadwinners in another 23 percent of families.[7] Women make up 47 percent of the workforce, but 14.7 percent of women live in poverty.[8] At a time when more families are relying on women's income, it is critical that we break down barriers that keep women from entering the workforce and succeeding and advancing in their careers.

In addition, individuals who identify as lesbian, gay, bisexual, or transgender (LGBT) also face high levels of sex discrimination at work in the form of discrimination on the basis of sexual orientation or gender identity. For example, according to a survey by the National Center for Transgender Equality, 29 percent of transgender workers and 15 percent of workers with nonconforming gender identities reported job loss due to discrimination—with transgender women experiencing job loss due to bias at a rate of 36 percent compared to 19 percent for transgender men.[9]

Job training programs have the potential to increase women's earnings, lifting women and their families out of poverty and helping to narrow the wage gap. Indeed, studies of job training programs have shown that such programs help increase participants' earnings.[10] These programs can also help end the occupational segregation that has kept women in lower paying fields by providing them training to enter nontraditional jobs that will increase their earnings and employability.

---

[5] ANNE MORRISON & KATHERINE GALLAGHER ROBBINS, NAT'L WOMEN'S LAW CTR., CHARTBOOK: THE WOMEN IN THE LOW-WAGE WORKFORCE MAY NOT BE WHO YOU THINK (Sept. 2015), *available at* http://nwlc.org/resources/chart-book-women-low-wage-workforce-may-not-be-who-you-think/.

[6] NAT'L WOMEN'S LAW CTR., WOMEN IN CONSTRUCTION: STILL BREAKING GROUND 2 (2014), *available at* http://www.nwlc.org/sites/default/files/pdfs/final_nwlc_womeninconstruction_report.pdf.

[7] SARAH JANE GLYNN, CENTER FOR AMERICAN PROGRESS, BREADWINNING MOTHERS, THEN AND NOW 7 (2014), *available at* https://cdn.americanprogress.org/wp-content/uploads/2014/06/Glynn-Breadwinners-report-FINAL.pdf.

[8] NAT'L WOMEN'S LAW CTR., POVERTY RATES BY STATE (2014), *available at* http://nwlc.org/wp-content/uploads/2015/08/compiled_state_poverty_table_2014_final.pdf.

[9] JAIME M. GRANT, LISA A. MOTET & JUSTIN TANIS, NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 53 (2011), *available at* http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

[10] *See* CAROLINE M. FRANCIS, NATIONAL POVERTY CENTER WORKING PAPER SERIES, WHAT WE KNOW ABOUT WORKFORCE DEVELOPMENT FOR LOW-INCOME WORKERS: EVIDENCE, BACKGROUND AND IDEAS FOR THE FUTURE (2013), *available at* http://npc.umich.edu/publications/u/2013-09-npc-working-paper.pdf; U.S. DEPARTMENT OF LABOR ET AL., WHAT WORKS IN JOB TRAINING: A SYNTHESIS OF THE EVIDENCE (2014), *available at* http://www.dol.gov/asp/evaluation/jdt/jdt.pdf.

Unfortunately, studies show that the federal workforce development system reinforces the gender wage gap and occupational gender segregation. Data published by DOL show that women's quarterly earnings are substantially lower than men's once they exit federal workforce training services: in 2011, the gender wage gap in earnings between women and men four quarters after they received Workforce Investment Act (WIA)-funded services (the recent predecessor to WIOA) was 74.6 percent (a gap of $1,789 per quarter) among the general population of WIA service recipients, and 76.4 percent (a gap of $2,078 per quarter) for women and men who received services under the 'dislocated workers' programs.[11] An analysis conducted by the Institute for Women's Policy Research suggests that a major factor contributing to this earnings gap is that women are trained for traditionally "female" occupations while men are trained for traditionally "male" occupations.[12] In 2011, close to half of women received training services for 'sales and clerical' or 'service' jobs, compared to fewer than one in seven men.[13] Fewer than one in sixteen women received training in 'installation, repair, production, transportation, or material moving,' or 'farming, fishing, forestry, construction, and extraction' skills, compared to over half of men.[14]

Given the federal workforce development system's history of reinforcing gender inequities, it is crucial that DOL enact final regulations that include the strongest possible nondiscrimination protections as well as affirmative measures to end these disparities.

II. Discrimination on the Basis of Sex – § 38.7

Since the issuance of the nondiscrimination regulations in 1999, principles of nondiscrimination and equal opportunity law have evolved significantly, especially as relates to discrimination on the basis of sex. We strongly support the proposed updates to the regulations in these important areas of law as they bring the regulations into alignment with current law and clarify recipients' obligations. We offer comments to further strengthen the proposed sex discrimination rule.

A. Discrimination on the Basis of Pregnancy

We commend DOL for rectifying the regulations' current omission of pregnancy discrimination as a form of sex discrimination by explicitly clarifying in proposed §38.7 that sex includes "pregnancy, childbirth, and related medical conditions." This addition brings the proposed rule in line with current law, which, since the 1970s, has explicitly included pregnancy discrimination

[11] INST. FOR WOMEN'S POLICY RESEARCH (IWPR), WORKFORCE INVESTMENT SYSTEM REINFORCES OCCUPATIONAL GENDER SEGREGATION AND THE GENDER WAGE GAP (June 2013), *available at* http://www.iwpr.org/publications/pubs/workforce-investment-system-reinforces-occupational-gender-segregation-and-the-gender-wage-gap.

[12] *Id.*; *see also* ARIANE HEGEWISCH & HELEN LUYRI, INST. FOR WOMEN'S POLICY RESEARCH (IWPR), THE WORKFORCE INVESTMENT ACT AND WOMEN'S PROGRESS: DOES WIA FUNDED TRAINING REINFORCE SEX SEGREGATION IN THE LABOR MARKET AND THE GENDER WAGE GAP? 1 (Jan. 2010), *available at* http://www.iwpr.org/publications/pubs/the-workforce-investment-act-and-women2019s-progress.

[13] IWPR, *supra* note 11.

[14] *Id.*

as sex-based discrimination under the protections of Title VII[15] in the workplace and Title IX[16] in the educational sphere.

Suggestions for Improvement

While we commend DOL for including discrimination on the basis of pregnancy as an example of unlawful sex-based discriminatory practices in proposed § 38.7(b)(7), the pregnancy discrimination example proposed does not illustrate the full scope of unlawful pregnancy discrimination. Accordingly, we urge DOL to clarify that sex discrimination includes "[d]enying individuals who are pregnant, who become pregnant, who plan to become pregnant, *or who are of childbearing capacity* opportunities for or access to aid, benefit, service, or training on the basis of pregnancy, *childbirth, or related medical conditions, including childbearing capacity*." Such additions will ensure that the rule is aligned with the EEOC guidance on pregnancy and pregnancy-related conditions,[17] and with DOL regulations addressing sex discrimination in other contexts.[18]

For the same reasons, we also encourage DOL to strengthen the regulations by adding in proposed § 38.7(b)(7), or in a separate subsection, that sex-based discriminatory practices would also include "[f]ailing to provide individuals who are pregnant reasonable accommodations related to pregnancy or pregnancy-related medical conditions, where such accommodations are provided to or are required to be provided to other program participants similar in their ability or inability to work." As discussed in greater detail in Section III, such an addition would align with the Supreme Court's recent decision in *Young v. United Parcel Serv., Inc.*[19]

B. Discrimination Based on Gender Identity as Sex Discrimination

We support the proposed rule's recognition of the well-supported principle that gender identity discrimination is a form of sex discrimination under Title VII.[20] Numerous federal courts have interpreted Title VII and other federal sex discrimination laws to include discrimination on the basis of gender identity, gender transition, or transgender status.[21] The Equal Employment

---

[15] 42 U.S.C. § 2000(e)(k) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . . .").
[16] Pub. L. No. 92-318, 86 Stat. 235 (1972) (codified at 20 U.S.C. §§1681-1688); 34 C.F.R. 106.40(a).
[17] OFFICE OF LEGAL COUNSEL, EQUAL EMP'T OPPORTUNITY COMM'N (EEOC), NOTICE NO. 915.003, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES, (June 2015).
[18] Discrimination on the Basis of Sex, 80 Fed. Reg. 5246, 5278 (proposed Jan. 30, 2015) (to be codified at 41 C.F.R. pt 60-20).
[19] 135 S. Ct. 1338, 1351-1352 (2015).
[20] Implementation of the Nondiscrimination and Equal Opportunity Provisions of WIOA, 81 Fed. Reg. 4494, 4499 (proposed Jan. 26, 2016) (to be codified at 29 C.F.R. pt 38).
[21] *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (Equal Protection Clause); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (Gender Motivated Violence Act); *Rumble v. Fairview Health Serv.*, No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (Affordable Care Act); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Finkle v. Howard Cty., Md.*, 12 F.Supp. 3d 780 (D. Md. 2014). Older cases finding that Title VII does not protect transgender workers, *see, e.g.*

Opportunity Commission (EEOC) has followed these decisions and held that anti-transgender discrimination is "by definition" discrimination based on sex in violation of Title VII.[22] The Attorney General has reaffirmed this interpretation,[23] as has DOL itself.[24] Similarly, the Departments of Education and Justice have clarified on multiple occasions that, under Title IX, discrimination based on gender identity and nonconformity to sex stereotypes is discrimination based on sex,[25] and the Department of Health and Human Services has clarified the same regarding the Affordable Care Act's prohibition on sex discrimination.[26]

i. Equal Access to Workplace Facilities

We applaud DOL for its recognition that denying access to facilities consistent with an employee's gender identity because of the employee's transgender status is a form of sex discrimination. Proposed § 38.7(b)(9) is consistent with the EEOC's established application of Title VII requiring employers to treat individuals according to their gender identity, including by ensuring equal access to gender-specific facilities.[27] DOL has reaffirmed this interpretation in guidance for the Job Corps programs[28] and other employment and training programs,[29] and in

---

Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1086 (7th Cir. 1984), reached their conclusions based on case law that has since been repudiated by the Supreme Court's holding in *Price Waterhouse v. Hopkins*, which determined that Title VII's prohibition on sex discrimination includes sex stereotyping. 490 U.S. 228 (1989). For an analysis of these cases, *see* Statement of Interest of the United States at *14, *Jamal v. Saks*, No. 4:14-cv-02782 (S.D. Tex. Jan. 26, 2015).

[22] *Macy v. Holder*, E.E.O.C. App. No. 0120120821, 2012 WL 1435995, at *12 (Apr. 20, 2012).

[23] Memorandum from Attorney General Eric Holder, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (Dec. 15, 2014); *see also* Statement of Interest of the United States, *Jamal*, No. 14-2782; Statement of the United States, *Burnett v. City of Phila.*, No. 09-4348 (E.D. Pa. Apr. 4, 2014).

[24] Apprenticeship Programs; Equal Opportunity, 80 Fed. Reg. 68908 (proposed Nov. 6, 2015); Discrimination on the Basis of Sex, 80 Fed. Reg. 5246; Office of Fed. Contract Compliance Programs (OFCCP) Dir. 2015-1, Handling Individual and Systemic Sexual Orientation and Gender Identity Discrimination Complaints (Apr. 16, 2015); OFCCP Dir. 2014-02, Gender Identity and Sex Discrimination (Aug. 19, 2014).

[25] Finding Letter from Adele Rapport, Director of Chicago Regional Office of Office for Civil Rights of U.S. Department of Education, to Daniel E. Cates, Superintendent of Township High School District 211 (Nov. 2, 2015); Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant and Urging Reversal, *G.G. v. Gloucester Cty. Sch. Bd.*, No. 15-2056 (4th Cir. Oct. 28, 2015); Statement of Interest of the United States, *G.G. v. Gloucester Cty. Sch. Bd.*, No. 4:15-cv-54, (E.D. Va. June 29, 2015); Statement of Interest of the United States, *Tooley v. Van Buren Pub. Sch.*, No. 2:14-cv-13466 (E.D. Mich. Feb. 24, 2015); Dep't of Educ., *Title IX Resource Guide*, 1 (Apr. 2015); Dep't of Educ., "Questions and Answers on Title IX and Sexual Violence," 5 (Apr. 29, 2014). *See also* Dep't of Educ., "Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities," 25 (Dec. 1, 2014); Dep't of Educ., "Dear Colleague," 7-8 (Oct. 26, 2010).

[26] Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54172 (proposed Sept. 8, 2015) (to be codified at 45 C.F.R. pt. 92).

[27] *See, e.g.*, *Lusardi v. McHugh*, E.E.O.C. App. No. 0120133395, at *15 (April 1, 2015).

[28] Dep't of Labor, Job Corps Program Instruction Notice No. 14-31, Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program (May 1, 2015).

[29] Dep't of Labor, Training and Employment Guidance Letter No. 37-14, The Workforce Development System: Training and Employment Guidance Letter on Gender Identity, Gender Expression and Sex Stereotyping (May 29, 2015), http://wdr.doleta.gov/directives/attach/TEGL/TEGL_37-14_Acc.pdf; Dep't of Labor, *DOL Policies on Gender Identity: Rights and Responsibilities* (July 2013), http://www.dol.gov/oasam/programs/crc/20130712GenderIdentity.htm#_ftn3.

proposed sex discrimination rules for federal contractors.[30] Numerous other agencies have acknowledged this basic principle of nondiscrimination with respect to a wide range of other settings, including school restrooms and locker rooms,[31] dormitories,[32] health care facilities,[33] and shelters.[34] To date, at least 13 states and the District of Columbia have, by regulations, guidance, case law, or specific statutory language, clarified that state laws prohibiting gender identity discrimination require that transgender individuals have access to sex-segregated facilities consistent with their gender identity.[35] Additionally, courts have rejected claims that a third party's discomfort with the presence of a transgender person in a sex-specific facility implicates any legally cognizable right.[36]

---

[30] Discrimination on the Basis of Sex, 80 Fed. Reg. 5246.

[31] *See, e.g.*, Brief of the United States as Amicus Curiae Supporting Plaintiff-Appellant and Urging Reversal, *G.G.* ex rel. *Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056, (4th Cir. Oct. 28, 2015); Statement of Interest of the United States at 5, *G.G.* ex rel. *Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15cv54 (E.D. Va. June 29, 2015); *Tooley v. Van Buren Pub. Sch.*, No. 2:14-cv-13466 (E.D. Mich. Feb. 24, 215); Resolution Agreement between the Arcadia Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division (OCR No. 09-12-1020) (DOJ No. 169-12C-70) (July 24, 2013); Resolution Agreement between the Downey Unified School District and the U.S. Department of Education, Office for Civil Rights (OCR Case No. 09-12-1095 Oct. 8, 2014).

[32] Dep't of Labor, Job Corps Program Instruction Notice No. 14-31, *supra* note 28.

[33] Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. at 54219; Dep't of Health & Human Servs., Office for Civil Rights, Bulletin: The Brooklyn Hospital Center Implements Non-Discriminatory Practices to Ensure Equal Care for Transgender Patients (July 14, 2015).

[34] Dep't of Justice, Frequently Asked Questions: Nondiscrimination Grant Conditions in the Violence Against Women Reauthorization Act of 2013, at 9 (Apr. 9, 2013); Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs, 80 Fed. Reg. 72542 (proposed Nov. 20, 2015) (to be codified at 24 C.F.R. pt. 5).

[35] *See* CAL. EDUC. CODE § 221.5(f); N.J. STAT. ANN. § 10:5-12(f)(1); 3 COLO. CODE REGS. § 708-1:81.11; D.C. MUN. REGS. tit. 4, § 802.1; OR. ADMIN. R. 839-005-0031(2) (2014); WASH. ADMIN. CODE § 162-32-060 (2015); *Dep't of Fair Emp't & Hous. v. Am. Pac. Corp.*, Case No. 34-2013-00151153-CU-CR-GDS (Cal. Sup. Ct. Mar. 13, 2014); *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600 (Me. 2014); *Mathis v. Fountain-Fort Carson Sch. Dist. 8*, Charge No. P20130034X, Determination (Colo. Div. of Civil Rights Jun. 18 2013); *Sommerville v. Hobby Lobby Stores*, Charge Nos. 2011CN2993/2011CP2994 (Ill. Human Rights. Comm'n, May 15, 2015); *Jones v. Johnson Cty. Sheriff's Dep't*, CP No. 12-11-61830, Finding of Probable Cause (Iowa Civil Rights. Comm'n Feb. 11, 2013); Conn. Safe Sch. Coal., Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws 8 (2012), http://www.sde.ct.gov/sde/lib/sde/pdf/equity/title_ix/guidelines_for_schools_on_gender_identity_and_expression2012oct4.pdf; Iowa Civil Rights Comm'n, Guidance on Sexual Orientation & Gender Identity: A Housing Provider's Guide to Iowa Law Compliance (2012), https://icrc.iowa.gov/sites/files/civil_rights/publications/2012/SOGIEmpl.pdf; Mass. Dep't of Elementary and Secondary Educ., *Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment: Nondiscrimination on the Basis of Gender Identity* 9-10 (2013), http://www.doe.mass.edu/ssce/GenderIdentity.pdf; Nev. Equal Rights Comm'n, Facts About Gender Identity or Expression Discrimination (2012), http://detr.state.nv.us/Nerc_pages/NERC_docs/Facts_About_Gender_Identity_or_Expression_Discrimination.pdf; New York State Educ. Dep't, Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students (2015), http://www.p12.nysed.gov/dignityact/documents/Transg_GNCGuidanceFINAL.pdf; Vt. Human Rights Comm'n, Sex, Sexual Orientation and Gender Identity: A Guide to Vermont's Anti-Discrimination Law for Employers and Employees (2012), http://hrc.vermont.gov/sites/hrc/files/publications/trans-employment-brochure.pdf.

[36] *See Cruzan v. Special Sch. Dist.*, #1, 294 F.3d 981 (8th Cir. 2002) (rejecting as insufficient teacher's assertion that her "personal privacy" was invaded when school permitted transgender woman to use women's room); *Crosby v.*

Despite this widespread recognition, many employers and training program staff continue to misinterpret their obligations under sex discrimination laws, and frequently deny transgender people access to appropriate restrooms.[37] Proposed § 38.7(b)(9) is essential for preventing this harmful and discriminatory practice in WIOA-funded programs, and we urge DOL to incorporate it into its final rule.

Suggestions for Improvement

We recommend that DOL make several minor changes to the language of § 38.7 to clarify that individuals cannot be denied equal access to any gender-segregated workplace facilities, rather than only bathrooms, and that WIOA-funded programs are authorized but not required to provide gender-segregated multiuser facilities.

ii. Ensuring Treatment Consistent with Individuals' Gender Identities

We appreciate DOL's inclusion of a provision prohibiting "treating an individual adversely" based on their transgender status. We believe that adverse treatment necessarily includes the failure to treat individuals according to their gender identity, including deliberately and repeatedly referring to them by a name or pronoun that is inconsistent with their gender identity, prohibiting them from dressing in a manner consistent with their gender, and, as discussed above, denying them equal access to workplace facilities.

Suggestions for Improvement

We are concerned that it may not be clear to all WIOA-funded program staff that such conduct is prohibited by DOL's proposed regulation, and therefore urge DOL to clarify that refusing to treat an individual according to the individual's gender identity constitutes sex discrimination, and to include specific examples of prohibited conduct. For example, in accordance with the EEOC's holdings, DOL should make clear that the refusal to process an appropriately requested name change for a transgender employee[38] and the "persistent failure to use [an] employee's correct name and pronoun" constitute discrimination.[39] As the EEOC has recognized, the deliberate and

---

Reynolds, 763 F. Supp. 666 (D. Me. 1991) (non-transgender female prisoner's objection to sharing a cell with a transgender woman implicated no clearly established right); *see also* Nedda Reghabi, *A Balancing Act for Businesses: Transsexual Employees, Other Employees, and Customers*, 43 ARIZ. ST. L.J. 1047 (2011) (concluding invasion-of-privacy claims by customers offended by transgender employees' use of appropriate restrooms would also likely fail for lack of actual harm).

[37] *Cf.* NAT'L. LGBTQ TASK FORCE & NAT'L CTR. FOR TRANSGENDER EQUALITY, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 56 (2011), *available at* http://endtransdiscrimination.org/PDFs/NTDS_Report.pdf (22 percent of respondents in a national study of transgender individuals reported that they had been denied access to restrooms consistent with their gender identity in the workplace).

[38] *Complainant v. Dep't of Veterans Affairs*, E.E.O.C. Appeal No. 0120133123, 2014 WL 1653484 (Apr. 16, 2014). *See also* Consent Decree, *Deluxe Fin. Servs. Corp.*, No. 0:15-cv-02646-ADM-SER, at *10.

[39] *Lusardi*, E.E.O.C. App. No. 0120133395, at *15. *See also Jameson v. U.S. Postal Serv.*, E.E.O.C. Appeal No. 0120130992, 2 (May 21, 2013) ("[S]upervisors and coworkers should use the name and pronoun of the gender that the employee identifies with…. Intentional misuse of the employee's new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment."); Complaint, *EEOC v. Deluxe Fin.*

repeated use of a name and pronouns associated with a transgender employee's assigned sex at birth is "demeaning" and amounts to a refusal to recognize the validity of their gender.[40] This is consistent with DOL's internal gender identity policy, which requires managers to "[r]efer to each person by the name, and the gender-specific pronoun, by which the person wants to be called."[41] By explicitly clarifying that sex discrimination includes the refusal to treat individuals consistent with their gender identity, DOL can ensure that program participants are protected from this pervasive and harmful mistreatment.

C. Sexual Orientation Discrimination as Unlawful Sex Discrimination and Sex Stereotyping

We urge DOL to explicitly recognize that sexual orientation discrimination constitutes sex discrimination within the final rule in § 38.7(a). The EEOC and federal courts have determined that discrimination based on sexual orientation is a form of sex discrimination prohibited by Title VII. For example, in *Baldwin v. Foxx*, the EEOC held in 2015 that Title VII's prohibition on employment decisions based on "sex-based considerations" includes considerations based on an individual's sexual orientation, and that "[a] complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account."[42] Explicitly incorporating sexual orientation within the definition of sex in the final rule is both consistent with current legal interpretations[43] and essential to

---

Servs. Corp., No. 0:15-cv-02646-ADM-SER, at *14 (alleging discrimination when co-workers and supervisors "subjected [complainant] to gender-based derogatory comments about her appearance, intentionally referred to her with male pronouns, and called her insulting names"); Office of Personnel Mgmt., *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace* (2011), https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance ("Continued misuse [of a transitioning employee's] new name and pronouns, and reference to the employee's former gender by managers, supervisors, or coworkers is contrary to the goal of treating transitioning employees with dignity and respect, and creates an unwelcoming work environment.").

[40] *Lusardi*, E.E.O.C. App. No. 0120133395, at *15.

[41] Dep't of Labor, *DOL Policies on Gender Identity: Rights and Responsibilities*, *supra* note 29 (emphasis omitted). Other agencies, such as the Office of Personnel Management, are in accord with this position. *See* Office of Personnel Mgmt., *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace* (2011), *supra* note 39.

[42] *Baldwin v. Foxx*, E.E.O.C. Appeal No. 0120133080, 2015 WL 4397641, at *5 (July 16, 2015). The Commission has developed this interpretation in a long series of decisions prior to *Baldwin*. *See, e.g.*, *Complainant v. Johnson*, E.E.O.C. Appeal No. 0120110576 (Aug. 20, 2014); *Complainant v. Cordray*, E.E.O.C. Appeal No. 0120141108 (Dec. 18, 2014); *Complainant v. Donahoe*, E.E.O.C. Appeal No. 0120132452 (Nov. 18, 2014); *Complainant v. Sec'y, Dep't of Veterans Affairs*, E.E.O.C. Appeal No. 0120110145 (Oct. 23, 2014); *Couch v. Dep't of Energy*, E.E.O.C. Appeal No. 0120131136 (Aug. 13, 2013); *Brooker v. U.S. Postal Serv.*, E.E.O.C. Appeal No. 0120112085 (May 20, 2013); *Culp v. Dep't of Homeland Sec.*, E.E.O.C. Appeal No. 0720130012 (May 7, 2013); *Castello v. U.S. Postal Serv.*, E.E.O.C. Appeal No. 0120111795 (Dec. 20, 2011); *Veretto v. U.S. Postal Serv.*, E.E.O.C. Appeal No. 0120110873 (July 1, 2011). More recently, in March 2016, the EEOC filed two sex discrimination cases based on sexual orientation: *EEOC v. Scott Medical Health Center*, No. 2:16-cv-00225-CB (W.D. Pa. filed Mar.1, 2016), and *EEOC v. Pallet Companies, dba IFCO Systems NA*, 10 No. 1:16-cv-00595-RDB (D. Md. filed Mar. 1, 2016).

[43] As DOL acknowledges in footnotes 132-139 of the proposed rule, courts have increasingly accepted this common-sense conclusion. For example, in the December 2015 case *Videckis v. Pepperdine University*, 2015 WL 8916764 (C.D. Cal. Dec. 15, 2015), the court explicitly endorsed the EEOC's reasoning in *Baldwin*. A federal judge

ensuring that LGBT individuals have access to the services and programs to which they are entitled.

In addition to explicitly including sexual orientation discrimination as *per se* sex discrimination, we also urge DOL to clarify that it is a form of unlawful sex stereotyping under § 38.7(d). As the EEOC describes in the *Baldwin* decision, sex stereotyping can involve not only expectations for masculine and feminine gender presentation, but also beliefs related to sexual orientation, such as the stereotype that men must date and marry women, and women must date and marry men.

We therefore urge DOL to adopt language consistent with the regulatory language included in the proposed revisions to § 60–20.7 incorporated into the proposed Office of Federal Contract Compliance Programs (OFCCP) rule, *Discrimination on the Basis of Sex,* published in January 2015.[44] Section 60-20.7(a)(3) of this proposed rule provides that employment decisions made on the basis of sex-based stereotypes include, "adverse treatment of an employee because he or she does not conform to sex-role expectations by being in a relationship with a person of the same sex." Including similarly explicit language to this proposed rule would not only reflect federal case law and EEOC policy,[45] but would also provide much needed consistency and clarity across DOL programs.

D. Sex Stereotyping and Occupational Segregation

We commend DOL for explicitly recognizing sex stereotyping as sex discrimination and for making clear that complaints of discrimination based on sex stereotyping shall be treated as complaints of sex discrimination. Sex-based stereotypes remain a serious obstacle to women's entry into and success in the workplace and are particularly problematic in the context of WIOA programs and activities. Outdated assumptions about women not being breadwinners in their families and about who should be responsible for family caregiving contribute to occupational gender segregation, as do assumptions about the work that interests women and the work women are qualified to do. Women make up only a very small share of workers in many higher-paying jobs such as the skilled trades;[46] their limited access begins early in their careers and is

---

in *Isaacs v. Felder Services, LLC*, 2015 U.S. Dist. LEXIS 146663, at *10 (M.D. Ala. Oct. 29, 2015), also incorporated this reasoning in October 2015.

[44] Discrimination on the Basis of Sex, 80 Fed. Reg. at 5279.

[45] In *Veretto v. United States Postal Service*, 2011 WL 2663401 (E.E.O.C. July 11, 2011), for example, the EEOC determined that the complainant's allegation of sexual orientation discrimination was a sufficient sex discrimination claim because the discrimination was based on the sex stereotype that "marrying a woman is an essential part of being a man" and was "motivated by…attitudes about stereotypical gender roles in marriage." Similarly, the court in *Terveer v. Library of Congress*, 34 F. Supp. 3d 100 (D.D.C. 2014), rejected a motion to dismiss the plaintiff's claim of sex discrimination on the basis of sexual orientation and sex stereotyping under Title VII. In this 2014 case, the court held that the plaintiff's "status as a homosexual male did not conform to [his supervisor's] gender stereotypes associated with men under his supervision and that his orientation as a homosexual had removed him from [his supervisor's] preconceived definition of male."

[46] Women make up only 2.6 percent of workers in the construction and extraction industries, where the median hourly wage of $19.55 is nearly double the median hourly wage for female-dominated occupations like home health aids, maids, housekeepers, and child care workers. *See* WOMEN IN CONSTRUCTION, *supra* note 6, at 5. Additionally,

perpetuated by gender- and sex-based stereotypes. For example, women face discrimination in pre-apprenticeship and apprenticeship programs for the skilled trades.[47] In career and technical education, women are concentrated in programs that lead to generally low-paying occupations like childcare workers, cosmetologists, and medical assistants.[48] Unfortunately, as discussed above, federal workforce development programs have also been shown to reinforce occupational segregation. In 2011, nearly 48 percent of women federal workforce development clients received training services for "sales and clerical" or "service" jobs, compared to 14.6 percent of men.[49] By contrast, 6 percent of women received training in "installation, repair, production, transportation, or material moving," or "farming, fishing, forestry, construction, and extraction" skills, compared to 52.6 percent of men.[50]

The underrepresentation of women in traditionally male-dominated, higher-wage fields cannot be explained away simply by pointing to occupational choice.[51] Sex-based stereotypes regarding the type of work that women should perform, isolation, active discouragement, harassment, unequal job training, outright exclusion, and lack of information about alternative job options are all barriers to women's entry into higher-wage jobs that are nontraditional for their gender.[52] While research conducted on occupational training and counseling decisions of low-income women found that many women said they were not interested in nontraditional skills, "women who said they would be interested in nontraditional training significantly outnumbered women

---

women make up only 1.3 percent of bricklayers, plumbers, pipefitters and steamfitters who earn a median hourly wage of $22.82; 1.8 percent of automotive body and related repairers who earn a median hourly wage of $18.45; and 2.2 percent of electricians who earn a median hourly wage of $23.96. Median hourly wages from Bureau of Labor Statistics (BLS), Occupational Employment Statistics, May 2012 National Occupational Employment and Wage Estimates (Mar. 29, 2013), *available at* http://www.bls.gov/oes/current/oes_nat.htm. Percentage of women from BLS, Current Population Survey, 2012 Annual Averages, Table 11. Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity, *available at* http://www.bls.gov/cps/cpsaat11.pdf.

[47] WOMEN IN CONSTRUCTION. *supra* note 6, at 6-8.

[48] NAT'L COAL. FOR WOMEN & GIRLS IN EDUC. & NAT'L JOBS & JOB TRAINING, EDUCATION DATA SHOW GENDER GAP IN CAREER PREPARATION 2 (Mar. 2013), *available at* http://www.nwlc.org/sites/default/files/pdfs/ncwge_report_on_gender_gap_in_career_preparation.pdf.

[49] IWPR, *supra* note 11.

[50] *Id.*

[51] *See* NAT'L WOMEN'S LAW CTR., FAQ ABOUT THE WAGE GAP (2015), *available at* http://nwlc.org/wp-content/uploads/2015/08/faq_about_the_wage_gap_9.23.15.pdf; AM. ASS'N OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 8 (2016), *available at* http://www.aauw.org/files/2016/02/SimpleTruth_Spring2016.pdf/.

[52] U.S. DEPARTMENT OF LABOR ADVISORY COMM. ON OCCUPATIONAL SAFETY & HEALTH, WOMEN IN THE CONSTRUCTION WORKPLACE: PROVIDING EQUITABLE SAFETY AND HEALTH PROTECTION (June 1999), *available at* https://www.osha.gov/doc/accsh/haswicformal.html (explaining that continued isolation, sexual discrimination, and harassment created a hostile environment and affected the safety of construction worksites); *see also* Phyllis Kernoff Mansfield et al., *The Job Climate for Women in Traditionally Male Blue-Collar Occupations*, 25 SEX ROLES: J. RES. 63, 76 (1991), *available at* http://anothersample.net/the-job-climate-for-women-in-traditionally-male-blue-collar-occupations (explaining that women in nontraditional occupations face high levels of sexual harassment and sex discrimination, which is particularly problematic because skills in these occupations "usually are acquired during apprenticeships or on the job, and are dependent on help and support from coworkers").

who were actually referred to nontraditional job training."[53] Indeed, the research showed that many counselors were unlikely to proactively suggest alternative programs that might lead to higher earnings.[54] Many of the women surveyed said they might have pursued training for different occupations had they seen more detailed information about potential earnings and benefits.[55]

This occupational segregation negatively impact women's earnings. In fact, wages in occupations that are predominantly female—"pink collar" occupations such as child care workers, family caregivers or servers—pay low wages[56] precisely because women are the majority of workers in the occupation.[57] One study that used the share of women in an occupation to predict wages in that job a decade later found that "women's occupations"—those that were two-thirds or more female—had wages that were 6 percent to 10 per cent lower than "mixed occupations."[58] It is thus not surprising that women who exited the workforce development system in 2011 made 74.6 cents to every dollar made by men exiting the system.[59]

Accordingly, we strongly support the inclusion of proposed § 38.7(d) to clarify that discrimination on the basis of sex stereotypes, such as stereotypes about how persons of a particular sex are expected to look, speak, or act is a form of unlawful sex discrimination. This is in line with the well-established principle that employment-related decisions made on the basis of sex stereotypes are a form of sex-based employment discrimination, as recognized by the U.S. Supreme Court in *Price Waterhouse v. Hopkins*[60] and consistently applied in subsequent Supreme Court and lower-court decisions.[61]

In particular, we strongly support the example in proposed § 38.7(d)(9) of discriminating against an individual because the individual "does not conform to a sex stereotype about individuals of a

---

[53] HEGEWISH & LUYRI, *supra* note 12, at 5 (citing Negrey, Cynthia, Stacie Golin, Sunhwa Lee, Holly Mead, and Barbara Gault. 2000. *Working First but Working Poor: The Need for Education and Training Following Welfare Reform*. Washington, DC: Institute for Women's Policy Research and NOW Legal Defense and Education Fund).
[54] *Id.*
[55] *Id.*
[56] FAQ ABOUT THE WAGE GAP, *supra* note 51; NAT'L WOMEN'S LAW CTR., THE 10 LARGEST JOBS PAYING UNDER $10.10/HOUR ARE MAJORITY WOMEN (2013), *available at* http://www.nwlc.org/sites/default/files/pdfs/womendominatedminwageoccupations.pdf.
[57] Philip N. Cohen, *Devaluing and Revaluing Women's Work*, THE HUFFINGTON POST (updated May 25, 2011, 3:20 PM), *available at* http://www.huffingtonpost.com/philip-n-cohen/devaluing-and-revaluing-w_b_444215.html.
[58] Asaf Levanon, Paula England, & Paul Allison, *Occupational Feminization and Pay: Assessing Causal Dynamics Using 1950-2000 U.S. Census Data*, 88 SOCIAL FORCES, 865, 878 (2009), *available at* http://sf.oxfordjournals.org/content/88/2/865.short.
[59] IWPR, *supra* note 11.
[60] 490 U.S. 228, 251 (1989).
[61] *See, e.g., Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (stereotype-based beliefs about the allocation of family duties on which state employers relied in establishing discriminatory leave policies held to be sex discrimination under the Equal Protection Clause of the Constitution); *Chadwick v. Wellpoint, Inc.*, 561 F.3d 38 (1st Cir. 2009) (making employment decision based on the belief that women with young children neglect their job responsibilities is unlawful sex discrimination under Title VII); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009) (harassment based on a man's so-called effeminacy is a form of sex discrimination under Title VII).

particular sex working in a specific job, sector, or industry." This example highlights the type of sex stereotyping that leads to occupational gender segregation and lower wages for women.

Suggestions for Improvement

We are concerned, however, about the absence of any mention in the proposed regulations of the need to eliminate the persistent occupational gender segregation that is reinforced through training disparities between men and women in federal workforce development programs. We urge DOL to specifically recognize in the Preamble to the final rule the need to address the stark gender segregation in the jobs for which women and men receive training and how this segregation results in the underrepresentation of women in higher-paid fields and curtails their opportunities and economic security.

Given the severity of occupational segregation within federal workforce development programs, maximum clarity about what sex stereotyping that leads to occupational segregation looks like is essential. Accordingly, we urge DOL to include additional examples of the ways in which occupational segregation is perpetuated at work and in training programs, such as the isolation of women within training programs; the tracking of women and men into certain positions within a training program based on assumptions about their capabilities and skills because of their sex; denial of, or unequal access to, networking, mentoring, and/or other individual development opportunities for women; unequal on-the-job training and/or job rotations; and applying non-uniform performance appraisals that may lead to subsequent opportunities for advancement. Given that lack of information about nontraditional training opportunities has been identified as a significant reason for occupational segregation in workforce development programs, it is particularly important to include, as an example of discriminatory sex stereotyping, failing to provide information about services or training opportunities in the full range of services and opportunities offered by the recipient.

E. Discrimination Based on Parental Status and Caregiving Responsibilities as Sex Discrimination

We strongly support the proposal to explicitly address sex discrimination based on parental status and caregiving responsibilities in § 38.7. Stereotypes about caregiving undermine women's workplace success.[62] For example, among full-time, year-round workers, mothers typically earn only 70 percent of what fathers earn,[63] and research shows that motherhood is often perceived by employers as rendering a worker less committed and less valuable, while fatherhood has the opposite effect.[64] Women applicants, program participants, or employees may

[62] *See, e.g.*, Shelley J. Correll, Stephan Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J.SOC. 1297, 1316 (2007), *available at* http://gender.stanford.edu/sites/default/files/motherhoodpenalty_0.pdf (finding that "mothers were judged as significantly less competent and committed than women without children").
[63] NAT'L WOMEN'S LAW CTR., HOW THE WAGE GAP HURTS WOMEN AND FAMILIES (July 2015), *available at* http://nwlc.org/wp-content/uploads/2015/08/7.8.15_how_the_wage_gap_hurts_women_and_families.pdf.
[64] Correll, Benard & Paik, *supra* note 62, at 1307 (finding that "[u]nlike the motherhood role, being a good father

also find themselves facing derogatory comments about the reliability of working mothers, less favorable training opportunities, less responsibility in assignments, or less favorable scheduling based on stereotypes about their competence and commitment given their caregiving responsibilities outside of work. For example, applicants, participants, or employees with parental responsibilities may be penalized for taking time to fulfill caregiving duties while other applicants or participants are not similarly penalized for taking time off for activities that are not related to caregiving responsibilities, such as attending a court date.

We support inclusion in the final rule of the proposed examples of unlawful sex discrimination based on parental status and/or caregiving responsibilities, specifically, the examples prohibiting recipients from denying parents of one sex access to WIOA services that are available to parents of another sex who have children,[65] and adversely treating unmarried parents of one sex, but not unmarried parents of another sex.[66] We also support the inclusion of the proposed examples of unlawful sex stereotyping based on caregiving responsibilities, specifically, the examples prohibiting recipients from adversely treating or denying access to WIOA services to mothers of children based on sex-stereotyped beliefs about work-life balance,[67] and prohibiting adverse treatment of male employees for taking family or medical leave based on a belief that it is a woman's job to take care of children.[68] These examples are an important reminder of the ways in which sex-based stereotypes operate to harm both men and women.

Federal agencies have recognized the need to address sex-based discrimination against workers who are parents or who are otherwise responsible for providing care for family members or others. The EEOC has issued enforcement guidance on unlawful discrimination against workers with caregiving responsibilities that violates Title VII's prohibition on sex discrimination.[69] The EEOC has also issued guidance on employer best practices for workers with caregiving responsibilities.[70] Accordingly, the proposed regulations' examples of sex discrimination based on parental status and caregiving responsibilities are aligned with current law.

Suggestions for Improvement

We urge DOL to strengthen the regulations by adopting more examples illustrative of the problems women face at work based on their position as mothers and caretakers. DOL should

---

is not seen as culturally incompatible with being an ideal worker. . . . [B]eing a good father and a good employee are part of the "package deal" defining what it means to be a man. Therefore, since the "good father" and "ideal worker" are not perceived to be in tension, being a parent is not predicted to lead to lower workplace evaluations for fathers").

[65] Implementation of the Nondiscrimination and Equal Opportunity Provisions of WIOA, 81 Fed. Reg at 4550 (§ 38.7(b)(2)).

[66] *Id.* (§ 38.7(b)(3)).

[67] *Id.* at 4551 (§ 38.7(d)(6)).

[68] *Id.* (§ 38.7(d)(5)).

[69] EEOC ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (May 2007), *available at* http://www.eeoc.gov/policy/docs/caregiving.html.

[70] EEOC, EMPLOYER BEST PRACTICES FOR WORKERS WITH CAREGIVING RESPONSIBILITIES, *available at* http://www.eeoc.gov/policy/docs/caregiver-best-practices.html.

include additional examples of caregiver discrimination under § 38.7(d), such as making employment decisions based on assumptions that women with caregiving responsibilities are less capable than men without such responsibilities, cannot succeed in a fast-paced environment, prefer to spend time with family rather than work, or are less committed to their jobs than full-time employees.

Second, DOL should add that discussing current and future plans about family during the interview or career counseling process may be evidence of sex discrimination, which would align the rule with requirements under the Americans with Disabilities Act (ADA) not to make disability-related inquiries in the pre-offer stage.[71] Under the ADA, employers may not ask an applicant disability-related questions that are not relevant to the qualifications for the job.[72] This prohibition "helps ensure that an applicant's possible hidden disability (including a prior history of a disability) is not considered before the employer evaluates an applicant's non-medical qualifications."[73] We suggest that to strengthen the rule, DOL incorporate similar language into the final regulation to prohibit pre-employment questions regarding family or family planning to ensure that the candidate is judged on her qualifications for the job, rather than her caregiving or potential caregiving responsibilities. This is in line with EEOC guidance indicating that inquiries as to whether an applicant or employee intends to become pregnant will generally be treated as evidence of pregnancy discrimination where the employer subsequently makes an unfavorable job decision affecting a pregnant worker.[74]

Finally, we urge DOL to make clear in the examples of caregiving discrimination that stereotypes against caregivers are not limited to caregivers of children. In addition to continuing to do the majority of caregiving for children,[75] women also do the majority of caregiving for other family members.[76] As the EEOC has recognized, "[s]ex-based stereotyping about caregiving responsibilities is not limited to childcare and includes other forms of caregiving, such as care of a sick parent or spouse."[77] Furthermore, discrimination against caregivers who care for individuals with disabilities is also unlawful under the ADA which prohibits

[71] 42 U.S.C.A. § 12101, et seq.
[72] ENFORCEMENT GUIDANCE: PREEMPLOYMENT DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMINATIONS UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990, 8 FEP Manual (BNA) 405:7191 (1995), *available at* http://www.eeoc.gov/policy/docs/preemp.html.
[73] *Id.*
[74] EEOC ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES, *supra* note 17.
[75] Bureau of Labor Statistics, American Time Use Survey Summary (June 2015), *available at* http://www.bls.gov/news.release/atus.nr0.htm
[76] AARP, CAREGIVING IN THE U.S. (2015), *available at* http://www.aarp.org/content/dam/aarp/ppi/2015/caregiving-in-the-us-research-report-2015.pdf?intcmp=AE-BL-IL-DOTORG; *see also* Navaie-Waliser, M., Feldman, P. H., Gould, D. A., Levine, C. L., Kuerbis A. N., & Donelan, K., *When the Caregiver Needs Care: The Plight of Vulnerable Caregivers*, American Journal of Public Health, 92(3), 409–413 (2002).
[77] EEOC ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (May 2007), *available at* http://www.eeoc.gov/policy/docs/caregiving.html.

discrimination against an individual based on the individual's association or relationship with a person who has a disability.[78]

F. Discrimination Against Victims of Domestic Violence as Sex Discrimination

We applaud DOL's recognition in § 38.7(d)(6) of the proposed regulation that protection from sex discrimination includes protection for individuals who are victims of domestic violence who may be eligible for, or participate in WIOA programs. Domestic violence has significant and wide-ranging impacts on an individual victim's employment and employment opportunities, as well as the workplace itself. Victims may lose or be denied jobs not only due to productivity or use of leave, but also due to gendered stereotypes about victims of domestic violence. DOL's recognition in a federal regulatory instrument that domestic violence can impact an individual's employment and ability to access and benefit from WIOA programs will enhance survivors' safety and economic security.

i. Domestic Violence Is Widespread and Negatively Impacts Survivors' Employment and Employment Opportunities.

Domestic violence is widespread in the United States: more than 1 in 3 women (35.6 percent) have experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime.[79] Given these high rates of prevalence, it is likely that many workers are either victims, or perpetrators, of domestic violence. Domestic violence has significant and long-lasting negative physical, emotional, psychological, health, educational, social and financial impacts on individuals. While anyone can be a victim of domestic violence, lower income women (who may be more likely to access WIOA benefits and programs) may be at greater risk because poverty limits resources and options, making it harder to separate from a perpetrator, seek justice and/or obtain health care or other assistance while staying safe and supporting a family.[80] Domestic violence also has significant economic impacts for businesses, such as lost productivity.[81]

---

[78] 42 U.S.C. § 12112(b)(4). This prohibition is recognized in § 38.12(l) of the proposed regulations: "A recipient must not exclude, or otherwise deny equal aid, benefits, services, training, programs, or activities to, an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association."

[79] CENTERS FOR DISEASE CONTROL AND PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (2011), *available at* http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf. Women of color experience disproportionately high rates of violence. *Id.* at 39. More than 1 in 4 men (28.5%) in the United States have experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime. *Id.* at 38.

[80] *See* Benson, M.L. & Fox, G.L., U.S. DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, ECONOMIC DISTRESS, COMMUNITY CONTEXT AND INTIMATE VIOLENCE: AN APPLICATION AND EXTENSION OF SOCIAL DISORGANIZATION THEORY, FINAL REPORT (2002), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/193434.pdf.

[81] The estimated cost of intimate partner rape, physical assault and stalking totals $5.8 billion each year for direct medical and mental health care services and lost productivity from paid work and household chores. Of this, total productivity losses accounted for nearly $1.8 billion in the United States in 1995. The cost of intimate partner rape, physical assault and stalking is more than $8.3 billion in 2003 dollars. CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, COSTS OF INTIMATE PARTNER VIOLENCE

Economic stability and opportunity is critical to survivors being able to take steps to separate from violence and maintain their safety while supporting their families. Employment is a key element of this stability. But victims of domestic violence face significant barriers in obtaining and maintaining employment. Abusive partners may ruin the victim's credit score and rental history, making victims less attractive hires; sabotage employment and educational opportunities; and steal or control assets, including bank accounts and credit cards. Victims may need to take leave or sick time to seek assistance (legal, medical, or counseling) or to assist a family member who is a victim of violence, or to relocate or make alternate child care arrangements. Yet many survivors do not have leave or sick days, whether paid or unpaid, or cannot afford to take unpaid leave, and risk losing a job if they do so. Workers may have performance issues related to the violence, possibly due to fear, trauma, medication or a medical condition, or intermittent absences. Victims may be absent from or late to work due to stalking, harassment or violence by an abuser, occurring either away from work or at work. Finally, workers who are victims may require accommodations for disabilities related to the violence, or workplace changes to improve safety.

ii. The Proposed Regulations' Recognition of Domestic Violence Is Critical For Ensuring Survivors Can Challenge Discriminatory Decisions and Maintain Employment.

The proposed regulations' acknowledgment that sex stereotyped-beliefs about victims of domestic violence can constitute sex discrimination is timely and necessary. Currently no federal law specifically prohibits discrimination against victims of domestic violence.[82] As acknowledged in the proposed regulations, in October 2012, the EEOC issued a fact sheet explaining how Title VII and the ADA could apply to employment issues involving victims of

---

AGAINST WOMEN IN THE UNITED STATES (2003), *available at* http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf.

[82] The Security and Financial Empowerment (SAFE) Act, which would prohibit such discrimination, has been introduced in several sessions of Congress but not enacted. *See* Security and Financial Empowerment Act, S.2208, 114th Cong. (2015); Security and Financial Empowerment Act, H.R. 3841, 114th Cong. (2015); Security and Financial Empowerment Act, H.R. 1229, 113th Cong. (2013); Security and Financial Empowerment Act, H.R. 3271, 112th Cong. (2011); Security and Financial Empowerment Act, S. 1740, 111th Cong. (2009); Security and Financial Empowerment Act, H.R. 739, 111th Cong. (2009); Survivors' Empowerment and Economic Security Act (SEES Act), S.1136, 110th Cong. (2007); Security and Financial Empowerment Act (SAFE Act), H.R. 2395, 110th Cong. (2007). The White House formally recognized the impact of domestic violence on workers and workplaces in April 2012, when President Obama issued a memorandum directing all federal agencies to establish and implement policies addressing the workplace impact of domestic violence, sexual assault, stalking and the workplace, and to provide assistance to employees who are victims. As the White House noted, "[d]omestic violence affects both the safety of the workplace and the productivity of employees." The directive intended to establish the federal government, the country's largest employer, "as a model in responding to the effects of domestic violence on its workforce." Pursuant to the memorandum, the Office of Personnel Management developed a guidance in February 2013 which can be a source of promising practices for businesses. *See* OFFICE OF PERSONNEL MANAGEMENT, GUIDANCE FOR AGENCY-SPECIFIC DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING POLICIES, *available at* https://www.opm.gov/policy-data-oversight/worklife/news/2013/2/opm-guide-for-agency-specific-domestic-violence-sexual-assault-and-stalking-policies-released/.

domestic and sexual violence (EEOC Q&A).[83] Some victims have pursued and obtained redress under Title VII.[84] Several states have enacted laws that specifically prohibit employment discrimination against survivors of violence.[85] But this still leaves the vast majority of workers who experience domestic violence unprotected from discriminatory practices based on the fact that they are victims.

iii. Gendered Stereotypes About Victims of Domestic Violence Drive Discriminatory Employment Actions

In some cases, survivors lose jobs or access to them because of violence-related absences or productivity or performance problems. But many survivors also lose their jobs or employment opportunities because of their employers' gendered stereotypes about survivors, as both the EEOC Q&A and proposed regulations recognize.

Price Waterhouse v. Hopkins affirmed sex discrimination includes discrimination based on sex stereotypes – social norms and expectations about appropriate behavior, roles, and appearance for men and women. Although both women and men can be victims of domestic violence, and such violence occurs in opposite- and same-sex relationships, the majority of victims of domestic violence are women and the majority of perpetrators are men. This has led to the creation of gendered stereotypes about victims and perpetrators of violence.

For instance, female victims are often accused of being untrustworthy, hysterical, or prone to exaggerating arguments or disagreements with partners in an effort to extract an advantage or sympathy. A female victim may be painted as a shrew who is deliberately "making trouble" for

[83] EEOC, QUESTIONS AND ANSWERS: THE APPLICATION OF TITLE VII AND THE ADA TO APPLICANTS OR EMPLOYEES WHO EXPERIENCE DOMESTIC OR DATING VIOLENCE, SEXUAL ASSAULT, OR STALKING (2012), *available at* http://www.eeoc.gov/eeoc/publications/qa_domestic_violence.cfm.

[84] Over the years, courts have recognized Title VII sex discrimination claims, including sexual harassment, by plaintiffs who were victims of domestic violence and/or sexual assault. *See, e.g*., *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (finding hostile work environment claim where plaintiff had been sexually assaulted by her co-worker); *Crowley v. LL Bean, Inc*., 303 F.3d 387 (1st Cir. 2002) (upholding jury verdict on hostile work environment claim and systemic sex discrimination claim where plaintiff was stalked and harassed by co-worker, who was fired only after she obtained an order of protection); *Excel Corp. v. Bosley*, 265 F.3d 365 (9th Cir. 1999) (affirming jury's award on sexual harassment and disparate treatment claims, where husband sexually harassed wife, a co-worker, after they separated); *Fuller v. City of Oakland*, 41 F.3d 1522 (9th Cir. 1995) (finding successful hostile work environment sexual harassment claim where police officer who ended romantic relationship with fellow officer was stalked and harassed by him, and employer failed to adequately address the situation); *Rohde v. K.O. Steel Castings Inc.*, 649 F.2d 317 (5th Cir. Unit A 1981) (finding Title VII disparate treatment claim successful where plaintiff, who was physically assaulted by co-worker with whom she was in a relationship, was fired where the male employee who assaulted her was not); *Valdez v. Truss Components, Inc*., No. CV98-1310-RE, 1999 U.S. Dist. LEXIS. 22957 (D. Or. Aug. 19, 1999) (denying summary judgment on disparate treatment claim where plaintiff who dated co-worker and was stalked and threatened by him was fired).

[85] California, Connecticut, Delaware, Hawaii, Illinois, New York, and Oregon have added domestic violence victims (and in some states, sexual assault and stalking victims as well) to the classes of individuals protected from employment discrimination. *See* Cal. Lab. Code §§ 230 & 230.1; Conn. Gen. Stat. § 31-51ss; Del. Code Title 19 § 711(h); Haw. Rev. Stat. § 378-2; 820 Ill. Comp. Stat. 180/30; N.Y. Exec. L. § 296-1(a); Ore. Rev. Stat. §659A.290(2).

the abuser with baseless accusations in order to punish him or her.[86] Conversely, the abusive partner may be perceived by the community and the employer as a "good provider," as well as credible and rational. If they are believed, female victims of domestic violence can find themselves in a double bind, like the female plaintiff in *Price Waterhouse*. If they disclose the violence and leave a violent partner or situation, they are often blamed for breaking up the family. But if victims stay in a violent situation, their credibility and judgment are questioned, and they may be accused of endangering their children.[87]

The belief that domestic violence is a "private" or "personal" matter often underlies employers' discomfort and reactive behavior when confronted with the workplace impacts of domestic violence. Mostly female victims are often blamed for the violence against them; they are presumed to have provoked the violent or controlling behavior, or seen to be lying in order to deliberately cause problems for the abuser. When an abuser appears at the workplace and disrupts it or issues threats, the worker-survivor may be blamed for failing to control the abuser's behavior, and be penalized with discipline or termination. Employers may believe that if they fire the worker-victim, she will take the "problem" with her and the violence will no longer spill over into or impact the workplace.[88] In situations where the victim and perpetrator are co-workers, it is often the victim who bears the employment consequences of the violence (firing, transfer, resignation) when it is discovered.[89]

---

[86] *See* Barnett, O. W. (2000). *Why battered women do not leave, Part 1: External inhibiting factors within society*. TRAUMA, VIOLENCE, & ABUSE 1, 343-372.

[87] *See Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002) (examining attitudes about victims of domestic violence in finding that an abused mother's inability to prevent her children from witnessing domestic violence does not in itself constitute neglect, and therefore cannot be the sole basis for an administrative agency's removal of her children from their family home).

[88] Employers may not realize that there are other steps that they can take against the abuser—such as reporting harassment to the police or, in states that authorize it, seeking a workplace restraining order —to address harassing or disruptive conduct, rather than firing the survivor of the violence. Many employers also fail to take into account that their employees may be perpetrators. Workers who are perpetrators of violence also impose costs on their workplaces in terms of absenteeism and lateness, diminished productivity, safety threats, leave to participate in legal proceedings, and using work time or resources to stalk, harass, or threaten a victim. *See* SCHMIDT, M.C. & BARNETT, A., EFFECTS OF DOMESTIC VIOLENCE ON THE WORKPLACE: A VERMONT SURVEY OF MALE OFFENDERS ENROLLED IN BATTERER INTERVENTION PROGRAMS (January 2012), *available at* http://www.uvm.edu/crs/reports/2012/VTDV_WorkplaceStudy2012.pdf; RECKITT, L.G. & FORTMAN, L. A., IMPACT OF DOMESTIC VIOLENCE OFFENDERS ON OCCUPATIONAL SAFETY AND HEALTH: A PILOT STUDY, MAINE DEP'T OF LABOR & FAMILY CRISIS SERVICES (2004), *available at* http://www.state.me.us/labor/labor_stats/publications/dvreports/domesticoffendersreport.pdf.

[89] Many of the cases recognizing Title VII (or state analogue) sex discrimination claims by domestic violence victims are in the context of dating co-workers, where one partner began engaging in abusive or violent behavior at and/or away from work. *See, e.g., Rohde v. K.O. Steel Castings Inc*., 649 F.2d 317 (5th Cir. Unit A 1981) (plaintiff, who was physically assaulted by co-worker with whom she was in a relationship, was fired where the male employee who assaulted her was not); *Sereno-Morales v. Cascade Food Inc*., 819 F. Supp. 2d 1148 (D. Ore. 2011) (plaintiff was fired for refusing to withdraw a restraining order she obtained against her co-worker and former boyfriend, who assaulted her); *Valdez v. Truss Components, Inc*., No. CV98-1310-RE, 1999 U.S. Dist. LEXIS. 22957 (D. Or. Aug. 19, 1999) (plaintiff who dated co-worker and was stalked and threatened by him was fired).

Additionally, employers may retaliate against survivors because they need workplace accommodations/changes, including leave or an altered schedule, which an employer deems costly or complicated. These concerns are especially relevant in the still-recovering economy; if a business has a significant number of applications relative to vacancies for a job, it may be tempted to dispense with an employee it views as "problematic."

The examples in the proposed regulations (and the EEOC Q&A) illustrate how these stereotypes combine in complex ways to undermine victims' attempts to obtain or maintain employment while seeking assistance to ensure safety. Survivors could be denied access to a WIOA program, or be dismissed from one, based on the belief that the survivor would disrupt the program or activity. This is based on several assumptions: the victim is being "dramatic" – that is, exaggerating the partner's behavior because she is a liar and enjoys the attention or sympathy; the victim is unreliable because she is often late or absent for the program or activity, or because the abuse is affecting performance; or the victim's presence at the program or activity will attract the abuser, who causes a disruption or poses a safety threat. All of those assumptions are based on gendered stereotypes of victims of domestic violence.

The second example of sex stereotyping in the proposed regulation is the belief that the victim may be unable to access aid, benefits, service, or training. This may be based on the perception that a victim will need time off for court, to talk to the police, obtain child care, or address medical and legal issues. Program administrators may assume that a victim will be taking care of her children in the absence of other child care options or will need accommodations or modifications to participate. If a victim is being stalked by an abuser, the program administrator may believe that the victim will draw threats to the workplace by being harassed or stalked at work by the abuser.

Given the consequences of these stereotypes, without antidiscrimination protection, survivors have no incentive to disclose the violence they experience or any potential safety threat to a workplace. Moreover, other program participants who observe the treatment of such individuals will be less inclined to disclose violence or threats themselves.

Suggestions for Improvement

We commend DOL for including sex stereotyping of domestic violence victims as an example of sex discrimination. However, we believe program administrators and program participants would benefit from additional illustrative examples and discussion of the ways in which gendered stereotypes about victims of domestic violence could prevent individuals from accessing or participating in training, or accessing aid, benefits or services. For instance, we urge DOL to include examples of how sex discrimination or sex stereotyping can manifest when both the victim and the abusive partner access or participate in the same program or activity.

G. Disparate Impact

We commend DOL for recognizing that policies or practices that have an adverse impact on the basis of sex, and are not program-related and consistent with program necessity, constitute sex

discrimination in violation of WIOA. Addressing this issue of disparate impact is particularly important for combatting the problem of occupational segregation discussed above. Many of the obstacles that women face in nontraditional fields are related to job requirements or criteria that are not job-related or required as a business necessity, but disproportionally exclude and/or otherwise harm women. Requirements that have been shown to have a disparate impact on women entering and advancing in traditionally male-dominated fields include, *inter alia*, minimum height and weight requirements that are unrelated to the job, [90] strength requirements that exceed job necessity,[91] and policies prohibiting large equipment operators from using a restroom while on the job.[92] Such criteria generally do not reflect actual job performance requirements, but rather stereotypical assumptions regarding job qualifications that disproportionally harm and exclude women.

Suggestions for Improvement

We urge DOL to include specific examples, such as those listed above, of the types of policies or practices that may have a disparate impact on the basis of sex, and thus constitute unlawful sex discrimination under WIOA. We further recommend that DOL explicitly state that where physical tests are required due to the demands of the job, accommodations that are available on job sites should be provided during the test. Finally, DOL should explicitly state that there should be uniform interview procedures and questions, such that interviews cannot be used as the basis for excluding certain individuals, who have met other program requirements, without some objective and uniform basis for making such determinations.

H. Discrimination in Pay

We commend DOL for recognizing that employment practices which must remain nondiscriminatory include "deciding rates of pay or other forms of compensation."[93] More than fifty years after the Equal Pay Act became law, women are still paid less than men in nearly every occupation. One study found that out of 265 major occupations, men's median salaries exceeded women's in all but one.[94] This is true whether women work in predominately female occupations, predominantly male occupations, or occupations with a more even mix of men and women.[95] It is also true for women in jobs across the income spectrum.[96]

---

[90] *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979).
[91] *See, e.g., Equal Employment Opportunity Comm'n v. Dial Corp.*, 469 F.3d 735 (8th Cir. 2006); *Legault v. Russo*, 842 F. Supp. 1479 (D.N.H. 1994).
[92] *See, e.g., Johnson v. AK Steel Corp*, 2008 WL 2184230 (S.D. Ohio May 23, 2008).
[93] Implementation of the Nondiscrimination and Equal Opportunity Provisions of WIOA, 81 Fed. Reg. 4494 at 4545 (§ 38.4(s)(6)).
[94] Frank Bass, *Shining Shoes Best Way Wall Street Women Outearn Men*, BLOOMBERG BUSINESSWEEK (Mar. 16, 2012), *available at* http://www.businessweek.com/news/2012-03-16/the-gender-pay-disparity.
[95] ARIANE HEGEWISCH & MAXWELL MATITE, INST. FOR WOMEN'S POLICY RESEARCH, THE GENDER WAGE GAP BY OCCUPATION (2014), *available at* http://www.iwpr.org/publications/pubs/the-gender-wage-gap-by-occupation-2014-and-by-race-and-ethnicity.

As discussed above, women working full time, year round in 2014 typically made only 79 percent of the wages made by men working full time, year round.[97] And the gap in wages is far worse for women of color.[98] Lesbian women still earn less than men, regardless of men's sexual orientation.[99] Women in same-sex couples have a median personal income of $38,000, compared to $47,000 for men in same-sex couples and $48,000 for men in different-sex couples.[100] Yet women's paychecks are more critical to their families than ever.

The wage gap typically translates into $10,762 less in median annual earnings for women, leaving women and their families shortchanged.[101] A woman working full time, year round typically loses $430,480 over the course of her career, or a 40-year period, due to the wage gap.[102] To make up this gap, a woman would have to work more than eleven years longer.[103]

Occupational segregation stands as a barrier to equal pay by keeping women in disproportionately low-paid jobs compared to men. As discussed above, jobs that are predominantly done by women are often devalued precisely because they are "women's work."[104] For example, although job tasks for janitors and building cleaners are extremely similar to job tasks for maids and housekeeping cleaners,[105] the overall median weekly wage for a male-dominated janitor and building cleaner job is $85 dollars, which is 21 percent higher than the median weekly wage for a female-dominated maid and housekeeping cleaner job.[106]

---

[96] *Id.*
[97] THE WAGE GAP OVER TIME, *supra* note 1.
[98] THE WAGE GAP OVER TIME: AFRICAN AMERICAN WOMEN, *supra* note 3; THE WAGE GAP OVER TIME: HISPANIC WOMEN, *supra* note 4.
[99] M.V. LEE BADGETT ET AL., THE WILLIAMS INSTITUTE, BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION 14 (2007), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Sears-Lau-Ho-Bias-in-the-Workplace-Jun-2007.pdf.
[100] GARY J. GATES, SAME-SEX AND DIFFERENT SEX-COUPLES IN THE AMERICAN COMMUNITY SURVEY 2005-2011, THE WILLIAMS INSTITUTE 3-4 (Feb. 2013), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/ACS-2013.pdf. Figures only include people in labor force. Due to data limitations, they do not include lesbian or gay individuals who are not part of a couple. These figures are median annual personal income for all workers in the labor force – these figures differ from the median annual earnings for full-time, year-round workers reported for the wage gap and are not directly comparable.
[101] NAT'L WOMEN'S LAW CTR., THE WAGE GAP IS STAGNANT FOR NEARLY A DECADE (2015), *available at* http://nwlc.org/wp-content/uploads/2015/08/wage_gap_is_stagnant_9.23.15.pdf.
[102] *Id.*
[103] *Id.*
[104] Philip N. Cohen, *Devaluing and Revaluing Women's Work*, HUFFINGTON POST (Feb. 1, 2010, 9:38 AM), *available at* http://www.huffingtonpost.com/philip-n-cohen/devaluing-and-revaluing-w_b_444215.html.
[105] *Compare Summary Report for:37-2011.00 - Janitors and Cleaners, Except Maids and Housekeeping Cleaners*, O*NET ONLINE, http://www.onetonline.org/link/summary/37-2011.00 (last updated 2014) (describing duties of janitors and cleaners), *with Summary Report for: 37- 2012.00 - Maids and Housekeeping Cleaners*, O*NET ONLINE, http://www.onetonline.org/link/summary/37-2012.00 (describing duties of maids and housekeeping cleaners) (last updated 2012).
[106] NAT'L WOMEN'S LAW CTR., 50 YEARS AND COUNTING: THE UNFINISHED BUSINESS OF ACHIEVING FAIR PAY n. 65 (2014), *available at* http://www.nwlc.org/sites/default/files/pdfs/final_nwlc_equal_pay_report.pdf.

Punitive pay secrecy policies and practices also act as a significant obstacle to achieving equal pay. Such policies perpetuate pay discrimination by making it difficult for individuals to learn about unlawful pay disparities. In fact, the majority of private sector employers have policies prohibiting employees from discussing their compensation or discouraging employees from doing so.[107]

For those women who are able to discover pay disparities and bring their cases to court, a loophole in the Equal Pay Act means that employers are often not held accountable for discrimination. For example, some courts have accepted a "market forces" theory to justify pay differentials,[108] even where other courts have cautioned against using a "market forces theory" to justify discrimination.[109] Some courts have authorized employers to pay male employees more than similarly situated female employees based on the higher prior salaries enjoyed by those male workers without any analysis as to whether the prior salary itself was inflated because of sex discrimination.[110] And some have abandoned any effort to determine whether the employer's purported "factor other than sex" is related to the qualifications, skills, or experience needed to perform the job.[111]

---

[107] ARIANE HEGEWISCH, CLAUDIA WILLIAMS, & ROBERT DRAGO, INST. FOR WOMEN'S POLICY RESEARCH, PAY SECRECY AND WAGE DISCRIMINATION (2014), *available at* http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination-1/at_download/file (revealing that 60 percent of male employees and 62 percent of female employees report that their employers either prohibit or discourage the discussion of wages).

[108] *See Merillat v. Metal Spinners, Inc*., 470 F.3d 685, 697, 697 n.6 (7th Cir. 2006) (noting that the court has "held that an employer may take into account market forces when determining the salary of an employee," although cautioning in a footnote against employers taking advantage of market forces to justify discrimination); *Tavernier v. Healthcare Management Associates, Inc*., No. 0:10-01753-MBS, 2012 WL 1106751, at *11 (D.S.C. Mar. 30, 2012) (noting that "courts have, in certain circumstances, found that market forces constitute 'factors other than sex'" but granting summary judgment to defendant employer because plaintiff was unable to rebut employer's articulated reasons for paying the male employee a higher salary, including that he holds a relevant Master's Degree, his work history, and his salary at his previous employer); *Greer v. Univ. of South Carolina*, 2012 WL 405773, at *8 (D.S.C. Jan. 20, 2012) (accepting employer's market forces justification as one of several proffered legitimate reasons for a salary differential that is not based on sex); *Schultz v. Department of Workforce Development*, 752 F.Supp.2d 1015, 1028 (W.D. Wis. 2010) (noting that "[a]n employer may take market forces into account when determining the salary of an employee, provided there is no evidence suggesting that the employer took advantage of any kind of market forces that would permit different pay for a male and female for the same position").

[109] *See, e.g., Glenn v. Gen. Motors Corp*., 841 F.2d 1567 (11th Cir. 1988) (rejecting employer's "market forces" defense to pay discrimination that the plaintiffs previously earned lower salaries prior to promotion).

[110] *See, e.g., Sparrock v. NYP Holdings, Inc.*, No. 06 Civ. 1776, 2008 WL 744733, at *16 (S.D.N.Y. Mar. 4, 2008) (finding that "salary matching is permitted under the Equal Pay Act" because "it allows an employer to reward prior experience and to lure talented people from other settings." The district court came to this conclusion despite the fact that the male and female employees had similar experience and qualifications for the position); *Covington v. Southern Illinois University*, 816 F.2d 317, 322-23 (7th Cir. 1987) (holding that the University's "salary retention policy" that kept employees' same level of pay regardless of their position at the University, constituted a non-discriminatory "factor other than sex"); *but see Glenn v. Gen. Motors Corp*., 841 F.2d 1567 (11th Cir. 1988) (holding, after reviewing legislative history of the Equal Pay Act, that prior salary alone cannot justify wage disparities).

[111] *See, e.g., Glunt v. GES Exposition Servs*., Inc., 123 F. Supp. 2d 847, 859 (D. Md. 2000) (*citing Mazzella v. RCA Global Commc'ns, Inc*., 814 F.2d 653 (2d.Cir. 1987); *Walter v. KFGO Radio*, 518 F. Supp. 1309 (D.N.D. 1981)) (stating that "[o]ffering a higher starting salary in order to induce a candidate to accept the employer's offer over competing offers has been recognized as a valid factor other than sex justifying a wage disparity," and that "[i]t is

Suggestions for Improvement

Given the persistence of pay discrimination, we are concerned that simply listing compensation as a covered employment practice is insufficient to call recipients' attention to their obligation to not discriminate against employees, participants, or applicants in compensation. We urge DOL to adopt language consistent with the regulatory language included in proposed § 60–20.4 incorporated into the proposed OFCCP rule, *Discrimination on the Basis of Sex*, published in January 2015.[112] Section 60-20.4 of this proposed rule includes important examples of how pay discrimination may occur—for example, by contractors limiting career advancement opportunities based on sex[113]—and clarifies the relevant factors in examining "similarly situated" employees for purposes of analyzing a compensation discrimination claim.[114] These examples will help clarify for employers what pay discrimination looks like, making it easier for employers to self-correct discrimination. Finally, the proposed rule provides an important clarification of the definition of "compensation" that we urge DOL to adopt.[115] Including similarly explicit language in the WIOA nondiscrimination regulations would not only reflect current legal standards, but would provide much needed consistency and clarity across DOL programs.

In addition to the language discussed above, we urge DOL to explain in the final regulations that factors other than sex relied upon in determining compensation must be job-related, consistent with business necessity, and account for the entire pay differential. In addition, to ensure that past discrimination is not carried forward into an employee's tenure with a new employer, DOL should advise that prior pay matching should be a rare occurrence. Finally, the final regulations should clarify that punitive pay secrecy policies that interfere with enforcement of wage discrimination protections violate antidiscrimination law. Importantly, DOL should make clear that discrimination in compensation based on sex is prohibited both against employees employed in the administration of WIOA programs and against WIOA program participants or applicants who might receive remuneration.

III. Discrimination on the Basis of Pregnancy – § 38.8

We strongly support DOL proposing a section of the regulations specifically devoted to setting out the standard for pregnancy discrimination. Decades after Title IX and the PDA made it illegal to discriminate against a woman because of her pregnancy, women still face

---

widely recognized that an employer may continue to pay a transferred or reassigned employee his or her previous higher wage without violating the EPA, *even though the current work may not justify the higher wage*." (emphasis added)).

[112] Discrimination on the Basis of Sex, 80 Fed. Reg. 5246.

[113] *Id.* at 5278.

[114] *Id.*

[115] *Id.* at 5255 ("payments made to, or on behalf of, an employee or offered to an applicant as remuneration for employment, including but not limited to salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and contributions to retirement.")

discrimination on the job—and in job training programs—when they become pregnant. Women are seeking to work through their pregnancies in greater numbers than ever before. Between 2006 and 2008 (the most recent time period for which data are available), nearly two-thirds of first-time mothers worked while pregnant.[116] Women are also working later into their pregnancies. Almost nine out of ten (88 percent) first-time mothers who worked while pregnant worked into their last two months of pregnancy in 2006-2008, and more than eight out of ten (82 percent) worked into their last month of pregnancy.[117] Ultimately, three-quarters of women entering the workforce will find themselves pregnant and employed at least once.[118]

One reason women are working through their pregnancies in greater numbers is that women's income is critically important to today's families. Working women are primary breadwinners in more than 41 percent of families and they are co-breadwinners in another 23 percent of these families.[119] Women working in low-wage jobs are even more likely to bring in income that is crucial to their families; in married-couple families with children in the bottom income quintile, nearly 70 percent of working wives are primary breadwinners, earning as much or more than their husbands.[120] Additionally, 74 percent of single mothers worked in 2013, providing critical income as heads of household.[121] For most families today, and particularly those struggling financially, subsisting on a partner's income alone—if it is even available—is simply not an option. When pregnant women aren't even permitted to participate in a job training program or activity or are forced out of such programs and activities, whole families pay the price.

Many women are able to train or work throughout their pregnancies without any need for changes, but some have a medical need for temporary accommodations to protect their health and safety on the job. Pregnant workers in physically demanding, inflexible, or hazardous jobs or training programs are particularly likely to need accommodations at some point during their pregnancies to continue working safely. Accommodations are particularly important in physically demanding jobs because research shows that physically demanding work—including

---

[116] U.S. CENSUS BUREAU, MATERNITY LEAVE AND EMPLOYMENT PATTERNS OF FIRST-TIME MOTHERS: 1961-2008 4 (Table 1) (2011), *available at* http://www.census.gov/prod/2011pubs/p70-128.pdf.

[117] *Id.* In 2006-2008, 81.6 percent of first-time mothers who worked during pregnancy reported working until one month (or less) before birth and an additional 6.6 percent reported working until 2 months before birth.

[118] MELISSA ALPERT & ALEXANDRA CAWTHORNE, CTR. FOR AM. PROGRESS, LABOR PAINS: IMPROVING EMPLOYMENT AND ECONOMIC SECURITY FOR PREGNANT WOMEN AND NEW MOTHERS 2 (2009), *available at* https://cdn.americanprogress.org/wp-content/uploads/issues/2009/08/pdf/labor_pains.pdf.

[119] *See* GLYNN, *supra* note 7, at 7. Additionally, according to a new study out of PEW, "breadwinner moms" are "made up of two very distinct groups: 5.1 million (37%) are married mothers who have a higher income than their husbands, and 8.6 million (63%) are single mothers." WENDY WANG, KIM PARKER & PAUL TAYLOR, PEW RESEARCH CTR., BREADWINNER MOMS: MOTHERS ARE THE SOLE OR PRIMARY PROVIDER IN FOUR-IN-TEN HOUSEHOLDS WITH CHILDREN; PUBLIC CONFLICTED ABOUT THE GROWING TREND 1 (2013), *available at* http://www.pewsocialtrends.org/files/2013/05/Breadwinner_moms_final.pdf.

[120] SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, THE NEW BREADWINNERS: 2010 UPDATE 3 (2012), *available at* https://cdn.americanprogress.org/wp-content/uploads/issues/2012/04/pdf/breadwinners.pdf.

[121] Nat'l Women's Law Ctr. calculations based on U.S. Census Bureau, Current Population Survey, 2014 Annual Social And Economic Supplement Table FINC-03 (2013), *available at* http://www.census.gov/hhes/www/cpstables/032014/faminc/finc03_000.htm. Figures are for female-headed families.

jobs that require prolonged standing, long work hours, irregular work schedules, heavy lifting, or high physical activity—carries a statistically-significant increased risk of preterm delivery and low birth weight.[122] Mismatch between job duties and the demands of pregnancy also harms women in relatively high-paying, physically demanding jobs traditionally held by men—jobs that already are often particularly difficult for women to enter. And for the five to eight percent of pregnant women experiencing intimate partner violence, such mismatch undermines the economic independence that is critical to escaping a violent relationship.[123] When women face a physical conflict between work and childbearing, they will often lose their job, and their families will lose income at the very moment their financial needs increase.

Given the potential severity of pregnancy discrimination, clarity as to recipients' legal obligations towards pregnant WIOA applicants, participants, and employees is essential. Proposed § 38.8 provides this important clarity and is in line with current law.

i. Title IX and the Pregnancy Discrimination Act

Title IX of the Education Amendments of 1972 prohibits sex discrimination in any educational program or activity receiving federal financial assistance, including WIOA programs.[124] Federal regulations promulgated under Title IX—including DOL regulations—unequivocally include discrimination based on pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom as prohibited forms of sex discrimination.[125]

In the employment context, Congress passed the PDA in 1978 to make clear that sex discrimination includes pregnancy discrimination and to ensure that workers with physical limitations due to pregnancy, childbirth, or related medical conditions are not treated worse than workers with other types of physical limitations.[126] The PDA prohibits discrimination on the basis of pregnancy and requires employers to treat pregnant women as well as they treat other employees who are "similar in their ability or inability to work."[127] A primary purpose of the PDA was "to prohibit employer policies which force women who become pregnant to stop working regardless of their ability to continue."[128] Although the text of the PDA and the text of Title IX and its regulations differ slightly, there is ample evidence that Congress intended Title IX requirements and prohibitions on sex discrimination to be analogous to the same requirements

[122] *See* Letter from Wendy Chavkin, MD, MPH, to New York City Council Member James Vacca, (Nov. 29, 2012), http://www.abetterbalance.org/web/images/stories/Chavkin_letter_FINAL.pdf.
[123] NAT'L WOMEN'S LAW CTR., THE PREGNANT WORKERS FAIRNESS ACT: MAKING ROOM FOR PREGNANCY ON THE JOB (June 2015), *available at* https://nwlc.org/wpcontent/uploads/2015/08/pwfa_making_room_for_pregnancy_on_the_job_june_2015.pdf.
[124] Pub. L. No. 92-318, 86 Stat. 235 (1972) (codified at 20 U.S.C. §§1681-1688); 34 C.F.R. 106.40(a); 20 U.S.C. 1687 (Title IX provision applicable to vocational education and training programs).
[125] *See* 65 FR 52858 at 52859; 34 C.F.R. pt. 106 (U.S. Department of Education Regulations).
[126] 42 U.S.C. § 2000e(k).
[127] *Id.*
[128] S. REP. NO. 95-331 at 6 (1978).

and prohibitions in Title VII.[129] Moreover, courts frequently rely on both the PDA and Title IX when interpreting Title IX claims.[130]

ii. *Young v. UPS*

In March 2015, the Supreme Court held in *Young v. UPS* that if an employer accommodates some subset of nonpregnant workers with disabilities who are similar to pregnant workers in ability to work, while denying accommodations both to pregnant workers and to some other subset of nonpregnant workers with disabilities on the basis of a pregnancy-neutral rule, that this is not a *per se* violation of the PDA.[131] However, the Court emphasized that such an employer cannot justify a refusal to accommodate pregnant workers based merely on expense or convenience.[132] Moreover, even if an employer offers some other apparently legitimate reason for refusing to accommodate pregnancy, the employer may still violate the PDA if the employer's accommodation practices impose a significant burden on pregnant workers—for example, if the employer accommodates a large percentage of nonpregnant workers with physical limitations while failing to accommodate a large percentage of pregnant workers with physical limitations—that outweigh the offered justification.[133]

iii. *Americans with Disabilities Act Amendments Act*

In addition, in 2008, Congress passed the Americans with Disabilities Act Amendments Act (ADAAA) to require employers to accommodate a much wider range of temporary disabilities than were previously reached under the original ADA or Section 503 of the Rehabilitation Act.[134] As a result, many pregnant workers with pregnancy-related impairments such as gestational diabetes or hyperemesis gravidarum will themselves have disabilities covered by the ADAAA and be entitled to reasonable accommodations.[135]

Moreover, whether or not a pregnant worker is herself considered to have a covered disability, the ADAAA has implications for employers' legal obligations under the PDA. The ADAAA requires the accommodation of a large percentage of non-pregnant workers who are similar in ability to work to workers with typical physical limitations arising out of pregnancy. For example, the ADAAA requires employers to accommodate a temporary back injury resulting in a 20-pound lifting restriction,[136] or a leg condition that precludes standing for more than two hours without significant pain,[137] or a condition that causes an individual to experience shortness of

[129] *See* Implementation of the Nondiscrimination and Equal Opportunity Provisions of WIOA, 81 Fed. Reg. at 4511, n. 150.
[130] *See, e.g.*, *Franklin v. Gwinnett Cnty. Pub. Schs*., 503 U.S. 60, 75 (1992) (interpreting Title IX's substantive prohibitions by reference to Title VII analysis).
[131] 135 S. Ct. at 1351-52.
[132] *Id*. at 1354.
[133] *Id.*
[134] 42 U.S.C.A. § 12101.
[135] *See* ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION, *supra* note 17.
[136] 29 C.F.R. pt.1630, app. § 1630.2(j)(1)(viii).
[137] *Id.* at §1630.2(j)(4).

breath and fatigue when walking reasonable distances.[138] An employer who makes these accommodations cannot refuse on the mere basis of cost or convenience to also provide an accommodation when pregnancy renders a worker temporarily unable to lift more than 20 pounds, stand without pain for more than two hours, or walk a reasonable distance without becoming short of breath. As a result, the ADAAA's expansive coverage will mean that most non-pregnant employees similar in ability to work to pregnant workers with physical limitations will be accommodated in the workplace; the Supreme Court's decision in *Young* makes clear that employers who refuse to also accommodate pregnant workers in this situation are at significant risk of liability under the PDA.

iv. The Proposed Regulations

We strongly support DOL's inclusion of an example of unlawful pregnancy discrimination specifying that it may be unlawful disparate treatment to deny accommodations to pregnant workers when accommodations are provided to workers similar in ability to work, or are required to be provided to workers similar in ability based on a recipient's policy or relevant laws. The proposed regulations indicate that this approach to pregnancy accommodation is "intended to align with the U.S. Supreme Court's decision in *Young v. UPS*."[139] We commend DOL for seeking to align the proposed rule with respect to pregnancy accommodation with the Court's decision in *Young*.

We agree with DOL's estimation of the burdens on recipients of accommodating pregnant applicants, participants, and employees. Many of the accommodations requested by pregnant workers, such as sitting rather than standing, avoiding heavy lifting, and taking breaks to go to the bathroom, are all accommodations employers frequently provide to employees with disabilities. A survey by the Job Accommodation Network, a technical assistance provider to DOL's Office of Disability Employment Policy, found that the majority of employers that provided accommodations to employees with disabilities reported that the accommodations did not impose any new costs on the employer.[140] In addition, employers that provide accommodations to workers with disabilities and voluntary workplace flexibility programs report a strong return on investment, including reduced workforce turnover, increased employee satisfaction and productivity, and savings in workers' compensation and other insurance costs.[141]

---

[138] *Id.*

[139] Implementation of the Nondiscrimination and Equal Opportunity Provisions of WIOA, 81 Fed. Reg. at 4511.

[140] JOB ACCOMMODATION NETWORK ("JAN"), WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT 4 (2012), *available at* http://askjan.org/media/downloads/LowCostHighImpact.pdf.

[141] *See, e.g.*, Helen P. Hartnett et. al, E*mployers' Perceptions of the Benefits of Workplace Accommodations: Reasons to Hire, Retain, and Promote People with Disabilities*, 34 J. VOC'L REHABILITATION 17, 21 (2011), *available at* http://iospress.metapress.com/content/c7l182x6jk016586/fulltext.pdf (finding that employers report that providing accommodations for employees directly affects the employees' happiness as well as improved morale and work quality, while employers benefit from cost-savings and increases in productivity); JAN, WORKPLACE ACCOMMODATIONS, *supra* note 140, at 4 (finding that employers experience multiple direct and indirect benefits

We also commend DOL for recognizing within the pregnancy discrimination section of the proposed regulations that a "pregnancy-related medical condition" may also be a disability. In particular, we commend identification of lactation as a pregnancy-related medical condition, given that some courts have erroneously held it is not.[142] The proposed regulation appropriately follows EEOC Guidance and the Fifth Circuit in reaching lactation.[143] These revisions to the nondiscrimination regulations will help ensure that pregnant workers receive the accommodations they need to protect their, and their families', economic security.

Suggestions for Improvement

i. Set Out the Complete PDA Nondiscrimination Standard

While we support DOL's proposal to incorporate the PDA standard by prohibiting discrimination "on the basis of pregnancy, childbirth, or related medical conditions, including childbearing capacity," as forms of sex-based discrimination, this language only covers part of the PDA nondiscrimination standard. We urge DOL to strengthen the regulations by setting forth the complete PDA nondiscrimination standard in the first paragraph of § 38.8, including that recipients are required to treat applicants, program participants, and employees of childbearing capacity and those affected by pregnancy, childbirth, or related medical conditions the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work. Incorporating this language provides important clarity for recipients as to their obligations towards pregnant workers under WIOA.

ii. Enumerate Additional Examples of Pregnancy-Related Medical Conditions

We commend DOL for setting out specific examples of pregnancy-related medical conditions, including lactation, in the proposed regulations and for making clear that these examples are illustrative rather than exhaustive. We urge DOL further to include as an example of pregnancy discrimination, discrimination against women who face adverse action because they are breastfeeding or because they request accommodations to express breast milk.

---

from accommodating employees, such as retaining a qualified employee, increased employee productivity, and cost-savings by eliminating costs of training a new employee).

[142] *See e.g., Martinez v. N.B.C.*, 49 F. Supp. 2d 305, 309-10 (S.D.N.Y. 1999); *Wallace v. Pyro Mining*, 789 F. Supp. 867, 869-70 (W.D. Ky. 1990), *aff'd,* 951 F.2d 351 (6th Cir. 1991) (per curiam); *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487, 1492 (D. Colo. 1997) ("[B]reast-feeding and child rearing concerns after pregnancy are not medical conditions related to pregnancy or childbirth within the meaning of the PDA."); *Barrash v. Bowen*, 846 F. 2d 927, 931-32 (4th Cir. 1988) (opining without citation that the PDA only covered medical conditions that were "incapacitating" and therefore did not cover an employee's request for extended leave in order to breastfeed).

[143] *See EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 430 (5th Cir. 2013) (discrimination on the basis of lactation is covered under Title VII generally and as a "related medical condition" under the PDA); ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION, *supra* note 17; *see also Statement of Chair Jenny R. Yang and General Counsel P. David Lopez on the Supreme Court's Ruling in* Young v. UPS, EEOC, *available at* http://www.eeoc.gov/eeoc/litigation/statement_young_v_ups.cfm (including "the application of the Pregnancy Discrimination Act to lactation and breastfeeding" among the aspects of the guidance unaffected by the decision).

We also urge DOL to include additional examples of pregnancy-related medical conditions (and in some cases, disabilities), including but not limited to the following examples provided in the EEOC Guidance: impairments of the reproductive system that require a cesarean section, cervical insufficiency, pregnancy-related anemia, pregnancy-related sciatica, pregnancy-related carpal tunnel syndrome, gestational diabetes, nausea that can cause severe dehydration, abnormal heart rhythms, swelling due to limited circulation, pelvic inflammation, symphysis pubis dysfunction, breech presentation, pregnancies characterized as "high-risk," and depression (including but not limited to post-partum depression).[144] Such examples, while not constituting an exhaustive list, will provide recipients with greater clarity regarding the broad spectrum of pregnancy-related conditions.

iii. Clarify the Young v. UPS Accommodation Standard

DOL has requested comments on "how best to operationalize application of the Court's pretext analysis" in *Young.*[145] We believe the rule proposed in § 38.8 appropriately reflects the *Young* standard. However, in the final regulations, DOL should make clear several important points about the *Young* pretext analysis:

- *Young* indicates that employers impose a significant burden on pregnant workers when they "accommodate[] a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."[146] It did not require a showing that an employer accommodates a "majority" of nonpregnant workers with limitations in ability to work while failing to accommodate a "majority" of pregnant workers with limitations in ability to work, and no such requirement should be read into the decision.
- Evidence that an employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers is not the only way to demonstrate a "significant burden" supporting an inference of discrimination. For example, *Young* strongly suggests that if a plaintiff shows an employer has multiple policies accommodating non-pregnant workers, but not accommodating pregnant workers, this also could show a "significant burden."[147]
- Relatedly, a "significant burden" supporting an inference of discrimination can be based on the conclusion that an employer's policies would reasonably be expected to result in the accommodation of a large percentage of nonpregnant workers and the denial of accommodation for a large percentage of pregnant workers. For example, if an employer has refused to accommodate a pregnancy-related lifting restriction and

[144] ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES, *supra* note 17.
[145] Implementation of the Nondiscrimination and Equal Opportunity Provisions of WIOA, 81 Fed. Reg. at 4512.
[146] 135 S. Ct. at 1354.
[147] *Id.* at 1354-55 ("Young might also add that the fact that UPS has multiple policies that accommodate nonpregnant employees with lifting restrictions suggests that its reasons for failing to accommodate pregnant employee with lifting restrictions are not sufficiently strong [and could give rise to an inference of discrimination].")

> explains that this is because it has a policy of only making accommodations for ADA-qualifying conditions, it could reasonably be expected that the employer would accommodate a large percentage of those workers with non-pregnancy related multi-month lifting restrictions, given the ADAAA's broadening of the definition of disability, thus demonstrating a significant burden.[148]

Given the implications of the ADAAA and the Court's emphasis on employer policies, we particularly commend DOL for explaining in the pregnancy accommodation example in proposed §38.8(d) that denying pregnant individuals reasonable accommodations may be discriminatory when such accommodations "*are required to be provided by a recipient's policy or by other relevant laws*." DOL should make explicitly clear in the final regulations that, because of the ADAAA, in many instances today recipients will have a legal obligation to accommodate the universe of non-pregnant individuals who have precisely the limitations typically experienced by pregnant individuals. As a result, recipients will typically be required to provide these accommodations to pregnant applicants, program participants, and employees as well under the standard articulated by the Court in *Young*. In light of the significant implications of the ADAAA on recipients' pregnancy accommodation obligations, we urge DOL to include an example in § 38.8(d) explaining that the ADAAA's expansive coverage means that most non-pregnant individuals similar in ability to work to pregnant individuals with physical limitations will be accommodated and recipients who refuse to also accommodate pregnant workers in this situation are at significant risk of liability.

We also urge DOL to make clearer that not only are a recipient's policies and other laws relevant to the *Young* pretext analysis, but also the recipient's actual provision of accommodations regardless of whether they are provided pursuant to a policy or a law. As presently written, proposed § 38.8(d) could be read to suggest that reasonable pregnancy accommodations may only be required when an employer has a *policy* requiring accommodations for others or when other relevant laws require others be accommodated. But a recipient may provide accommodations for certain applicants, program participants, or employees even when the recipient isn't required by law or its own policy to provide such accommodations. The recipient's actual provision of such accommodations is no less relevant to the determination of whether the recipient must also provide accommodations to pregnant applicants or participants. Consequently, we urge DOL to amend the language in § 38.8(d) to read "*when such accommodations or modifications are provided, or are required to be provided by a recipient's policy or by other relevant laws, to other applicants or participants. . . .*"

[148] Indeed, the Court noted in *Young* that the passage of the ADAAA, which occurred after Young initiated her lawsuit against UPS, had important implications for pregnancy accommodation analysis. The ADAAA, the Court stated, "expanded the definition of 'disability' under the ADA to make clear that 'physical or mental impairments that substantially limit' an individual's ability to lift, stand, or bend are ADA-covered disabilities" and this statutory change "may limit the future significance of our interpretation of the [Pregnancy Discrimination] Act." *Id.* at 1348.

iv. Clarify That the ADAAA Directly Requires Accommodation of Pregnancy-Related Disabilities

We commend DOL for explicitly recognizing in both proposed § 38.8 and in the definition of disability in proposed § 38.4 that a "pregnancy-related medical condition" may also be a disability. Given the wide range of pregnancy-related medical conditions for which the ADAAA requires recipients to offer reasonable accommodations, we encourage DOL to further emphasize pregnancy-related medical conditions as potential disabilities that could require reasonable accommodations. The proposed regulations only make brief reference in § 38.8 to the fact that a pregnancy-related medical condition may also be a disability without explaining that many pregnant workers will therefore be entitled to reasonable workplace accommodations for their temporary, pregnancy-related impairments. To avoid confusion and alert recipients to these separate ADAAA accommodations, it would be beneficial to refer to recipients' obligations to applicants, program participants, and employees with pregnancy-related disabilities under the ADAAA in § 38.8 and to cite to the EEOC's discussion of the ADAAA in its pregnancy discrimination guidance. We also urge DOL to create a separate subsection in the provision defining disability which addresses pregnancy-related conditions as a type of impairment that could constitute a disability necessitating the provision of a reasonable accommodation.

v. Disparate Impact

Finally, the final regulations should reiterate that accommodation policies that exclude employees who need accommodation because of pregnancy may constitute disparate impact discrimination, as well as disparate treatment discrimination. For example, a policy of only offering "light duty" to employees with on-the-job injuries, which excludes employees affected by pregnancy and related conditions, may have a disparate impact and thus would be impermissible unless shown to be job-related and consistent with business necessity.[149] Similarly, an employer policy and/or practice of requiring pregnant employees who need a pregnancy-related accommodation to go out on leave, but not imposing this on non-pregnant employees who are similar in their ability to work may also constitute disparate impact discrimination. For this reason, it would be beneficial to provide additional examples of disparate impact discrimination, in the context of pregnancy-related accommodations, and to note that they are illustrative rather than exhaustive.[150] It would also be helpful to cross-reference this obligation to accommodate under disparate impact theory throughout the proposed rule, to be included, for example, in § 38.7(d).

[149] *See Lehmuller v. Incorporated Village of Sag Harbor*, 944 F. Supp. 1087 (E.D.N.Y. 1996); *Lochren v. Suffolk County*, No. 01-3925, 2008 WL 2039458 (E.D.N.Y. 2008); *Germain v. County of Suffolk*, No. 07-CV-2523 (ADS) (ARL), 2009 WL 1514513 (E.D.N.Y. May 29, 2009*); see generally Young v. United Parcel Serv.*, 2015 WL 1310745, at *6 (setting out disparate impact rule and noting that Young did not bring a disparate impact claim).
[150] *See, e.g., Garcia v. Women's Hospital of Texas*, 97 F.3d 810, 813 (5th Cir. 1996).

V. Harassment – § 38.10

We commend DOL's proposed addition of § 38.10 to clarify existing prohibitions against harassment on the basis of sex. While more than 72 million women work outside the home in the United States,[151] comprising nearly half of workers in all occupations,[152] sexual harassment undermines their best efforts to provide for themselves and their families. One in four women reports that she has experienced sexual harassment at work.[153] In Federal Fiscal Year 2013, over 30,000 harassment charges were filed with the EEOC and state and local Fair Employment Practices Agencies.[154] More than 10,000 of these charges involved sexual harassment—82 percent of which were brought by women.[155] But these charge statistics do not even begin to represent the extent of sexual harassment in the workplace, given that a recent study found that 70 percent of workers who experience sexual harassment say they have never reported it.[156] Whether suffering harassment from supervisors, coworkers,[157] or third parties (such as customers), most victims of harassment are suffering in silence.

Sexual harassment is particularly bad for women in low-wage jobs and in nontraditional fields. Women in better-paying jobs that are nontraditional for women also face high rates of sexual harassment. Construction jobs are an important example. Those jobs typically offer women the opportunity to earn higher wages than in traditionally female occupations.[158] But data indicate that most of the women in these industries face extreme sexual harassment and denigration.[159] A study by Chicago Women in Trades found that 88 percent of female construction workers

---

[151] U.S. Dep't of Labor, Bureau of Labor Statistics, Labor Force Statistics from Current Population Survey, http://www.dol.gov/wb/stats/recentfacts.htm#rates (last visited March 28, 2016).
[152] *Id.*
[153] ABC NEWS & WASHINGTON POST, ONE IN FOUR U.S. WOMEN REPORTS WORKPLACE HARASSMENT (Nov. 16, 2011), *available at* http://www.langerresearch.com/uploads/1130a2WorkplaceHarassment.pdf.
[154] E-mail from Indu Kundra, Senior Program Analyst, Program Planning and Analysis Division, Office of Research, Information and Planning, U.S. Equal Employment Opportunity Commission, to Lauren Khouri, Fellow, Nat'l Women's Law Ctr. (Feb. 27, 2014) (on file with the Nat'l Women's Law Ctr.).
[155] *Id.*; E-mail from Indu Kundra, Senior Program Analyst, Program Planning and Analysis Division, Office of Research, Information and Planning, U.S. Equal Employment Opportunity Commission, to Lauren Khouri, Fellow, Nat'l Women's Law Ctr. (March 3, 2014) (on file with the Nat'l Women's Law Ctr.).
[156] HUFFINGTON POST & YOUGOV, POLL OF 1,000 ADULTS IN UNITED STATES ON WORKPLACE SEXUAL HARASSMENT (Aug. 2013), *available at* http://big.assets.huffingtonpost.com/toplines_harassment_0819202013.pdf.
[157] As noted in section II.F., sexual harassment also can occur in the context of co-workers (or an employee and supervisor) in an intimate relationship. *See supra* note 84. For this reason, we urge DOL to provide varied examples of sex stereotyping and sexual harassment involving two WIOA program participants, or a recipient and a participant
[158] NAT'L WOMEN'S LAW CTR., WOMEN IN CONSTRUCTION: STILL BREAKING GROUND, *supra* note 6.
[159] Gunseli Berik et al., *Gender and Racial Training Gaps in Oregon Apprenticeship Programs* 14 (Dep't of Economics Working Paper Series, Paper No. 2008-15, 2008); MATHEMATICA POLICY RESEARCH, AN EFFECTIVENESS ASSESSMENT AND COST-BENEFIT ANALYSIS OF REGISTERED APPRENTICESHIP IN 10 STATES 50-52 (2012), *available at* http://wdr.doleta.gov/research/FullText_Documents/ETAOP_2012_10.pdf; Elizabeth J. Bader, *Skilled Women Break Through Barriers to Entry and Promotion in Trades Work*, TRUTH-OUT.ORG (October 6, 2012), *available at* http://www.truth-out.org/news/item/11927-skilled-women-break-through-barriers-to-entry-and-promotion-in-trades-work.

experience sexual harassment at work,[160] more than three times the rate of women in the general workforce.[161] The harassment women may face intensifies the already high risks of physical injury, leaving some women afraid for their lives.[162] Yet, out of fear of losing their jobs and the income that is critical to their families, few women report the sexual harassment they face at work but rather tolerate it as part of the culture of the workplace.

Transgender and gender-nonconforming workers experience some of the highest rates of harassment at work across occupations. A study by the National Center for Transgender Equality found that fully 90 percent of transgender workers have encountered some form of harassment or mistreatment at work, and nearly half of transgender workers have experienced an adverse job outcome simply because of who they are.[163] Of those workers, more than a quarter report that they lost their jobs directly due to their gender identity or expression.[164]

Harassment based on sex is prohibited under both Title VII[165] and Title IX.[166] We agree that addressing harassment in § 38.10 will "provide recipients with direction concerning the conduct that may constitute unlawful harassment," allowing them to "better prevent, identify, and remedy it." We commend DOL for incorporating the EEOC Guidelines related to sexual harassment in §38.10 as this will align the prohibitions against sexual harassment under WIOA with the prohibitions under Title VII. Section 38.10 also mirrors the language in OFCCP's proposed rule addressing Discrimination Based on Sex relating to sexual harassment. This language will add much needed clarity and consistency regarding recipients' obligations to protect against and respond to sexual harassment. And specifying that "[h]arassment because of sex" should be broadly interpreted to include "harassment based on gender identity and failure to comport with sex stereotypes; harassment based on pregnancy, childbirth, or related medical conditions; and sex-based harassment that is not sexual in nature but that is because of sex or where one sex is targeted for the harassment,"[167] ensures that the regulation will reach all forms of harassing behavior that interfere with an individual's ability to feel safe while participating in or administering a WIOA program.

---

[160] CHICAGO WOMEN IN TRADES, BREAKING NEW GROUND: WORKSITE 2000 (1992), *available at* http://chicagowomenintrades2.org/wp-content/uploads/2015/02/Breaking-New-Ground2.pdf; ADVISORY COMM. ON OCCUPATIONAL SAFETY & HEALTH, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, WOMEN IN THE CONSTRUCTION WORKPLACE: PROVIDING EQUITABLE SAFETY AND HEALTH PROTECTION (1999), *available at* https://www.osha.gov/doc/accsh/haswicformal.html.

[161] *See* ABC NEWS & WASHINGTON POST, *supra* note 153.

[162] ADVISORY COMM. ON OCCUPATIONAL SAFETY & HEALTH, *supra* note 160 (describing a female construction worker who had hammers and wrenches dropped on her from the scaffolding above by her male coworkers, and describing a female miner who reported that a male coworker threatened to throw her – or, as he called her, "the little bitch" – into concentrator bins, the likely result of which would have been death by suffocation or crushing").

[163] GRANT, MOTTET & TANIS, *supra* note 9, at 51.

[164] *Id.* at 53.

[165] 42 U.S.C. § 2000e.

[166] 20 U.S.C. § 1681.

[167] Implementation of the Nondiscrimination and Equal Opportunity Provisions of WIOA, 81 Fed. Reg. at 4553 (§38.10(b)).

Suggestions for Improvement

First, we urge DOL to include sexual orientation in the definition of "harassment because of sex for the reasons set out in section II.C *supra*.

Second, we urge DOL to address recipients' obligation to prevent and remedy sexual harassment. Unfortunately, the Supreme Court's 2013 decision in *Vance v. Ball State University*[168] regarding when and how an individual can hold a supervisor or employer accountable for sexual harassment at work, only muddied the legal landscape and closed the courthouse doors to many victims of sexual harassment. In *Vance*, the Supreme Court limited the term "supervisor" to an employee who is empowered to take tangible employment actions against a victim of workplace harassment.[169] In a 5-4 decision, the Court defined tangible employment actions as the ability to "effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[170] However, the Court made clear that if an employer relies on a lower-level employee's recommendations to make tangible employment decisions, then the employer may be vicariously liable for harassment by the lower-level employee.[171]

DOL should likewise clarify that a recipient is liable for harassment by other program participants if it was negligent in addressing the harassment; that is, if it knew or had reason to know about the harassing conduct and failed to stop it.[172] Robust enforcement of protections against harassment under this standard is even more important in the wake of *Vance*, as supervisors who solely direct daily activities may be miscategorized as mere coworkers, and many more harassment cases are likely now to be analyzed under the negligence standard. Clarity on what constitutes employer negligence also would help remind WIOA program recipients of their continued responsibility to address harassment from non-employees/non-participants. These factors, as articulated in the *Vance* decision, include evidence that an employer failed to "monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed."[173]

---

[168] 133 S. Ct. 2434 (2013).
[169] *Id*. at 2443.
[170] *Id*.
[171] *Id*. at 2454. Although only eight of the 133 post-*Vance* sexual harassment cases even discuss the concept of effective delegation, in at least six of these cases, employees were able to proceed with their claims under an effective delegation theory. Bryce Covert, *Exclusive: 43 Sexual Harassment Cases That Were Thrown Out Because of One Supreme Court Decision*, THINK PROGRESS (Nov. 24, 2014, 11:24 AM), http://thinkprogress.org/economy/2014/11/24/3596287/vance-sexual-harassment/.
[172] *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742,759 (1998) ("[A]nemployer can be liable [] where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it.").
[173] *Vance*, 133 S.Ct. at 2453.

VI. Implementation and Compliance Measures

We commend DOL for revising the nondiscrimination regulations to ensure recipients' increased compliance. For these rules to be effective and efficiently incorporated into recipients' compliance with the law, it is critical that DOL have a strong implementation plan. We strongly support the revisions to the written assurances and the designation of Equal Opportunity (EO) Officers with sufficient expertise, authority, and resources.[174] These revisions will help ensure that recipients are clear about their legal obligations.

i. Equal Employment Opportunity Notice

In addition, we strongly support the inclusion of a parenthetical in recipients' Equal Opportunity (EO) notice or poster noting that sex, as a prohibited basis for discrimination, includes pregnancy, childbirth and related medical conditions, sex stereotyping, transgender status, and gender identity.[175] We believe that this recitation should also include sexual orientation, for the reasons set out in section II.C *supra*. Given the severity of discrimination on these bases and the frequency with which this type of discrimination still occurs, it is essential to specifically enumerate these types of discrimination to inform those who would not otherwise be aware of the development of the law and to ensure maximum clarity about legal obligations for all recipients. We also strongly support requiring recipients' EO notice to be communicated in orientation presentations to new participants, employees, and/or the general public.[176] This provision will help increase recipient compliance by ensuring that individuals engaging in the federal workforce development system are aware of their rights.

ii. Affirmative Outreach

We also strongly support the proposed revisions to § 38.40 making clear that recipients must take *affirmative* steps to ensure equal access to their programs and activities and requiring these steps to involve "reasonable efforts to include members of the various groups protected by these regulations." This provision is crucial because we are concerned that the nondiscrimination requirements alone are insufficient to end occupational segregation and its economic consequences.

<u>Suggestions for Improvement</u>

As discussed above, the federal workforce development system has often reinforced gender inequities in employment and pay despite the fact that the system has been subject to nondiscrimination regulations for nearly two decades. Accordingly, we urge DOL to strengthen recipients' affirmative outreach obligations by making the list of "reasonable efforts" in §38.40(a)-(c) a list of minimum, specific targeted outreach required of recipients to address underrepresentation or inequitable representation of protected individuals within WIOA

[174] Implementation of the Nondiscrimination and Equal Opportunity Provisions of WIOA, 81 Fed. Reg. at 4558-60.
[175] *Id.* at 4560 (§ 38.35).
[176] *Id.* (§ 38.36).

programs and activities. Since research shows that women might have pursued training for different, higher paying occupations had they received more detailed information about the wages and benefits of different occupations before they began their training,[177] we further urge DOL to require recipients to provide all applicants and program participants information, including wages and benefits, about the full range of employment opportunities offered by the program.[178]

iii. Data Collection

We commend DOL for requiring recipients to collect data and records "designed to allow the Governor and DOL to conduct statistical or other quantifiable data analyses to verify the recipient's compliance with section 188 of WIOA."[179] The collection of such data is essential for ensuring recipient compliance and for moving WIOA programs away from reinforcing gender inequities and towards promoting gender equality and women's economic security.

Suggestions for Improvement

As proposed, the regulations would require the collection of records on the race/ethnicity, sex, age, and, in some circumstances, disability status and limited English proficiency, of every applicant, registrant, participant, terminee, applicant for employment, and employee.[180] However, collecting data on WIOA service and program usage by demographic category would allow for a more precise assessment of the reasons the gender wage gap persists among workers who receive WIOA-funded services. At least one study of local workforce boards shows that such boards agree that better data on who receives services and on other outcomes would help local boards set policy for the workforce development system. [181] Accordingly, we urge DOL to require recipients to collect data for WIOA service and program use by gender and race/ethnic background.

This data should also be cross-tabulated so that recipients and DOL can more readily evaluate the utilization of WIOA services and programs by men or women of a particular racial or ethnic group. Collecting data cross-tabulated by race, sex, and ethnicity would ensure that a recipient's data and records do not mask the barriers to WIOA service access and participation faced by subgroups of individuals, such as African American women or Latinas. Analyzing data by subgroups will help bring to light barriers that otherwise would go unnoticed, and thus will lead

[177] *See e.g.*, HEGEWISCH & LUYRI, *supra* note 12, at 5.
[178] *See* STATEWIDE NONTRADITIONAL LEADERSHIP TEAM AND GENDER EQUITY ADVISORY COMMITTEE & ILLINOIS STATE BOARD OF EDUCATION, EQUITABLE ACCESS TO EMPLOYMENT SERVICES: HOW ARE WOMEN IN ILLINOIS BEING SERVED (2002) (recommending disseminating labor market information regarding nontraditional jobs (and their wages) to all female clients).
[179] Implementation of the Nondiscrimination and Equal Opportunity Provisions of WIOA, 81 Fed. Reg. at 4561 (§38.41(b)(1)).
[180] *Id.* (§ 38.41(b)(2)).
[181] WIDER OPPORTUNITIES FOR WOMEN & NATIONAL ASSOCIATION OF WORKFORCE BOARDS, WHAT LOCAL WORKFORCE BOARDS SAY ABOUT SERVICES TO WOMEN (2002).

to better targeted and more effective outreach. Clarifying that the proposed regulations require the cross-tabulation of data will not require the collection of any new data and does not create any new burdens. Cross-tabulation would simply require that the data already collected and reported by recipients be presented in a format that is more helpful and useful.

iv. Technical Assistance

Finally, implementation of the proposed rule could be strengthened by offering technical assistance to recipients. We encourage DOL to publish compliance assistance materials, including fact sheets and FAQs, along with hosting webinars for the WIOA funding recipient community and conducting listening sessions to identify challenges. DOL should also offer technical assistance for current and prospective recipients who will be covered by the proposed rule, as well as for employees.

In addition, DOL should invest in training its investigators on how to identify and examine cases alleging discrimination based on sex as described in the updated proposed rules. We also recommend that DOL focus its compliance reviews on recipients in industries with the widest gaps between the average wages of men and women, or in industries with the highest rate of EEOC charge filings. This prioritization will ensure a quick accountability for the worst offenders and that recipients who have the privilege of receiving federal funding are following the law.

VII. The Proposed Regulations Are Good for Recipients of WIOA Financial Assistance and Good for the Workforce Overall

In making recipients' obligations clear, the rules will aid workforce development programs in their compliance with the law and promote economy and efficiency by reducing instances of litigation and costs for recipients. Moreover, issuing these changes as regulations rather than guidelines will help hold recipients accountable for discrimination. The regulations will boost the economy by working to eliminate causes of the gender-based pay gap and barriers to entering and advancing in the workforce, which means women will be bringing home higher paychecks for themselves and their families.

We urge DOL to adopt final nondiscrimination regulations swiftly and without any unnecessary delay. The proposed rule will be an effective measure to combat pay discrimination, shrink the wage gap, end occupational segregation and sex-based harassment, provide equal access to career opportunities and equal opportunity for LGBT workers, and prohibit pregnancy discrimination.

The undersigned organizations thank you for the opportunity to provide comments on these important regulations.

Sincerely,

National Women's Law Center
Equal Rights Advocates
Legal Aid Society-Employment Law Center
National Resource Center on Domestic Violence
Legal Momentum
9to5, National Association of Working Women
    9to5 California
    9to5 Colorado
    9to5 Georgia
    9to5 Wisconsin
A Better Balance
African American Ministers In Action
American Association of University Women (AAUW)
American Civil Liberties Union
Anti-Defamation League
Apprenticeship and Nontraditional Employment for Women (ANEW)
Asian Pacific American Labor Alliance, AFL-CIO (APALA)
Augustus F. Hawkins Foundation
California Employment Lawyers Association
Chicago Women in Trades
Coalition of Labor Union Women
Communications Workers of America (CWA)
Compliance USA, Inc.
Construction Training Inc.
Construction Workforce Diversity Alliance
Family Values @ Work
Feminist Majority
FORGE, Inc.
Futures Without Violence
Gender Justice
Human Rights Campaign
Indiana Institute for Working Families
Institute for Science and Human Values, Inc.
J♀urneyman
Jewish Women International
Labor Project for Working Families in partnership with FV@W
The Leadership Conference on Civil and Human Rights
Los Angeles LGBT Center
Make it Work Campaign

Marriage Equality USA
Mississippi Center for Justice
Mississippi Low Income Childcare Initiative
Missouri Women in the Trades
MN Tradeswomen
Moore Community House Women in Construction Program
National Advocacy Center of the Sisters of the Good Shepherd
National Alliance for Partnerships in Equity (NAPE)
National Asian Pacific American Women's Forum
National Association of Human Rights Workers (NAHRW)
National Black Justice Coalition
National Center for Transgender Equality
National Coalition Against Domestic Violence
National Council of Jewish Women
National Council of Jewish Women-California
National Employment Law Project
National Latina Institute for Reproductive Health
National LGBTQ Task Force
National Network to End Domestic Violence
National Organization for Women
    National Organization for Women, New Jersey
    National Organization for Women, New Jersey-Middle Sex County
National Partnership for Women & Families
National Skills Coalition
National Taskforce on Tradeswomen's Issues
Nontraditional Employment for Women (NEW)
On Equal Terms Project
Oregon Tradeswomen, Inc.
PFLAG National
PowHer New York
Restaurants Opportunities Centers United
Sargent Shriver National Center on Poverty Law
Sisters in the Building Trades
The Women's Law Center of Maryland, Inc.
Tradeswomen, Inc.
UltraViolet
Union for Reform Judaism
UNITED SIKHS
URGE: Unite for Reproductive & Gender Equity
Voices for Freedom

West Virginia Women Work
Wisconsin Tradeswomen Network
Women Build Too Education and Trades Foundation-New Jersey
Women Employed
Women of Reform Judaism
Women's Law Project
Workplace Equality Ribbon