

TITLE 11 LABOR AND WORKERS' COMPENSATION
CHAPTER 2 JOB TRAINING
PART 21 WORKFORCE INNOVATION AND OPPORTUNITY ACT GRIEVANCE AND COMPLAINT RESOLUTION PROCEDURES

11.2.21.1 ISSUING AGENCY: New Mexico Department of Workforce Solutions (DWS)
[11.2.21.1 NMAC - N, 7/1/2018]

11.2.21.2 SCOPE: State workforce development board (state board), department of workforce solutions (DWS), chief elected officials (CEOs), local workforce development boards (local boards), local workforce system administrative entities (local administrative entities), workforce system sub-recipients, and workforce system partners.
[11.2.21.2 NMAC - N, 7/1/2018]

11.2.21.3 STATUTORY AUTHORITY: Title I of the Workforce Innovation and Opportunity Act (WIOA) 29 USC Subchapter I of Chapter 32, and 50-14-1 *et seq.* 1978 NMSA.
[11.2.21.3 NMAC - N, 7/1/2018]

11.2.21.4 DURATION: Permanent.
[11.2.21.4 NMAC - N, 7/1/2018]

11.2.21.5 EFFECTIVE DATE: July 1, 2018, unless a later date is cited at the end of a section.
[11.2.21.5 NMAC - N, 7/1/2018]

11.2.21.6 OBJECTIVE: To establish procedures for processing grievances and complaints as required by WIOA. These procedures apply to all levels of the New Mexico workforce system and covers equal opportunity (EO) requirements, discrimination EO grievances, state and local WIOA complaints, and criminal fraud and abuse.
[11.2.21.6 NMAC - N, 7/1/2018]

11.2.21.7 DEFINITIONS: 29 C.F.R. Section 37.4 contains the definitions of the terms used in the implementation of nondiscrimination and equal opportunity requirements of WIOA. For convenience, some of the definitions found in that section are listed below. If a conflict exists between terminology, as defined in this policy and 29 C.F.R. Section 38.4, the definition in 29 C.F.R. Part 38.4 is controlling.

A. Applicant. An individual who is interested in being considered for any WIOA Title I-financially assisted aid, benefit, service, or training by a recipient, and who has signified that interest by submitting personal information in response to a request by a recipient.

B. Participant. An individual who has been determined to be eligible to participate in and who is receiving aid, benefit, service, or training under a program or activity financially assisted in whole or in part under Title I of WIOA. "Participant" includes, but is not limited to, individuals receiving any service(s) or benefit(s) under state unemployment insurance programs.

C. Recipient. An entity to which financial assistance under WIOA Title I is extended, directly from DWS, or through the governor or another recipient (including any successor, assignee, or transferee of a recipient). The term excludes any ultimate beneficiary of the WIOA Title I-financially assisted program or activity. In instances in which a governor operates a program or activity, either directly or through a state agency, using discretionary funds apportioned to the governor under WIOA Title I (rather than disbursing the funds to another recipient), the governor is also a recipient. In addition, for the purposes of this part, one-stop partners, as defined in Section 121(b) of WIOA, are treated as "recipients", and are subject to the nondiscrimination and equal opportunity requirements of this part, to the extent that they participate in the one-stop delivery system. Recipients are listed in 29 CFR 38.44(zz).

D. Retaliation. Retaliation means discharging, intimidating, threatening, coercing, or discriminating against any individual because the individual has:

- (1) filed a complaint alleging a violation of Section 188 of WIOA or 29 CFR Part 38;

(2) opposed a practice prohibited by nondiscrimination and equal opportunity provisions of WIOA or 29 CFR Part 38;

(3) furnished information to, or assisted or participated in any manner, in an investigation, review, hearing, or any other activity related to the following:

(a) Administration of the nondiscrimination and equal opportunity provisions of WIOA, 29 CFR Part 38, or 11.2.21.1 NMAC et seq;

(b) Exercise of authority under those provisions;

(c) Exercise of privilege secured by those provisions; or

(d) Otherwise exercised any rights and privileges under the nondiscrimination and equal opportunity provisions of WIOA or 29 CFR Part 38.

[11.2.21.7 NMAC - N, 7/1/2018]

11.2.21.8 BACKGROUND: Section 188 of WIOA prohibits discrimination on the basis of race, color, religion, sex, national origin, age, disability, or political affiliation or belief or, for any beneficiaries, applicants, and participants only, on the basis of citizenship status as a lawfully admitted immigrant authorized to work in the United States or for participation in a WIOA Title I financially assisted program or activity. The federal regulations (29 C.F.R. Part 38) clarify the application of the nondiscrimination and equal opportunity provisions of WIOA and provide uniform procedures for implementing them. Examples of discriminatory acts specifically prohibited, other than those based on a disability, are set forth in 29 C.F.R. Sections 37.6. The regulatory requirements associated with employment practices and communications with individuals with disabilities are set forth in 29 C.F.R. Sections 38.12 through 38.17.

[11.2.21.8 NMAC - N, 7/1/2018]

11.2.21.9 EQUAL OPPORTUNITY REQUIREMENTS: References include the following: Workforce Innovation and Opportunity Act (WIOA), 29 CFR, Part 38, 20 CFR Section 667.275, 20 CFR Section 667.600(g)(1)(2) and Training and Employment Information Notice (TEIN) No. 16-99.

A. Recipient requirements. Recipients of WIOA Title I federal financial assistance have basic requirements which are summarized as follows.

- (1) designate an equal employment opportunity officer;
- (2) communicate equal employment opportunity policy and train staff to carry it out;
- (3) review all contracts, plans, and agreements for equal opportunity;
- (4) make efforts to provide equitable services among substantial segments of the eligible population;
- (5) ensure program and site access to individuals with disabilities;
- (6) collect and maintain data to examine discrimination;
- (7) monitor recipients for compliance;
- (8) receive and process discrimination complaints; and
- (9) obtain corrective action or apply sanctions for violating nondiscrimination requirements.

B. Annual self-appraisal. All WIOA recipients shall perform an annual self-appraisal to ensure and document compliance with the above listed requirements. This will include completion by each local board and service providers of the five accessibility checklists, set forth in USDOL training and information notice no. 16-99, available on the web at: www.doleta.gov/directives.

[11.2.21.9 NMAC - N, 7/1/2018]

11.2.21.10 DISCRIMINATION AND EQUAL OPPORTUNITY GRIEVANCE:

A. Equal opportunity complaints.

(1) WIOA prohibits discrimination on the basis of race, color, religion, sex (including pregnancy, childbirth, and related medical conditions, transgender status, and gender identity), national origin (including limited English proficiency), age, disability, political affiliation or belief, and for beneficiaries, applicants, and participants only, on the basis of either citizenship status or participation in any program or activity that received financial assistance under WIOA Title or 29 CFR Part 38. Sexual harassment is a prohibited form of sex discrimination.

(2) Any person who believes that he or she, or any specific class of individuals, has been or is being subjected to discrimination or retaliation prohibited by WIOA or its implementing regulations may file a written complaint, either individually or through an authorized representative.

(3) The discrimination complaint processing procedures shall be completed and a written notice of final action issued within 90 calendar days from the date the complaint was filed.

(4) To the extent possible and permitted by law, the confidentiality of information obtained as a result of the processing or investigation of a complaint will be maintained and will only be provided to those persons who have a legitimate need to know in order to achieve a timely resolution of the complaint. Even if an individual who makes an initial report of suspected discrimination or harassment ultimately decides to not file a formal complaint, it may still be necessary for the state or local administrative entity, service provider, one-stop operator, the state-level EO officer or the local area EO officer to investigate the matter in order to protect other applicants or participants from discrimination and harassment.

(5) Reprisal or retaliation against any individual for making a complaint of unlawful discrimination or for using, cooperating, or participating in the complaint process, including serving as a witness, is prohibited. Any person or persons engaging in retaliation are subject to disciplinary action, up to and including termination from employment.

(6) Both the complainant and respondent have the right to be represented by an attorney or other individual of their choice at their own expense throughout the complaint process.

B. Time and place for filing complaint.

(1) Discrimination complaints shall be filed with a state or local administrative entity, service provider, one-stop operator, the state-level EO officer, a local area EO officer, or with the Director of the Civil Rights Center (CRC), USDOL, 200 Constitution Ave NW, Room N-4123, Washington, DC 20210.

(2) Discrimination complaints shall be filed within 180 days of the alleged discrimination. However, a complainant may petition the director of the civil rights center for an extension of the filing time.

(3) The date of filing of any discrimination complaint shall be:

(a) if the complaint is sent by mail, the postmark date on the envelope in which the complaint is mailed;

(b) if the complaint is sent via commercial courier service, the date on which the courier service records that it received the complaint;

(c) if the complaint is sent by fax, the transmittal date recorded on the complaint;

(d) if the complaint is sent by electronic mail, the date that it is date stamped on the e-mail; or

(e) in the absence of any of the above, the date on which the complaint is received by the state or local administrative entity, service provider, one-stop operator, state-level EO officer, or local area EO officer.

C. Complaint requirements: Each complaint must be in writing and contain the following information:

(1) The complainant's name, mailing address, telephone number (if any), and e-mail address (if available);

(2) The identity of the respondent, i.e. the individual or entity that the complainant alleges is responsible for the discrimination;

(3) A description of the complainant's allegations. This description must include enough detail to allow the recipient or the CRC director, as applicable, to determine whether:

(a) the CRC or the recipient, as applicable, has jurisdiction over the complaint;

(b) the complaint was filed in time; and

(c) the complaint has apparent merit; in other words, whether the complainant's allegations, if true, would indicate a violation of the nondiscrimination and equal opportunity provisions of Title I of WIOA or 29 CFR Part 38.

(4) The signature of the complainant or complainant's representative.

D. Initial complaint processing procedures.

(1) **Logging of complaints.** All complaints shall be logged.

(a) For complaints filed with a service provider, one-stop operator or local area EO officer, it shall be the local area EO officer's responsibility to log the complaint.

(b) For complaints filed DWS, or the state-level EO officer, it shall be the state-level EO officer's responsibility to log the complaint;

(c) All equal opportunity complaint logs shall include the following information: the name and address of the complainant; the basis of the complaint; a description of the complaint; the disposition and date of disposition of the complaint; and any other pertinent information.

(d) Each local EO officer shall transmit copies of its equal opportunity logs for their corresponding local workforce development area to the state-level EO officer on a monthly basis and shall do so no later than 10 calendar days after the last day of the month the log covers.

(e) The state-level EO officer will compile and maintain copies of all complaint logs submitted in order to carry out the recordkeeping and monitoring activities required under WIOA and 29 CFR Part 38.

(2) **Determining jurisdiction.** Jurisdiction must be determined within five business days of the date the complaint is received. In order for a recipient to have jurisdiction to process a discrimination complaint, each of the following elements must be met:

(a) the respondent against whom the complaint was filed must be a WIOA recipient;
(b) the complaint must allege a basis for discrimination that is prohibited by WIOA, including unlawful retaliation; and

(c) the complaint was filed within 180 calendar days of the alleged discrimination.

(3) **Who determines jurisdiction.**

(a) if the complaint is filed with the local administrative entity, service provider, one-stop operator, or local area EO officer, then the local area EO officer is responsible for determining jurisdiction.

(b) if the complaint is filed with DWS or the state-level EO officer, then the state-level EO officer is responsible for determining jurisdiction.

(4) **Notice of lack of jurisdiction.** If a determination is made that there is no jurisdiction to process the complaint, the EO officer (state-level or local area) making the determination shall send a written notice of lack of jurisdiction to the complainant that includes the reason for the determination and notice that the complainant has the right to file a complaint directly with the civil rights center within 30 calendar days from receipt of the notice of lack of jurisdiction. The written notice of lack of jurisdiction must be sent within five business days of the date that the complaint is received.

(5) **Joint jurisdiction.** Where the complaint alleges discrimination by a WIOA recipient, or service provider on a basis that is prohibited by both WIOA and by a civil rights law independently enforced by that WIOA recipient or service provider, the complaint shall be referred to that WIOA recipient or service provider for processing under their procedures. For example, WIOA prohibits discrimination on the basis of national origin. If a discrimination complaint on the basis of national origin is made against a WIOA recipient or service provider and they are also prohibited from discriminating on the basis of national origin, then the complaint will be referred to them for processing according to their own procedures. The state-level or local area EO officer making the determination that joint jurisdiction exists is responsible for making written referral of the complaint to the WIOA recipient or service provider and sending written notice of the referral to the complainant within five business days of the date that the complaint is received.

(6) **Sole jurisdiction.** Where the complaint alleges discrimination by a WIOA recipient or service provider on a basis that is prohibited by WIOA and is not covered by a civil rights law independently enforced by that WIOA recipient or service provider (e.g., political affiliation or belief, citizenship or participation in WIOA Title I), the complaint shall be processed by that WIOA recipient or service provider under these procedures. When it is determined that WIOA has sole jurisdiction over the discrimination complaint, the complaint will be referred to the state-level EO officer within five business days of the date that the complaint is received.

(7) Within 10 business days of the date that the complaint was filed, the state-level EO officer shall conduct an initial review of the complaint and issue an initial notice in writing to the complainant containing the following information:

(a) an acknowledgement that the recipient has received the complaint;
(b) notice that the complaint process shall be completed and a written notice of final action issued within 90 calendar days from the date the complaint was filed;

(c) notice that the complainant has the right to be represented in the complaint process;

(d) a copy of the “equal opportunity is the law” statement;

(e) notice that the complainant has the right to request and receive, at no cost, auxiliary aids and services, language assistance services, and that this notice will be translated into non-English languages upon the complainant’s request;

(f) a list of issues raised in the complaint;

(g) for each issue raised in the complaint, a statement whether the recipient will accept the issue for investigation or reject the issue, and the reasons for the rejection;

(h) a statement that the complainant has the right to elect resolution of their complaint through alternative dispute resolution (ADR), at the complainant's sole option;

(i) a statement that, if the complainant does not desire to use ADR, he or she must notify the state-level officer of that fact within 10 business days of the issuance of the state-level EO officer's initial letter acknowledging receipt of the complaint; and

(j) a statement that retaliation against any individual for filing a complaint or cooperating with an investigation is unlawful and prohibited.

(8) **Alternative Dispute Resolution (ADR).** The complainant may, but is not required to, attempt to resolve their complaint through ADR.

(a) the choice whether to use ADR rests with the complainant;

(b) the complainant must notify the state-level EO officer of his or her election to use ADR within 10 business days of the issuance of the state-level EO officer's initial letter acknowledging receipt of the complaint;

(c) if the complainant requests to use ADR for resolving the complaint, the state-level EO officer will request a mediator and monitor the processing of the complaint. The mediator will schedule mediation by written notice, mailed to all interested parties at least 7 calendar days prior to the first mediation session. The notice will include the date, time, and place of the mediation. The mediation process shall be concluded within 45 calendar days from the date the complaint was filed. The complaint is considered resolved when all parties to the complaint enter into a written agreement resolving the issues raised in the complaint. The written agreement shall give notice that if the terms of the agreement are breached, the non-breaching party may file a complaint with the director of the CRC within 30 calendar days of the date the non-breaching party learns of the breach.

(d) if the parties do not reach an agreement, the state-level EO officer will proceed to investigate the circumstances underlying the complaint under these procedures.

(9) **Fact-finding and investigation.**

(a) Unless the complainant has notified the state-level EO officer that the complainant desires to attempt a resolution of their complaint through ADR, the state-level EO officer shall investigate the circumstances underlying the complaint. The investigation may include, but is not limited to, interviewing the complainant, the respondent, and any witnesses included in the complaint or who become known through the investigation process; reviewing documents and other evidence; and conducting site visits.

(b) The state-level EO officer has the power to make written request of any entity to which financial assistance under WIOA Title I is extended to produce records or documents that are potentially relevant to the investigation of the complaint.

(c) The entity to which financial assistance under WIOA Title I is extended shall produce such records or documents requested by the state-level EO officer within 10 days of the request. Failure by the entity to comply with the state-level EO officer's request for records could negatively impact its eligibility for financial assistance under WIOA Title I in future grant cycles.

(d) If at any stage in the investigation the state-level EO officer investigating the complaint has a reasonable belief that immediate action is necessary to protect any involved parties from harm, the appropriate members of management shall be notified and actions deemed appropriate will be taken.

(e) Within 90 days of the date that the complaint was filed, the state-level EO officer shall complete his or her investigation and issue a notice of final action.

(f) If at any time during the processing of a complaint it becomes apparent the state-level EO officer has a conflict of interest with respect to the complaint which would make it improper for him or her to conduct or participate in the investigation, the cabinet secretary of DWS, as the governor's designee with respect to enforcement of nondiscrimination and equal opportunity provisions of WIOA, shall appoint an alternate qualified individual to process, investigate and make a determination on the complaint.

(10) **Notice of final action.** The notice of final action shall contain the following information:

(a) For each issue raised in the complaint, a statement of either: the decision on the issue and an explanation of the reasons underlying the decision based on the findings of the investigation or; if the parties elected to use ADR to resolve the complaint, a description of the way the parties resolved the issue; and

(b) Notice that the complainant has a right to file a complaint with the director of the CRC within 30 days of the date in which the notice of final action is received if the complainant is dissatisfied with the notice of final action.

(c) The notice of final action shall be sent to: the complainant; DWS; and in the case of a complaint involving a recipient, service provider, one-stop operator or other entity under the jurisdiction of

a local workforce development board, the local workforce development board, which shall treat all information related to the complaint or contained in the notice of final action with utmost confidentiality.
[11.2.21.10 NMAC - N, 7/1/2018]

HISTORY OF 11.2.21 NMAC:

History of Repealed Material:

11.2.15 NMAC, Workforce Investment Act (WIA) Grievance Procedures, filed 6-23-2000 - Repealed effective 12-31-2005.

11.2.21 NMAC, WIA Technical Assistance and Corrective Action - Local Workforce Development Board Failure to Meet Performance, filed 12-15-2005 - Repealed effective 8-15-2012.

11.2.26 NMAC, WIA Program Complaint Resolution Procedures and Procedures for Reporting Criminal Fraud and Abuse, filed 12-15-2005 - Repealed effective 8-15-2012.

11.2.27 NMAC, WIA Equal Opportunity Requirements and Discrimination Complaint Resolution Procedures, filed 12-15-2005 - Repealed effective 8-15-2012.

11.2.27 NMAC, WIA Equal Opportunity Requirements and Discrimination Complaint Resolution Procedures, filed 8-15-2012 - Repealed effective 7-1-2018.