EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	CLASSIFICATION LGBT
	CORRESPONDENCE SYMBOL OWI-OPDR
	DATE May 29, 2015

ADVISORY: **TRAINING AND EMPLOYMENT GUIDANCE LETTER NO.** 37-14

TO: ONE-STOP CAREER CENTERS (currently branded as AMERICAN JOB CENTERS)
STATE WORKFORCE AGENCIES
STATE WORKFORCE ADMINISTRATORS
STATE WORKFORCE LIAISONS
STATE AND LOCAL WORKFORCE BOARD CHAIRS AND DIRECTORS
STATE AND LOCAL EQUAL OPPORTUNITY OFFICERS
STATE LABOR COMMISSIONERS
WORKFORCE INNOVATION AND OPPORTUNITY ACT SECTION 166 INDIAN AND NATIVE AMERICAN GRANTEES
WORKFORCE INNOVATION AND OPPORTUNITY ACT SECTION 167 MIGRANT AND SEASONAL FARMWORKER JOBS PROGRAM GRANTEES
SENIOR COMMUNITY SERVICE EMPLOYMENT PROGRAM GRANTEES
JOB CORPS CONTRACTORS
RECIPIENTS OF DEPARTMENT OF LABOR FINANCIAL ASSISTANCE
SUB-RECIPIENTS OF DEPARTMENT OF LABOR FINANCIAL ASSISTANCE

FROM: PORTIA WU
Assistant Secretary
Employment and Training Administration

NAOMI BARRY-PEREZ
Director
Civil Rights Center

SUBJECT: Update on Complying with Nondiscrimination Requirements: Discrimination Based on Gender Identity, Gender Expression and Sex Stereotyping are Prohibited Forms of Sex Discrimination in the Workforce Development System

RESCISSIONS	EXPIRATION DATE
None	Continuing

1. **Purpose.** The purpose of this Training and Employment Guidance Letter (TEGL) is to provide information to the public workforce system and other entities (including the "covered entities" listed in the "To" line above) that receive federal financial assistance under Title I of the Workforce Investment Act (WIA) and that will begin implementing Title I of the Workforce Innovation and Opportunity Act (WIOA) on July 1, 2015, as well as education and training programs or activities receiving Department of Labor financial assistance, regarding the prohibitions on discrimination based on gender identity, gender expression, and sex stereotyping. Lesbian, gay, bisexual and transgender (LGBT) individuals experience unemployment and employment discrimination at significantly higher rates compared to the rest of the American population, making it particularly important that they have full access to the services provided by the public workforce system, to help overcome the employment-related barriers they encounter.[1] This TEGL and related attachments explain the legal authority for these obligations, give some examples of prohibited discrimination, and suggest ways to prevent, identify, and address discrimination.

2. **References.** The nondiscrimination provisions that apply to the public workforce system prohibit discrimination on the basis of sex, among other bases. These provisions prohibit intentional discrimination as well as actions, policies or practices, which, though neutral on their face, have a disproportionate impact on a protected class and cannot be justified as job related and consistent with business necessity. Although gender identity is not an explicitly protected basis under the applicable federal laws, discrimination based upon gender identity, gender expression, and sex stereotyping has been interpreted to be a form of prohibited sex discrimination, including under laws that apply to federally financially assisted employment, training, and education programs and activities.

   a. The Workforce Investment Act (WIA), 29 U.S.C. 2801 et seq., is the key source of federal assistance for state and local workforce development activities. Section 188 of the Workforce Innovation and Opportunity Act (WIOA) retains the same non-discrimination provisions currently found in Section 188 of WIA, and as the workforce system transitions to operations under this new law, this guidance will remain in effect. The relevant nondiscrimination provision in WIA states that no "individual shall be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration of or in connection with, any such program or activity" on the basis of race, color, religion, sex, national origin, age, disability, or political affiliation or belief, among other bases. 29 U.S.C. 2938(a)(2). The regulations implementing this provision, administered and enforced by the Department of Labor's Civil Rights Center (CRC), apply to all programs and activities that are operated by One-Stop partners as part of the One-Stop delivery system. 29 C.F.R. 37.2(a)(2). Similarly,

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1 *See, e.g.*, Injustice at Every Turn: A Report of the National Transgender Discrimination Survey, National Center for Transgender Equality, National Gay and Lesbian Task Force (2011), available at http://endtransdiscrimination.org/report.html; Documented Evidence of Employment Discrimination & Its Effects on LGBT People, The Williams Institute, (2011), available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf.

under the Wagner-Peyser Act regulations, states are required to assure nondiscrimination regarding any services or activities authorized under that Act. 20 C.F.R. 652.8(j)(1).

The WIA nondiscrimination regulations prohibit recipients from using any method that has the purpose or effect of subjecting individuals to discrimination on a prohibited ground due to the recipient's administration of programs providing aid, benefits, services, training, or facilities. 29 C.F.R. 37.6. In addition, the Wagner-Peyser Act regulations specifically require states to "[a]ssure that discriminatory job orders will not be accepted, except where the stated requirement is a bona fide occupational qualification (BFOQ)." 20 C.F.R. 652.8(j)(2).

The CRC, which is charged with enforcing Section 188 of WIA[2] and its implementing regulations, interprets the prohibition against sex discrimination consistent with the U.S. Equal Employment Opportunity Commission's interpretation of sex discrimination under Title VII of the Civil Rights Act of 1964 and the U.S. Department of Education's interpretation of sex discrimination under Title IX of the Education Amendments of 1972, as described below.[3] These nondiscrimination obligations apply to recipients of WIA Title I funding and programs and activities that are part of the public workforce system and are operated by One-Stop (also known as American Job Centers) partners, to the extent the programs are being conducted as part of the One-Stop delivery system.

b. Title VII of the Civil Rights Act of 1964, as amended (Title VII), 42 U.S.C. 2000e et seq., prohibits employment discrimination based on race, color, religion, sex, and national origin. Entities within the public workforce system, such as the State Workforce Agencies and One-Stop Career Centers (currently branded as American Job Centers), may be regarded as "employment agencies" under Title VII.[4] Title VII prohibits employment agencies from failing or refusing to refer an individual for employment or otherwise to discriminate against any individual based on race, color, religion, sex, or

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2 This document refers to Section 188 of WIA. Section 188 of Workforce Innovation and Opportunity Act (WIOA) was signed into law on July 22, 2014 and it supersedes Section 188 of WIA. In general, WIOA takes effect on July 1, 2015, which is the first full program year after it was enacted. Enactment of WIOA in no way changes the nondiscrimination and equal opportunity obligations discussed in this TEGL.

3 *See, e.g.*, 29 CFR 37.10(c) ("In any investigation or compliance review, the [CRC] Director must consider . . . EEOC regulations, guidance and appropriate case law in determining whether a recipient has engaged in an unlawful employment practice"); 29 CFR 37.13 ("The [CRC] Director will make any rulings under, or interpretations of, the nondiscrimination and equal opportunity provisions of WIA or [29 CFR part 37]").

4 *See* 42 U.S.C. 2000e(c) (defining "employment agency" as "any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer"); EEOC Decision No. N-917.002, 1991 WL 11665181, at *1-2 & n.1 (Sept. 20, 1991). EEOC COMPLIANCE MANUAL, SEC. 2, THRESHOLD ISSUES, at 2-III.B.1.b (rev. 2000), *available at* http://www.eeoc.gov/policy/docs/threshold.html; EEOC POLICY GUIDANCE, NO. N-917.002, WHAT CONSTITUTES AN EMPLOYMENT AGENCY UNDER TITLE VII, HOW SHOULD CHARGES AGAINST EMPLOYMENT AGENCIES BE INVESTIGATED, AND WHAT REMEDIES CAN BE OBTAINED FOR EMPLOYMENT AGENCY VIOLATIONS OF THE ACT? *available at* 1991 WL 11665181, at *1-2 & n.1 (Sept. 20, 1991). *See*, however, 47 U.S.C. 230, which may shield Internet-based Job Banks from civil liability for posting content created by third parties.

national origin. 42 U.S.C. 2000e-2(b).[5] The U.S. Equal Employment Opportunity Commission (EEOC), the Federal agency with lead responsibility for interpreting Title VII, has issued a number of decisions concluding that LGBT individuals may have claims for sex discrimination when they allege discrimination involving sex-stereotypes and gender norms.[6] These decisions relied, in part, on a previous decision of the U.S. Supreme Court that held discrimination based on an individual's perceived or actual failure to conform with stereotypical gender norms constitutes discrimination because of sex within the meaning of Title VII.[7] In addition, several federal courts and the EEOC have held that discrimination against an individual because that person is transgender (also known as gender identity discrimination) may be discrimination because of sex.[8]

c. Title IX of the Education Amendments of 1972, as amended (Title IX), 20 U.S.C. 1681 prohibits discrimination on the basis of sex under any education program or activity receiving federal financial assistance. The U.S. Department of Education, which is the agency that takes the lead on enforcing Title IX, has interpreted Title IX's prohibition against discrimination on the basis of sex as including both sex stereotyping and gender identity.[9] As many entities within the public workforce system are federally-funded education programs and activities, this interpretation also applies to these programs.

d. Protection Under State or Local Laws. Many state and local laws explicitly prohibit discrimination based on sexual orientation or gender identity, along with other types of discrimination. As of the date of this Guidance and according to the Human Rights Campaign (www.hrc.org/state_maps), 22 states and the District of Columbia prohibit employment discrimination based on sexual orientation, with a majority of those States also extending protection based on gender identity. An additional 12 states offer protections for sexual orientation or gender identity in the public sector. The regulations

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5 The Office of Federal Contract Compliance Programs (OFCCP) administers Executive Order 11246, which prohibits covered federal contractors, federally-assisted construction contractors, and covered subcontractors from discriminating in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin. *See* Executive Order 11246, as amended. OFCCP enforces the nondiscrimination requirements of Executive Order 11246 in accordance with Title VII. The Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA), which requires covered federal government contractors to post certain categories of job announcements in the state workforce agency job bank or with American Job Centers, also is administered and enforced by OFCCP. *See* 38 U.S.C. 4212(a)(2). Nothing in this TEGL is inconsistent with the obligations of federal contractors and subcontractors under Executive Order 11246, as amended, Section 503 of the Rehabilitation Act, as amended, and 38 U.S.C. Section 4212, the Vietnam Era Veterans' Readjustment Assistance Act, as amended.

6 *See* Article, *What you Should Know about EEOC and the Enforcement Protections for LGBT Workers*, issued November 5, 2014, *available at* http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.

7 *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

8 *See, supra, What You Should Know about EEOC and the Enforcement Protections for LGBT Workers* (discussing EEOC cases); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004); *Schroer v. Billington*, 577 F. Supp.2d 293 (D.D.C. 2008).

9 U.S. Department of Education, Office of Civil Rights, "Questions and Answers on Title IX and Sexual Violence" at 5, *available at* http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf; U.S. Department of Education, Office of Civil Rights, "Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities," at 25, Dec. 1, 2014, available at http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf.

implementing WIA Section 188 state that they "do not preempt consistent State and local requirements." Therefore, state or local laws that provide greater protections on the basis of sexual orientation or gender identity than WIA Section 188, 29 CFR part 37, and the other Federal civil rights laws mentioned herein are fully consistent with those Federal legal provisions.

3. **Action Requested.** One-stop centers should ensure that they are providing equal access to services. As such, DOL is requesting that one-stop centers and other entities in the public workforce system take the following actions.

   a. One-stop centers and other entities in the public workforce system should use Attachment 2 when reviewing their existing policies and procedures and make any changes necessary to implement the guidance discussed in this directive.

   b. Workforce System staff should familiarize themselves with Attachment 1, "Key Terminology for Working with Lesbian, Gay, Bisexual, and Transgender Persons." Understanding and using this terminology can facilitate more effective communication with LGBT customers and employees of the workforce system.

   c. Equal Opportunity (EO) Officers should carefully investigate complaints by customers or employees alleging gender identity or sex stereotyping discrimination to determine whether discrimination has occurred on the basis of sex, as discussed in Attachment 2.

   d. Where State or local laws explicitly bar discrimination based on gender identity and/or sex stereotyping, EO Officers should advise customers or employees that additional State and local laws may also cover their claims, and how to file a complaint.

4. **Inquiries.** Inquiries about civil rights issues in the public workforce system should be addressed to CRC, by phone at 202-693-6500 (voice); by relay at 800-877-8339 (TTY/TDD); or by e-mail at CivilRightsCenter@dol.gov. Complaints alleging discrimination by entities in the system may be filed with CRC by postal mail, e-mail, or fax, addressed to Director, Civil Rights Center, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N-4123, Washington, DC 20210, CRCExternalComplaints@dol.gov, 202-693-6505 (fax). Further information about the discrimination complaint process is available on CRC's website at http://www.dol.gov/oasam/programs/crc/external-enforc-complaints.htm.

5. **Attachments.**

Attachment 1: Key Terminology for Working with Lesbian, Gay, Bisexual, and Transgender Persons

Attachment 2: Further Guidance Regarding Forms of Sex Discrimination Against LGBT Individuals

Attachment 1

Key Terminology for Working with Lesbian, Gay, Bisexual, and Transgender Persons

Sex: A characteristic assigned at birth based on a combination of an infant's biological characteristics.

Gender: Socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for men and women.[10]

Sexual Orientation: An individual's physical, romantic, and/or emotional attraction to people of the same and/or opposite gender. Examples of sexual orientation include straight (or heterosexual), lesbian, gay, and bisexual.

Gender Identity: A term that refers to one's internal sense of one's own gender. It may or may not correspond to the sex assigned to a person at birth, and may or may not be made visible to others.

Gender Expression: A term that refers to how a person represents or expresses one's gender identity to others, often through behavior, clothing, hairstyles, voice, and/or body characteristics.

Gender non-conforming: Refers to individuals whose gender expression is different from societal expectations related to gender.

Transgender: A term that refers to people whose gender identity, expression, or behavior is different from that typically associated with their assigned sex at birth. Transgender is a broad term and an acceptable descriptive term for non-transgender people to use. "Trans" is shorthand for "transgender." (Note: "Transgender" is correctly used as an adjective, not as a noun; thus "transgender people" is appropriate, but "transgenders" is often viewed as disrespectful.)

> **Transgender woman:** A term that refers to a person whose assigned sex at birth was male but whose gender identity is female.
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> **Transgender man:** A term that refers to a person whose assigned sex at birth was female but whose gender identity is male.

Transitioning: A term that refers to the time when a person begins living as the gender with which they identify rather than the gender they were assigned at birth, which often includes changing one's first name and dressing and grooming differently. Transitioning may or may not also include medical and legal aspects, such as taking hormones, having surgery, or changing identity documents (e.g., driver's license, Social Security record) to reflect one's gender identity. Medical and legal steps may be very costly and sometimes unaffordable.

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10 World Health Organization, *available at* http://www.who.int/gender/whatisgender/en/index.html.

Sex reassignment surgery: A term that refers to surgical procedures that change one's body to better reflect a person's gender identity. Contrary to popular belief, there is not one surgery; in fact there are many different surgeries. These surgeries are medically necessary for some people; however, not all people want, need, or can have surgery as part of their transition. "Sex change surgery" is considered a derogatory term by many.[11]

11 National Center for Transgender Equality, Transgender Terminology (2014), available at http://transequality.org/issues/resources/transgender-terminology.

Attachment 2

Further Guidance Regarding Forms of Sex Discrimination Against LGBT Individuals

Entities in the public workforce systems are prohibited from discriminating on the basis of sex based stereotypes, including stereotypes about how persons of a particular sex are expected to look, speak, or act. Examples of unlawful discrimination include, but are not limited to, the following practices:

- Denial of access to, or otherwise subjecting the individual to adverse treatment in accessing aid, benefits, services, or training, under a WIA/WIOA Title I-financially assisted program or activity because of that individual's failure to comply with gender norms and expectations for dress, appearance and/or behavior, including wearing jewelry, make-up, high-heeled shoes, suits, or neckties.

- Treating an individual adversely because the individual identifies with or is perceived to identify with a gender different from the individual's sex assigned at birth, or the individual has undergone, is undergoing, or is planning to undergo, sex reassignment surgery or other processes or procedures designed to facilitate the adoption of a sex or gender other than the individual's assigned sex at birth.

- Subjecting or otherwise permitting an individual to be subjected to adverse action or harassment and/or physical threats following disclosure that the individual was going to marry a same-sex partner or otherwise not conform to society's sex-role expectations by being in a relationship with a person of the same sex.

- Subjecting an individual to harassment in the form of "homophobic gestures," "homosexual mannerisms," and verbal mocking using "very feminine or very masculine voices."

- Denying transgender employees access to the bathrooms used by the gender with which they identify.

Protection of Transgender Persons

Because of persistent employment discrimination against transgender persons,[12] it may be more difficult for workforce system customers who are transgender to find jobs. To that end, and in

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12 *See, e.g.*, Injustice at Every Turn: A Report of the National Transgender Discrimination Survey, National Center for Transgender Equality, National Gay and Lesbian Task Force (2011), available at http://endtransdiscrimination.org/report.html; Documented Evidence of Employment Discrimination & Its Effects on LGBT People, The Williams Institute, (2011), available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf.

keeping with WIA non-discrimination regulations,[13] transgender customers cannot be denied access to workforce and training programs due to their gender identity. The customer should not be counseled to change their gender presentation in order to find work. The following should be considered when providing services:

- ***Names and Pronouns***. Always to refer to each person by the name, and the gender-specific pronoun (for example, he, his, him or she, hers, her), by which the person wants to be called. If staff does not know an individual's pronoun preference, they should ask in a tactful way. Continued intentional misuse of the person's name and pronouns may breach the person's privacy, may put the person at risk of harm, and in some circumstances, may be considered harassment.

- ***Identification documentation***. Transgender people may have mismatched identification documentation (i.e., "old" identification with a previous name and/or gender marker and "new" identification with corrected name and/or gender marker). This situation occurs because obtaining corrected identification documentation as a result of gender transition is a complex legal process that may take a significant amount of time and other resources. Such discrepancies should not prevent a transgender person from getting a job, participating in a program, or receiving services. If a situation in which discrepancies in personal identification pose legitimate obstacles is encountered, staff should explain what documentation must be provided (e.g., proof of a court-ordered name change).

- ***Restroom access***. All customers and employees must be able to access restrooms consistent with their gender identities. The decision as to which restroom to use should be left to the individual to determine the most appropriate and safest option for them. Restricting customers and employees to using only restrooms that are not consistent with their gender identity, or segregating them from other workers by requiring them to use gender-neutral or other specific restrooms, singles those individuals out and may make them fear for their physical safety. Bathroom restrictions can result in customers and employees avoiding using restrooms entirely while at work, which can lead to potentially serious physical injury or illness.

- ***Confidential Medical Information***. Information about a person's status as transgender may be considered medical information, and thus should be kept strictly confidential.[14]

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13 29 CFR 37.16(c) (stating that "[a] recipient must not exclude any individual from, or restrict any individual's participation in, any program or activity based on the recipient's belief or concern that the individual will encounter limited future employment opportunities" on the basis of a protected characteristic, including sex).
14 *See* 45 CFR 160; 45 CFR 164.