

MASSACHUSETTS

Workforce Investment Act

WIA Communication No. 05-72

☒ **Policy** ☐ **Information**

To: Chief Elected Officials
Workforce Investment Board Chairs
Workforce Investment Board Directors
Title I Administrators
Career Center Directors
Title I Fiscal Officers
DCS Regional Directors for Workforce Integration
DCS Associate Directors
DCS Field Managers

From: Susan V. Lawler, Commissioner
Division of Career Services

John P. O'Leary, Commissioner
Division of Unemployment Assistance

Date: September 15, 2005

Subject: Customer Disqualification under the Trade Program

Purpose: To provide Local Workforce Investment Boards, One-Stop Career Center Operators and local workforce investment partners with updated policy guidance related to the disqualification of Trade customers from the receipt of Trade Readjustment Allowances for withdrawal from, failure to begin or the failure to attend Trade approved training as scheduled.

This communication replaces No.00-08 Disqualifications under the Trade Adjustment Assistance Programs previously issued by the Commonwealth Corporation on 3/27/2000.

This issuance also updates the applicable references to reflect the current responsibilities of the Division of Career Services for the Trade Adjustment Assistance Program.

A STAFF GUIDE providing more detailed procedural instructions is attached.

Background: In conjunction with the Trade Adjustment Assistance Act of 1974, as Amended, a customer determined eligible for Trade services and benefits is generally entitled to training services if he/she meets six (6) criteria as delineated at 20CFR 617.22(a)(1-6):

- there is no suitable employment available for the adversely affected worker,
- the worker would benefit from the training program,
- There is a reasonable expectation of employment following completion of the training program,
- the training is reasonably available to the worker,
- the worker is qualified to undertake and complete the training, and
- the training program is suitable for the worker and available at a reasonable cost.

Additionally, Section 617.19 allows for the payment of Trade Readjustment Allowances (TRA) to an eligible customer if he/she is enrolled or participating in an approved training program as described in Section 617.22(a). TRA benefits may be paid to a customer who is not enrolled or participating in an approved training program *only* if the individual has been granted a waiver of the training requirement based on a determination that it is *not feasible* or is *not appropriate* to approve training for the otherwise eligible customer [617.19(a)(2)]. Section 115 (a)(1) of the Trade Act of 2002 further delineates when training for an individual is to be considered neither *feasible* nor *appropriate*:

- The worker has been notified of a recall,
- The worker possesses marketable skills,
- The worker is within 2 years of meeting all requirements for entitlement to payment of either Social Security benefits or a private pension sponsored by an employer or labor organization,
- The worker is unable to participate in training as a result of health issues,
- the first available enrollment date for the approved training is within 60 days of the date of approval of the waiver requirement, or
- approved training is not reasonably available to the worker, is not available at a reasonable cost, or training funds are not available.

The Trade Regulations promulgated at 20 CFR Section 617.18 (2) provides that an otherwise eligible Trade customer may be “disqualified” from the receipt of TRA if he/she does not attend scheduled training:

“(i) An individual who, without justifiable cause, fails to begin participation in a training program which is approved under §617.22(a), or ceases to participate in such training, or for whom a waiver is revoked pursuant to §617.19(c), shall not be eligible for basic TRA, or any other payment under this part 617, for the week in which such failure, cessation, or revocation occurred, or any week succeeding week thereafter until the week in which

the individual begins or resumes participation in a training program that is approved under §617.22(a).”

Additionally, the regulation at §617.22(f)(2) further limits the total amount of training an individual may receive under a specific Trade Petition (Certification):

“The maximum duration for any approvable training program is 104 weeks (during which training is conducted) and no individual shall be entitled to more than one training program under a single certification.”

Policy: Local Workforce Investment Boards, One-Stop Career Center Operators and other local workforce investment partners must assure that local policies and procedures are consistent with the content of this policy issuance. Furthermore, local Boards, Operators and partners must assure that staff are knowledgeable of the regulatory requirements pertaining to the training eligibility/disqualification parameters applicable to Trade eligible customers. Additionally, consistent with the content of this issuance, local Boards, Operators and partners must ensure that procedures are in place or are implemented to assure that case managers (or other designated staff) review with all Trade eligible customers approved for training services the potential sanctions and/or repercussions that may result should the customer decide to not start, withdraw from, or change his/her approved training program. The procedures must also assure that case managers (or designated staff) also instruct Trade eligible customers approved for training to inform the case manager *in advance*, of any desire or decision to not start, withdraw from, or to change an approved training program so as to fully understand any potential repercussions of taking such action.

Action Required: Please distribute copies of this policy to all appropriate individuals in your organization, and take necessary action to ensure compliance with this policy.

Effective: Effective immediately.

References: The Trade Adjustment Assistance Act of 1974, as Amended.
Trade Regulations, 20 CFR Part 617.
Trade Reform Act of 2002

Inquiries: Questions related to this policy should be directed to PolicyQA@detma.org . Please reference this Policy Communication Issuance number with the inquiry.

Filing: Please file this document in your notebook with previously issued policies as 05-72.

DISQUALIFICATION OF TRADE ELIGIBLE CUSTOMERS

STAFF GUIDE

INTRODUCTION

To assure compliance with the requirements of the Trade Act of 1974, as Amended and the Trade Act of 2002, this STAFF GUIDE has been prepared to provide instruction regarding policy and procedures related to the disqualification of Trade eligible customers from the receipt of Trade Readjustment Allowances (TRA) for failure to meet training participation requirements.

The GUIDE includes:

- Notification and documentation requirements necessary to make an initial determination of disqualification, and the regulatory citation applicable to each particular situation.
- Three sample letters utilized by the DCS Trade Unit in conjunction with potential customer disqualification.
- A sampling of various scenarios to illustrate possible outcomes related to a Trade customer's continuing eligibility or disqualification

JUSTIFIABLE CAUSE

The Trade regulation promulgated at 20 CFR Section 617.18 (2)(i) specifically states that any determination of disqualification of an otherwise eligible Trade customer from the receipt of TRA because of failure to participate in approved training as scheduled can be made *only* if the individual's failure to participate is "without justifiable cause". DCS must apply the definition of "justifiable cause" when reviewing the facts of a customer's withdrawal from, or change to an approved training program, including any documentation submitted by the individual facing possible disqualification under the Trade Act.

Justifiable cause is defined in the Trade Regulations at 617.18(C) as:

"...such reasons as would justify an individual's conduct when measured by conduct expected of a reasonable individual in like circumstances, including but not limited to reasons beyond the individual's control and reasons related to the individual's capability to participate in or complete an approved training program."

When the DCS Trade Unit receives notice of one of the following circumstances, a letter (via certified mail) may be issued to the customer to inform her/him of DCS's need either for justification or a determination of final disqualification or non-disqualification:

- ♦ The customer's *withdrawal* from an approved training program.
- ♦ The customer's *recall* to his/her former employer.
- ♦ The customer's intention to accept or prior acceptance of *employment with a new employer*.
- ♦ The customer's request for or notification of a *leave of absence* (due to sickness, travel out of the country, family emergencies, etc.).
- ♦ The customer's intention to *change the training program* for which he/she has been approved (either a new program/course and/or a new provider).
- ♦ The *approved training schedule is changed or altered* (full time to part time, different start/end dates, no longer offered in an upcoming semester, etc.).

NOTIFICATION TO DCS

Because of the potential consequences regarding a Trade customer's continued eligibility for either TRA or UI benefits any change or potential change related to a customer's training status must be *immediately* transmitted to the DCS Trade Unit.

Upon learning that any of the circumstances described above apply to a particular Trade customer, the case manager (or other staff person knowledgeable of the customer's circumstance) must inform the Division of Career Services (DCS) Trade Unit of the customer's situation as it applies to an approved training program. The written notice (email or hard copy) must fully describe the particular circumstances that apply to the situation and should include a statement from the customer as to the reason(s) for the withdrawal from, or change to the customer's approved training program. The notice should specifically state the customer's "*last date attended*" and should also include, to the extent possible, any pertinent documentation to support stated facts of the situation. Notification may be emailed to Beth Goguen at bgoguen@detma.org or Linda Kent at lkent@detma.org. A hard copy may be mailed to:

Trade Unit
Division of Career Services
19 Staniford Street, First Floor
Charles F. Hurley Building
Boston, MA 02114

FORMAL DISQUALIFICATION-RELATED CORRESPONDENCE

Upon notification that any of the circumstances outlined above, apply to a Trade customer who has been attending approved training, the DCS Trade Unit will issue to the customer one, or more of the formal letters described below (as necessary):

1. "Possible Disqualification" Letter:

If the notice of the customer's circumstances received by the DCS Trade Unit does not include the customer's statement of "justifiable cause", a letter of "possible disqualification" will be forwarded to the customer by certified mail. The letter informs the customer that he/she must provide "justifiable cause" regarding the situation related to his/her approved training program or face being disqualified from TRA benefits and/or any future training under the applicable Trade Petition Number [in accordance with regulations promulgated at §617.18(2)(i) and §617.22(f)(2).]

The letter also informs the individual that a written response must be forwarded to the DCS Trade Unit within two weeks of the date of the letter.

Upon receipt of the customer's response, DCS will review the documentation provided by the customer and make a determination as to the individual's continuing eligibility consistent with the Act and its associated regulations. *All determinations are made on an individual basis.* Upon making its determination, DCS will issue a formal response letter, as outlined in either section no. 2 or 3, below (depending on the determination). A copy of the determination letter is also forwarded by the DCS Trade Unit to the individual's case manager and to the Division of Unemployment Assistance (DUA) TRA Unit.

2. "Disqualification" Letter:

This certified letter notifies the customer that he/she *has been disqualified* based on the information DCS has received. However, the notification will inform the customer that he/she has the right to appeal the decision and will include the *Trade Programs Hearing Request Form* (Attachment A).

3. "Non-Disqualification" Letter:

This certified letter notifies the customer that he/she *has not been disqualified* based a review of the information received by DCS.

TRAINING CHANGE CONSIDERATIONS

- 1. Withdrawals:** The following examples are offered to provide staff guidance as to under what circumstances a customer's withdrawal from an approved training program may, or may not result in a disqualification of TRA and/or future training:

While the particular circumstances of an individual's decision to withdraw from an approved training program may meet the definition of "justifiable cause" resulting in a determination allowing the customer's continued eligibility for payment of TRA benefits, the determination may also include notification to the customer that, based on the amount of time the customer attended training, he/she *is no longer eligible* to either:

- resume the previously approved training program, or
- be approved for a new training program under the applicable Trade Petition Number.

Such a notification would be based on a determination that the individual's length of attendance at the prior training program satisfied the requirement that a Trade eligible individual is "entitled to no more than one training program under a single certification" in accordance with the regulation at §617.22(f)(2).

If, however, it is determined that the amount of time in attendance at the previous training program did not satisfy the requirement at §617.22(f)(2), the individual *may be eligible* to either:

- resume the previous training program, or
- be approved for a new training program.

The ability to either resume the prior training or be approved for a new training program would also depend on the customer meeting the six (6) training eligibility criteria at §617.22(a)(1-6) at the time of consideration. Additionally, to resume a previously attended training program, approval of the training provider is necessary. Depending on the amount of time that has passed since the worker left training, the worker may be required to begin with a new assessment process to determine if the worker still meets the Trade Program's criteria for training. Please remember that there is a time limit for receipt of TRA benefits that must also be considered in regard to any decision to resume or begin a new training program.

2. **Recalls:** A Trade eligible customer approved for and/or attending training *is not required* to accept a recall to his/her previous employment [as cited in reference to state law under 20 CFR Section 617.18 (b)(i)]. However, a worker who accepts a recall *must stop attending* an approved training program *unless the worker is also able to continue the training program on a full-time basis*. Any payment of TRA or state UI benefits will also stop. As with any withdrawal from training, it is important to remember that a customer who stops attending approved training may or may not be able to resume training if laid off again after the recall period in accordance with the regulatory requirements and circumstances described above.
3. **New Employment:** The notification to DCS must include, in addition to a justification for withdrawal and the individual's last date of attendance, a statement noting why the new employment should or should not be considered to constitute "*suitable employment*" as described at 20 CFR Section 617.22 (a)(1)(i):

"suitable employment" means...work of a substantially equal or higher skill level than the worker's past adversely affected employment, and wages for such work at not less than 80 percent of the worker's average weekly wage."

Again, should the individual be laid off from the new employment, his/her ability resume training may or may not be approved in accordance with the regulatory requirements and circumstances described above.

- * It should be noted that a trade eligible customer who accepts non-suitable employment *is allowed to continue in full-time training*.

4. **Leave of Absence:** The notification to DCS must include, in addition to a justification for withdrawal and the individual's last date of attendance, a statement noting the *specific dates for the leave of absence*.

Any leave of absence *must be approved by the DCS Trade Unit **prior to the start of the leave***. In cases of an emergency, the case manager (or other staff) must notify the DCS Trade Unit ***immediately** upon receiving notice from the customer*.

A Trade customer receiving UI benefits (and not TRA) must also contact a DUA Claim Center to request a separate approval of the "leave of absence". The request to DUA must be submitted and approved before the "leave of absence" begins.

Please note that vacations ***are not*** approvable as a "leave of absence".

An individual withdrawing from training under an approved leave of absence may or may not be approved to resume training upon the end of the "leave" in accordance with the regulatory requirements and circumstances described above.

5. **Change of Training Program:** In addition to including a justification for the change (with related documentation), the notification *must* be submitted to DCS ***prior to the effective date of the desired change in the training program***. In conjunction with the notification, a new Vendor Selection Submission must also be completed via MOSES (with all related documentation) ***prior to the effective date of the desired change***. The justification must address all reasons why the change is necessary. Customer preference *is not considered to be* a sufficient justification. If a change in programs is requested, labor market research must be conducted to indicate show that the customer and the training content meet the six (6) criteria outlined in §617.22(f)(2) of the regulations. The notification should specifically address:

- any changes to the start and/or end dates of the program,
- The ability to transfer classes from the old program to the new program,
- The projected effect on the customer's benefits,
- Whether or not the new program will extend the customer's total number of training weeks beyond the maximum 104 week duration for an approvable training program, and
- The total number of weeks in attendance at the original training program?

Please note that changes in programs *must* be approved by the DCS Trade Unit ***prior*** to the date the change occurs. A customer must notify his/her case manager of an interest in changing programs before effecting any changes in order to make an informed decision that takes into account any potential change regarding his/her Trade program eligibility status. Failure to inform DCS in advance *may result in disqualification*.

6. **Schedule Changes/Alterations:** For a change in the training program schedule to ***"Less than Full-Time status in Training"*** the notification must include a justification statement from the customer with corroborating documentation from either the case manager or the training provider. The notification *must* be submitted to the DCS Trade Unit ***prior to the effective date of the schedule change***.

Customer preference *is not considered to be* a sufficient justification.

The justification must address the following:

- how the change may affect the customer's benefits (does the change extend training and dose the individual have adequate benefits remaining to complete the program?),
- will the change result in a schedule extending beyond the maximum 104 week duration for any approvable training program,
- why full-time status may not be maintained,
- what the proposed training hours will be, and
- whether or not changes to the start and/or end dates will occur.

Please note that changes in program schedules *must be approved by DCS **prior** to the effective date*. Failure to inform DCS in a timely manner may result in disqualification.

If the change involves only a new Beginning and/or End Dates the case manager (or other staff) need only submit a "modification request" via the MOSES "Training Package" tab with a justification statement (documented in NOTES or on the modification screen's "Comments" section) from the case manager and/or training provider and the new start and/or end date(s). Again, this request procedure *must be completed **prior** to the effective date of the change*. Customer preference *is not considered to be* a sufficient justification.

The justification must describe why the change is necessary and must address the following:

- how the change may affect the customer's cash benefits,
- will the change result in a schedule extending beyond the maximum 104 week duration for any approvable training program,
- if the customer will maintain full-time status and if not, why?

OTHER DETERMINATION CONSIDERATIONS

Timely notification to the DCS Trade Unit is imperative as numerous aspects of Trade Program services and benefits (as well as state UI benefits) are time-sensitive. Non-timely submission of notification may result in an overpayment of benefits to the customer necessitating the allocation of considerable resources to pursue and effect repayment.

Additionally, a determination of disqualification may also adversely impact the individual's Health Care Tax Credit (HCTC) status as HCTC eligibility is based on the individual's eligibility to receive TRA benefits (not withstanding whether or not the individual is receiving TRA or state UI benefits at the time).

SAMPLE DETERMINATION SCENARIOS

While not fully inclusive, the following scenarios will help illustrate the variety of circumstances that may be encountered in making an eligibility determination regarding a Trade customer's decision to either not attend or to withdraw from an approved training program:

- A. John has just begun attending a ten-month computer technician course. He is receiving TRA payments. After his first week in training he is recalled to his former job. The recall is for two weeks. If the training vendor agrees that the two-week break in training will not jeopardize John's ability to resume and successfully complete the training program he would likely be allowed to resume the training program after the two-week recall. John would, however, likely be disqualified from the receipt of TRA benefits for the two-week recall period.
- B. John has just begun attending a ten-month computer technician course. He is receiving TRA payments. After his first week in training he is recalled to his former job. The recall is for 6 weeks. The training vendor states that the break in training is too long for John to make up the lost time and would not be able to resume the course and successfully complete it. Under this scenario, if John should choose to return to work in conjunction with the recall it is likely that he would not be allowed to resume the training program after the two-week recall. However, because of the short duration of his attendance, it is likely that he would be considered to have had his one training program under §617.22(f)(2). Additionally, John would be disqualified from the receipt of TRA benefits during the recall period.
- C. Karen has just begun attending a 12-month paralegal course. She is receiving TRA payments. After her second week in training she is recalled to her former job. The recall is open-ended with no end date. Should Karen choose to accept the recall the vendor might allow her to return if the recall lasted no more than one or two weeks, making it likely that Karen would be approved for a return to the training course and a resumption of TRA payments.

However, if Karen's recall period extended beyond two weeks, the training provider would not allow a return to the course. In addition, based on the provider's refund policy, the full amount of the contracted training cost is payable after two weeks of attendance. Should Karen accept the recall and it extended beyond the two week period it is likely that she would be considered to have received her one, approved training program [under §617.22(f)(2)] and would not be approved for future training under the applicable Trade Petition Number.

- D. Augusto has completed 10 months of a twelve-month CAD Certificate training program consisting of 24, two-week courses. He has been receiving TRA payments while attending classes. He accepts a one month recall to his former position. The courses that he will miss during the recall period will not be available until a year later. While the provider will allow Augusto to return to the program after the one-month recall, he would not qualify for the CAD Certification until he completed the missed courses. It is unlikely that Augusto would be approved to resume the course when the recall period ends and receive

TRA for the remaining weeks of the course. However, Augusto would be considered to have received his one approvable training program [under §617.22(f)(2)] and would not be approved to complete the missed courses in the following year. Additionally, Augusto would not be eligible to receive future TRA payments (under the applicable Petition Number) should decide, on his own, to complete the missed courses one year later in order to qualify for the CAD Certification.

- E. Mary, an unmarried high school graduate has been attending an 18-month Trade-approved training program to learn carpentry skills. She resides in a locality where employment in the home building sector is projected to grow steadily at a 2-3% rate each year over the next 5–10 years. She is receiving TRA payments while attending classes. After 13 months, and experiencing increasing difficulty in paying her bills she accepts a job with a large, nationwide Home Supply retailer to work in the kitchen remodeling department. The new position pays her 85% of her previous average wage. Her eligibility for TRA ceases upon her withdrawal from the training program. After 15 months of employment she is laid off from the retailer and applies for Trade approval of a new training program for an associates degree as a technician in the biomedical field which is expected to have a 15% growth rate over the next 5 years. Under this scenario, it would be unlikely that Mary would be approved for the new training program as she would be considered to have received her one training program under §617.22(f)(2) .
- F. Emily has just begun attending a 9-month course for Certified Home Care attendant with an anticipated wage, upon graduation, of \$8.50 to \$9.00 per hour. She is eligible to receive TRA payments while attending the course. Emily requests a Leave of Absence from the training program after her second day to begin a temporary job as a cashier at her uncle's convenience store that became open when his regular cashier underwent major surgery requiring a three month recuperation period. Her pay at the store is \$8.00 per hour. While Emily would be disqualified from receipt of any TRA payments while working at the store, upon the return to work of the regular cashier it would be likely that Emily would be approved to begin a new training program under the applicable Petition Number as she would be considered not to have received her one training program under §617.22(f)(2).
- G. Donald has been attending a 12-month, Trade-approved Automotive Technician Certificate training program through the local vocational technical school. He has been attending for 9 months and been an excellent student, picking up the skills easily. Donald's brother-in-law has offered to hire him on a full-time basis to work as a mechanic in his foreign auto repair shop after the Christmas holiday break. In order to accept the position, Donald wants to complete the training program on a part-time basis, attending 3 evenings a week for an additional 6 months. Under this scenario, it is unlikely that Donald would not be approved to continue the classes on a part-time basis as under the Trade program, the Automotive Technician Certificate training may be approved on a full-time basis, only as in accordance with §617.22(f)(1), a training program may be approved if it is "of suitable duration to achieve the desired skill level in the shortest possible time." In this case, the shortest possible time would be the full-time program.

H. Gwendolyn has been approved to begin a 26-week certificate training program to learn computer-based graphic arts skills that are a demand occupation for the local printing and publishing industry. Two weeks prior to the scheduled start date, Gwendolyn receives notice from the school that the start date for the course has been moved back one month (31 days) due to the instructor's recent surgery and required recuperation period. The end date of the course has also been moved back one month. The revised dates of the course fall within the 104 week time period.

Under this scenario, there would be no disqualification of either benefits or the training course. She could apply for and be approved for a waiver as the course would not begin within 30 days.