

EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	CLASSIFICATION OWI
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ADVISORY: TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 10-14

TO: 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 INVESTMENT ACT SECTION 166 INDIAN AND NATIVE
AMERICAN GRANTEES
WORKFORCE INVESTMENT ACT SECTION 167 MIGRANT AND
SEASONAL FARMWORKER JOBS PROGRAM GRANTEES
SENIOR COMMUNITY SERVICE EMPLOYMENT PROGRAM GRANTEES
EMPLOYMENT AND TRAINING ADMINISTRATION REGIONAL
ADMINISTRATORS
JOB CORPS CONTRACTORS
RECIPIENTS OF DEPARTMENT OF LABOR FINANCIAL ASSISTANCE
SUB-RECIPIENTS OF DEPARTMENT OF LABOR FINANCIAL
ASSISTANCE

FROM: PORTIA WU /s/
Assistant Secretary
Employment and Training Administration

NAOMI BARRY-PEREZ /s/
Director
Civil Rights Center

SUBJECT: Update on Complying with Nondiscrimination Provisions: Unemployment Status Restrictions and Possible Disparate Impact Based on Race, National Origin, Sex, and Disability

1. Purpose. The public workforce system should take proactive steps to help the unemployed and especially the long-term unemployed return to work. As outlined in the accompanying Training and Employment Notice (TEN) 12-14: *Promising Practices and Resources for Addressing Long-Term Unemployment*,¹ a number of employers, employer organizations,

¹ Training and Employment Notice 12-14, *Promising Practices and Resources for Addressing Long-Term Unemployment*, issued October 17, 2014, available at http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=7919.

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and workforce agencies have implemented or pledged to implement specific actions, policies, and/or services for addressing the unique barriers to employment facing many of the long-term unemployed. One of these barriers, which is the subject of this Training and Employment Guidance Letter (TEGL), is the practice among some employers to exclude unemployed and especially long-term unemployed individuals from hiring consideration. The purpose of this TEGL is to provide information to the public workforce system and other entities (including the “covered entities” listed above) that receive federal financial assistance to operate job banks, about the practice of some employers to exclude unemployed persons from hiring consideration, and to provide tools to educate employers about the practical and legal drawbacks of this practice. This guidance is being issued by the Department of Labor’s Employment and Training Administration (ETA), in conjunction with the Civil Rights Center (CRC).

- 2. Background.** This TEGL addresses the hiring practice of automatically excluding unemployed applicants from consideration for job vacancies.² This practice is sometimes overt, such as where a job posting requires applicants to “be currently employed,” but it more often occurs when employers, flooded by job applications, use the lack of current employment or evidence of long-term unemployment as a screen to reduce the applicant pool. This practice is detrimental to the interests of both employers and applicants. Employers may be excluding applicants who possess strong skills and had a strong employment record until they lost their jobs in the economic downturn. Further, applicants, despite their qualifications, may be denied the opportunity to re-join the workforce and rebuild a productive economic life.

This TEGL provides entities in the public workforce system, listed above (and their employer customers), with tools to ensure these exclusionary policies are not at cross-purposes with the public workforce system’s efforts to promote employment opportunities for unemployed workers. This problem can be addressed by promoting job postings that are open to all applicants and otherwise encouraging open and fair access to job opportunities, training, and placement programs. This TEGL applies to all jobs available through a covered entity’s job bank.

² This practice was the subject of a public meeting held in February 2011 by the U.S. Equal Employment Opportunity Commission (EEOC). See Meeting, EEOC to Examine Treatment of Unemployed Job Seekers, Feb. 16, 2011 (transcript and written testimony available at <http://www.eeoc.gov/eeoc/meetings/2-16-11/>). The National Association of State Workforce Agencies (NASWA) passed a resolution at its 2011 annual meeting, voicing its concern about “current postings in various states [that] include discriminatory language against hiring unemployed persons, including phrases such as, ‘must be currently employed’ and ‘currently employed on a permanent basis.’” NASWA further resolved “that the National Labor Exchange (NLX) in each state job bank will ensure that discriminatory language is not permitted in job postings on their sites.” See NASWA’s Resolution 9 at <http://www.naswa.org/assets/utilities/serve.cfm?gid=3f161b31-73f1-494a-8fe6-518bd02215b3>. A public advocacy group identified about 150 instances of “no jobless need apply” postings. See National Employment Law Project, *Hiring Discrimination Against the Unemployed: Federal Bill Outlaws Excluding the Unemployed from Job Opportunities, as Discriminatory Ads Persist* (Briefing Paper, July 12, 2011), available at <http://www.nelp.org/site/publications/>.

3. Actions to be taken by covered entities.

- a. Covered entities must provide the attached Notices to Employers (Attachments 1 and 2), which describe the drawbacks of excluding the unemployed from hiring consideration. At a minimum, covered entities must advise employers, through use of the Notices to Employers, about common misperceptions about hiring the unemployed. Employers should make clear that:
- Employment status alone does not indicate whether someone possesses the qualifications for success on the job. Particularly during difficult economic periods, there are many reasons why a person may be unemployed that are unrelated to job performance. These reasons may include, but are not limited to, an individual:
 - having been in school or in a training program (including many recent high school and college graduates entering the job market);
 - having to leave a job because of spousal relocation;
 - having lost a job because of lack of seniority during employer downsizing;
 - having lost a job because the employer eliminated an entire division or production line, or shut down completely;
 - having left employment temporarily due to illness, injury, disability, or pregnancy; and
 - having left employment to assume family care-giving responsibilities or to flee situations of domestic violence.
 - The pool of the unemployed includes better-educated, more skilled, and more experienced individuals than in pre-recession years, providing employers with a wealth of viable candidates to hire. Since the peak of the last recession, approximately 45 percent of displaced workers had three years or more experience in their previous job.³
 - The share of the unemployed with a bachelor's degree or higher is currently 22.4 percent, and was 20.0 percent during the peak of the last recession; and the share of the unemployed without a high school diploma has been trending downward since the peak of the last recession and is currently 14.8 percent.⁴
 - The qualifications and experience that applicants acquired through past jobs do not automatically disappear during a period of unemployment. Many of those who are unemployed for long periods of time before returning to work see their earnings bounce back eventually to their pre-unemployment levels, suggesting little loss of their skills during unemployment. Even for those jobs that require state-of-the-art knowledge, skills and/or abilities, current employment may not be an appropriate gauge for determining an applicant's relevant experience and knowledge. Many unemployed and underemployed workers volunteer or participate in training programs to maintain proficiency in their skills.⁵

³ Bureau of Labor Statistics, Current Population Survey, Displaced Workers Supplement 2011-2013, <http://www.bls.gov/news.release/pdf/disp.pdf>

⁴ Bureau of Labor Statistics, Current Population Survey, Table A-4, Annual Average 2013, <http://www.bls.gov/webapps/legacy/cpsatab4.htm>

⁵ Per the Bureau of Labor Statistics, 24.1 percent of the unemployed and 31.7 percent of part-time employees also volunteer. http://www.bls.gov/opub/ted/2014/ted_20140228.htm. Media articles record that unemployed workers will elect to volunteer to continue skill development and expand their networks. *See*

- Instead of automatically excluding all applicants who are currently unemployed, employers should assess applicants on an individual basis, such as by posing questions in interviews or using other nondiscriminatory selection procedures that are predictive of successful job performance or measure an individual's ability to perform important aspects of the job.
- b. Covered entities should conduct their activities using safeguards to prevent discrimination against individuals in protected groups because they are unemployed. Excluding individuals from hiring consideration due to their unemployment may amount to unlawful discrimination under federal civil rights laws, as discussed in Part 4 of this document.
- i. Posting job announcements in Job Banks. Covered entities should establish policies and procedures to ensure that job announcements containing restrictions based on unemployment status are handled as described below.
- When an employer registers with the American Job Center (or other covered entity) to use the Job Bank, it must receive the notice that appears as Attachment 1 to this TEGL. The notice explains practical considerations that counsel against screening out unemployed workers. The notice also advises employers not to automatically exclude job seekers based on their unemployment status or any other qualification that may not be job-related and consistent with business necessity. These types of screens may have a disparate impact on protected groups and could violate federal civil rights laws if not job related and consistent with business necessity.
 - Covered entities should use a system (automated or otherwise) for identifying job postings that include hiring restrictions based on an individual's current unemployment status. This system may be the same system that entities already use to identify other discriminatory language in job postings.
 - When job postings that exclude individuals based on an individual's current unemployment status have been identified, covered entities must provide employers that have posted these vacancy announcements the notice that appears as Attachment 2 to this TEGL, which states that the employer will be given the opportunity to remove or edit the vacancy announcement. The notice and opportunity to remove or edit must be provided to the employer whether the vacancy announcement has been posted directly with the covered entity or has instead been made available in the job bank through other means.
 - Any job postings containing language excluding candidates based on an individual's current unemployment status should only remain posted when accompanied by the Notice to Job Seekers that appears as Attachment 3 to this TEGL, which explains that such exclusions may be unlawful under certain circumstances. The notice further informs job seekers that individuals without current employment are not prohibited by the American Job Center from applying for the posted position. Covered entities that accept job applications from job seekers should

http://www.huffingtonpost.com/2010/09/03/unemployed-volunteering_n_703625.html;

<http://www.shrm.org/hrdisciplines/staffingmanagement/articles/pages/long-term-unemployed-jobseeker-guide.aspx>.

continue to forward the applications of all applicants, who otherwise meet the job qualifications, to employers despite language in vacancy announcements excluding candidates based on an individual's current unemployment status.

The Department recognizes that covered entities have a variety of systems in place to comply with nondiscrimination obligations, and that entities engage with employer customers in varying ways. Covered entities may elect to take steps other than those listed above that are at least equally effective to prevent the unjustified exclusion of unemployed persons, except that covered entities must provide the attached notices as discussed in this TEGL.

- ii. Screening and referral using restrictions based on an individual's current unemployment status. When screening or referring individuals for job postings, job orders, training, or other employment-related services, covered entity staff should not allow an individual's unemployment status to impede the individual in seeking employment or participating in a training program or other services:
 - Covered entity staff should refrain from screening and refusing to make job referrals because an applicant lacks current employment. Job seekers without current employment who are referred for positions where the job posting takes an individual's current employment status into account must receive a copy of the notice to job seekers, Attachment 3 to this TEGL, along with the job announcement.
 - Nothing in this TEGL prevents covered entity staff from taking into account an individual's current unemployment status for receiving employment-related services or participating in a program designed to benefit the unemployed.
- c. Covered entities are also encouraged to consult the TEN 12-14: *Promising Practices and Resources for Addressing Long-Term Unemployment*, which contains best practices for overcoming barriers to employment for the long-term unemployed.⁶
4. **Applicable civil rights statutes, regulations, and guidance.** The nondiscrimination provisions that apply to the federally-assisted workforce system prohibit intentional discrimination on the basis of race, national origin, sex, disability and other protected bases, as well as policies or practices which, though neutral on their face, have a disproportionate impact on these protected groups and cannot be justified as job related and consistent with business necessity. Although individuals without current employment are not a protected group under the applicable federal laws, certain antidiscrimination laws may be implicated when an employer disqualifies job seekers from hiring consideration because they are unemployed.

⁶ Training and Employment Notice 12-14, *Promising Practices and Resources for Addressing Long-Term Unemployment*, issued October 17, 2014, available at http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=7919.

The potential impact of this practice upon members of protected groups is apparent in light of national unemployment statistics. The Department of Labor’s analysis shows that African-Americans, Hispanics and individuals with certain disabilities are disproportionately unemployed and that requiring applicants to be currently employed may have a disparate impact on these groups. At the national level in 2013, for example, the unemployment rate was 6.8 percent for white men, 14.2 percent for African-American men, 12.1 percent for African-American women and 9.1 percent for Hispanics.⁷ The unemployment rate of working age individuals with certain disabilities also remains significantly higher than for those without disabilities.⁸ In 2013, the unemployment rate for individuals with certain disabilities who were age 16 to 64 was 14.7 percent, compared to 7.4 percent for individuals with no disabilities in that same age range.⁹

The possible disparate impact of such a policy on members of protected groups is particularly evident among long-term unemployed individuals.¹⁰ African-Americans are disproportionately represented among long-term unemployed individuals, making up 24.4 percent of the long-term unemployed. Hispanic individuals make up 18.1 percent of long-term unemployed individuals.¹¹ By comparison, African-American and Hispanic individuals make up 11 and 16 percent of the labor force, respectively.¹² Additionally, of unemployed workers, 43.3 percent of African-Americans and 41.7 percent of Asian-American and Pacific Islanders, a significantly higher percentage than among Whites, have been unemployed for 27 weeks or longer.¹³

To determine whether a particular employer has violated federal antidiscrimination statutes, an analysis of the relevant facts of the particular case and, if available, more refined data would be necessary.

- a. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., prohibits employment discrimination based on race, color, religion, sex, and national origin. See 42 U.S.C. 2000e-2. Entities within the public workforce system, such as the Nation’s State Workforce Agencies and American Job Centers, may be regarded as “employment agencies” under Title VII.¹⁴ Thus, if they “print or publish or cause to be printed” any job

⁷ *Labor Force Statistics from the Current Population Survey, Annual 2013.*

⁸ See 78 FR 58706 (Sept. 24, 2013) (The Department’s Office of Federal Contract Compliance Programs (OFCCP) final rule concerning affirmative action and nondiscrimination obligations of contractors and subcontractors regarding individuals with disabilities).

⁹ See Table A. Employment status of the civilian noninstitutional population by disability status and age, 2013 annual averages, available at <http://stats.bls.gov/news.release/disabl.a.htm>

¹⁰ The Bureau of Labor Statistics defines the term “long term unemployed” as those who have been actively searching for a job for 27 weeks or longer.

¹¹ Bureau of Labor Statistics, Current Population Survey, 2013 Annual Averages Table 31, <http://www.bls.gov/cps/cpsaat31.htm>.

¹² Bureau of Labor Statistics, Current Population Survey, 2013 Annual Averages.

¹³ See Chart 4. U.S. Department of Labor, *The Economic Status of Asian Americans and Pacific Islanders in the Wake of the Great Recession* (Aug. 28, 2014), <http://www.dol.gov/sec/media/reports/20140828-AAPI.pdf>.

¹⁴ 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,

announcement that discriminates based on race, color, religion, sex, or national origin, they may be liable for violating Title VII.¹⁵ Title VII also 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 national origin. 42 U.S.C. 2000e-2(b).¹⁶

- b. Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, applies to all programs or activities receiving federal financial assistance, such as covered entities that receive assistance under the Workforce Investment Act and/or the Wagner-Peyser Act. Title VI and its implementing regulations prohibit any program or activity from excluding from participation in or denying the benefits of programs, or otherwise subjecting anyone to discrimination, on the ground of race, color, or national origin. 42 U.S.C. 2000d; 29 C.F.R. 31.3(a). The Department’s Civil Rights Center (CRC) administers and enforces these requirements.

Recipients may not use any “criteria or methods of administration which have the effect of subjecting individuals to discrimination because of race, color or national origin.” 29 C.F.R. 31.3(b)(2). Further, the “selection, and referral of individuals for job openings or training opportunities and all other activities performed by or through employment service offices” must be done without regard to race, color, or national origin. 29 C.F.R. 31.3(d)(1)(i).

- c. The Americans with Disabilities Act of 1990, (ADA), 42 U.S.C. 12101 et seq., prohibits employment discrimination against qualified individuals with a disability. 42 U.S.C. 12112. The ADA applies to employers and employment agencies, 42 U.S.C. 12111(2), as well as state and local government programs, services, and activities. 42 U.S.C. 12132; 28 C.F.R. Part 35. DOL’s CRC is responsible for enforcing Title II of the ADA with regard to “[a]ll programs, services, and regulatory activities relating to labor and the work force.” See 28 C.F.R. 35.190(b)(7).
- d. The Rehabilitation Act of 1973, (Section 504), 29 U.S.C. 794, prohibits discrimination against qualified individuals with a disability “under any program or activity receiving

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.

¹⁵ 42 U.S.C. 2000e-3(b). See, however, 47 U.S.C. 230, which may shield Internet-based Job Banks from civil liability for posting content created by third parties.

¹⁶ OFCCP administers Executive Order 11246, which, similar to Title VII, 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. Many groups protected by OFCCP’s laws are also disproportionately represented among the long-term unemployed.

federal financial assistance.”¹⁷ CRC administers and enforces the Department’s regulations implementing Section 504 that apply to recipients of financial assistance from the Department. These regulations state that no qualified individual shall, on the basis of disability, “be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity,” 29 C.F.R. 32.4(a), nor may a recipient “use criteria or methods of administration that have the effect of subjecting qualified [individuals with disabilities] to discrimination on the basis of [disability].” 29 C.F.R. 32.4(b)(4)(i).

- e. 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. 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 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, 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).¹⁸

The WIA nondiscrimination regulations prohibit recipients from using “standards, procedures, criteria, or administrative methods” that have 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 “in any manner.” 29 C.F.R. 37.6(d). 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).

5. **Action Requested.** Covered entities and their program operators are directed to review their existing policies and procedures and make any changes necessary to implement the guidance discussed in this TEGL. They are also encouraged to consult TEN 12-14: *Promising Practices and Resources for Addressing Long-Term Unemployment*,¹⁹ which contains best practices for overcoming barriers to employment for the long-term unemployed.

¹⁷ The Department’s OFCCP enforces Section 503 of the Rehabilitation Act, 29 U.S.C. 793, which requires covered federal contractors and subcontractors to take affirmative action to employ and advance in employment qualified individuals with disabilities. The same employment discrimination standards that are applicable under the ADA also apply to Sections 503 and 504 of the Rehabilitation Act, 29 U.S.C. 794. Similar standards apply under WIA Section 188 and its implementing regulations.

¹⁸ The Workforce Innovation and Opportunity Act (WIOA), signed into law on July 22, 2014, supersedes the Workforce Investment Act of 1998 and amends the Wagner-Peyser Act and the Rehabilitation Act of 1973. 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.

¹⁹ Training and Employment Notice 12-14, *Promising Practices and Resources for Addressing Long-Term Unemployment*, issued October 17, 2014, available at http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=7919.

6. **Contact Information.** Inquiries about incentive programs and other efforts to promote employment opportunities for the unemployed should be addressed to the appropriate ETA regional or national office. Inquiries about civil rights issues should be addressed to CRC, by phone at 202-693-6500 (voice) or 202-693-6516 (TTY); by relay at 800-877-8339 (TTY/TDD), or (877) 709-5797 or myfedvrs.tv (video); or by e-mail at CivilRightsCenter@dol.gov. Complaints alleging discrimination by entities in the public workforce 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>.

Inquiries relating to discrimination in employment by federal contractors and subcontractors should be addressed to Office of Federal Contract Compliance Programs, U.S. Department of Labor, 200 Constitution Avenue, NW, Room C-3310, Washington, DC 20210. <http://www.dol.gov/ofccp>, 1-800-397-6251 (Help Desk).

7. **Attachments.**

- Notice to Employers Regarding Job Bank Nondiscrimination and Hiring Restrictions Based on an Individual's Unemployment Status
- Notice to Employers Regarding Job Posting Containing Exclusions or Restrictions Based on an Applicant's Unemployment Status
- Notice to Job Seekers to be Attached to Job Postings with Exclusions Based on an Applicant's Current Employment Status