

Preliminary Policy on Monitoring

Reference:

Workforce Innovation and Opportunity Act sections 107, 108, 129, 134, 184, 188. Uniform Requirements, Cost Principles, and Audit Requirements for Federal Awards Final Rule; Workforce Innovation and Opportunity Act – Notice of Proposed Rulemaking, Workforce Innovation and Opportunity Act – Notice of Proposed Rulemaking, 20 CFR § 683.410.

Action:

This policy is effective immediately.

Background:

The State is the pass-through entity of funds awarded for WIOA Title I Adult, Dislocated Worker, and Youth programs. It is responsible for oversight of the operations of the WIOA activities. The State must monitor its activities under the Federal awards to assure compliance with applicable WIOA requirements and performance expectations are being achieved. Monitoring by the State must cover each program, function, or activity.¹

The Nebraska Department of Labor, Office of General Counsel, monitors program and fiscal performance of local areas to ensure proper systems are not only in place, but that they are being followed and meet the requirements of the law on a yearly basis. A procedural guide for statewide monitoring activities will be available on the Internet at dol.nebraska.gov.

Definitions and Oversight Responsibilities:

“Non-Federal entity” means a State, local government, Indian tribe, institution of higher education, or non-profit organization that carries out a Federal award as a recipient or subrecipient.² The City of Omaha, City of Lincoln, State of Nebraska, Heartland Workforce Solutions (HWS), and Goodwill Industries, as subrecipients of WIOA funds, are considered “non-Federal entities.”

The non-Federal entity is responsible for oversight of the operations of the Federal award supported activities. The non-Federal entity must monitor its activities under Federal awards to assure compliance with applicable Federal requirements and performance expectations are being achieved. Monitoring by the non-Federal entity must cover each program, function, or activity.³

The non-Federal entity must submit performance reports at the interval required by the federal awarding agency or pass-through entity to best inform improvements in program outcomes and productivity. These reports will contain:

- A comparison of actual accomplishments to the objectives of the Federal award established for the period;

¹ 2 CFR § 200.328

² 2 CFR § 200.69

³ 2 CFR § 200.328(a)

- The reasons why established goals were not met, if appropriate; and
- Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.⁴

Events may occur between the scheduled performance reporting dates that have significant impact upon the supported activity. In such cases, the non-Federal entity must inform the Federal awarding agency or pass-through entity as soon as the following types of conditions become known:

- Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the Federal award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation; and
- Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more or different beneficial results than originally planned.⁵

“Pass-through entity” means a non-Federal entity that provides a subaward to a subrecipient to carry out part of a Federal program.⁶ If the non-Federal entity for the local area provides a subaward to a subrecipient to carry out part of a Federal program, the subrecipient is considered a “pass-through entity.” The State of Nebraska, the City of Omaha, and HWS are pass-through entities.

Among its responsibilities regarding subrecipients, a pass-through entity must:

- Evaluate each subrecipient's risk of noncompliance with Federal statutes, regulations, and the terms and conditions of the subaward for purposes of determining the appropriate subrecipient monitoring;
- Monitor the activities of the subrecipient as necessary to ensure that the subaward is used for authorized purposes, in compliance with Federal statutes, regulations, and the terms and conditions of the subaward; and that subaward performance goals are achieved.
- Verify that every subrecipient is audited as required by 2 CFR 200 Subpart F—Audit Requirements when it is expected that the subrecipient's Federal awards expended during the respective fiscal year equaled or exceeded \$750,000.
- Consider whether the results of the subrecipient's audits, on-site reviews, or other monitoring indicate conditions that necessitate adjustments to the pass-through entity's own records.
- Consider taking enforcement action against noncompliant subrecipients as described in §200.338 Remedies for noncompliance of this part and in program regulations.⁷

“Subrecipient” means a non-Federal entity that receives a subaward from a pass-through entity to carry out part of a federal program. A subrecipient may also be a recipient of other federal awards directly from a federal awarding agency.⁸ HWS, as a non-Federal entity that receives a subaward from the City of Omaha, is a subrecipient. Goodwill Industries, as a non-Federal entity that receives a subaward from HWS, is also a subrecipient.

⁴ 2 CFR § 200.328(b)(2)

⁵ 2 CFR § 200.328

⁶ 2 CFR § 200.74, A-133 § ___.105

⁷ 2 CFR § 200.331

⁸ 2 CFR § 200.93

Each subrecipient of funds under title I of WIOA must conduct regular oversight and monitoring of its WIOA programs and those of its subrecipients and contractors in order to:

- Determine that expenditures have been made against the proper cost categories and within the cost limitations specified in the Act and the regulations in this part;
- Determine whether there is compliance with other provision of the Act and the WIOA regulations and other applicable laws and regulations;
- Assure compliance with 2 CFR part 200; and
- Determine compliance with the nondiscrimination, disability, and equal opportunity requirements of WIOA Section 188.⁹

“Subaward” means an award provided by a pass-through entity to a subrecipient for the subrecipient to carry out part of a Federal award received by the pass-through entity. It does not include payments to a contractor or payments to an individual that is a beneficiary of a Federal program. A subaward may be provided through any form of legal agreement, including an agreement that the pass-through entity considers a contract.¹⁰

“Contractor” means an entity that receives a legal instrument (i.e., contract) by which a non-Federal entity purchases property or services needed to carry out the project or program under a Federal award. The term as used in this part does not include a legal instrument, even if the non-Federal entity considers it a contract, when the substance of the transaction meets the definition of a Federal award or subaward.¹¹

Subrecipient/Contractor Determination

The non-Federal entity may concurrently receive Federal awards as a recipient, a subrecipient, and a contractor, depending on the substance of its agreements with Federal awarding agencies and pass-through entities. Payments received for goods or services provided as a contractor are not federal awards.¹² Therefore, a pass-through entity must make case-by-case determinations whether each agreement it makes for the disbursement of Federal program funds casts the party receiving the funds in the role of a subrecipient or a contractor. The Federal awarding agency may supply and require recipients to comply with additional guidance to support these determinations provided such guidance does not conflict with this section.¹³

⁹ 20 CFR § 683.410(a)

¹⁰ 2 CFR § 200.92

¹¹ 2 CFR § 200.22 and 200.23

¹² 2 CFR § 200.330, 2 CFR § 200.501(f)

¹³ 2 CFR § 200.330

Characteristics which support the classification of the non-Federal entity as a subrecipient include when the non-Federal entity:	Characteristics indicative of a procurement relationship between the non-Federal entity and a contractor are when the non-Federal entity receiving the Federal funds:
Determines who is eligible to receive what Federal assistance	Provides the goods and services within normal business operations
Has its performance measured in relation to whether objectives of a Federal program were met	Provides similar goods or services to many different purchasers
Has responsibility for programmatic decision making	Normally operates in a competitive environment
Is responsible for adherence to applicable Federal program requirements specified in the Federal award	Provides goods or services that are ancillary to the operation of the Federal program
In accordance with its agreement, uses the Federal funds to carry out a program for a public purpose specified in authorizing statute, as opposed to providing goods or services for the benefit of the pass-through entity. ¹⁴	Is not subject to compliance requirements of the Federal program as a result of the agreement, though similar requirements may apply for other reasons. ¹⁵

In determining whether an agreement between a pass-through entity and another non-Federal entity casts the latter as a subrecipient or a contractor, the substance of the relationship is more important than the form of the agreement. All of the characteristics listed above may not be present in all cases, and the pass-through entity must use judgment in classifying each agreement as a subaward or a procurement contract.¹⁶

"The chief elected official in a local area shall serve as the local grant recipient for, and shall be liable for any misuse of, the grant funds allocated to the local area...unless the chief elected official reaches an agreement with the Governor for the Governor to act as the local grant recipient and bear such liability." [WIOA section 107(d)(12)(B)(i)(I)]

Policy:

The State monitoring system must:

- Provide for annual on-site monitoring reviews of each local area to ensure compliance with 2 CFR part 200, as required by WIOA section 184(a)(3).
- Ensure that established policies to achieve program quality and outcomes meet the objectives of the Act and WIOA regulations.
- Enable the Governor to determine if subrecipients and contractors have demonstrated substantial compliance with WIOA and Wagner-Peyser requirements;

¹⁴ 2 CFR § 200.330(a)

¹⁵ 2 CFR § 200.330(b)

¹⁶ 2 CFR § 200.330(c)

- Enable the Governor to determine whether a local plan will be disapproved for failure to make acceptable progress in addressing deficiencies as required in WIOA section 108(e)(1); and
- Enable the Governor to ensure compliance with the nondiscrimination, disability, and equal opportunity requirements of WIOA section 188, including the Assistive Technology Act of 1998 (29 U.S.C. 3003).¹⁷.

Steps in State Monitoring Process

1. Notification: With the exception of unscheduled reviews, notification of pending reviews will be given at least ten (10) days before each review. The Nebraska Department of Labor is authorized to monitor any entity receiving WIOA funds, and these reviews may include entering sites or premises to examine program and fiscal records, question employees, and interview participants. It reserves the option to conduct unannounced or unscheduled reviews as appropriate.
2. Sampling: Random-sampling and data validation techniques will be used to draw the samples that will be used to review records. The review may include all (100%) of the record universe if the universe is small or problems are identified during the review.
3. Interviews: Review interviews will be offered and/or provided upon request to appropriate officials for each review conducted.
4. Working Papers: Review working papers shall be established during the review and maintained at the Nebraska Department of Labor, Office of General Counsel.
5. Report: A report will be issued within thirty (30) days of the completion of the review and it shall be published with the following: background; Limitations (if applicable); Results of the Review; Corrective Action if Required; and Summary. Copies of the report will be dispensed to the following: Local Workforce Development Area Administrative Entity; Local Workforce Development Area Board Chair; Commissioner of Labor/WIOA Liaison; Director of the Office of Employment and Training; General Counsel, Monitor File, and CEO Representative, upon request.
6. Resolution or Completion: The review is completed or resolved if corrective action is not required.
7. Corrective Action: The entity will issue a corrective action plan to the Nebraska Department of Labor, Office of General Counsel, 550 South 16th Street, Lincoln, Nebraska 68509, within thirty (30) days of the receipt of a report that requires corrective action. The corrective action plan shall identify the action that the entity will initiate to correct the problem, the estimated date the problem will be resolved, and how the local board shall be involved in addressing this issue. In the event it is not possible to resolve findings through the monitoring system, a referral may be made to the Executive Director, Office of Employment and Training for Technical Assistance or referred to the Commissioner of Labor for resolution and/or action.
8. Acceptance of the Corrective Action Plan: The Nebraska Department of Labor shall notify the entity of the resolution of the corrective action plan.

¹⁷ 20 CFR § 683.410

9. Progress Reports: The Nebraska Department of Labor may choose to require progress reports from the entity for some corrective action plans. The acceptance notification will indicate if and when progress reports are required.
10. Further Action: At the discretion of the Nebraska Department of Labor, additional monitor reviews may be conducted to ensure full implementation of the corrective action plan.
11. Fiscal Controls/Sanctions: In the event of a subrecipient's failure to take required corrective action for substantial violation of standards, sanctions and fiscal controls will be imposed according to WIOA sections 184(b) and (c). These actions may be appealed to the Secretary of Labor in accordance with section 184(b)(2).

Certification will be provided to the Secretary every two years that:

- The State has implemented uniform administrative requirements;
- The State has monitored local areas to ensure compliance with uniform administrative requirements; and
- The State has taken appropriate corrective action to secure such compliance.¹⁸

Local Monitoring and Oversight Responsibilities

Pursuant to WIOA section 107(d)(8), the local board, in partnership with the chief elected official for the local area must:

- Conduct oversight for local youth workforce investment activities, local employment and training activities for adults and dislocated workers, and the one-stop delivery system in the local area;
- Ensure the appropriate use and management of the funds provided for the activities; and
- For workforce development activities, ensure the appropriate use, management, and investment of funds to maximize performance outcomes under WIOA section 116.

Each local area shall prepare and submit to the Nebraska Department of Labor, Office of Employment and Training, a schedule and a policy addressing how they will conduct monitoring of their subrecipients pursuant to 2 CFR § 200.331 and how they will engage their local board in monitoring and oversight activities.

Disclaimer

This policy is based on NDOL's reading of the statute along with the Notice of Proposed Rulemaking released by USDOL. This policy may be subject to change as additional federal regulations and TEGLs are released. This policy is not intended to be permanent and should be viewed as a placeholder until final federal regulations are released in early 2016.

¹⁸ WIOA Section 184(a)(6).