

**Interim Policy on Incumbent Worker Training Programs**

**Reference:**

Workforce Innovation and Opportunity Act (WIOA), Sections 108, 122, 134, 181, and 194; WIOA Notice of Proposed Rulemaking, 20 CFR §§ 680.780, 680.790, 683.200(c)(9); TEGL 3-15.

**Changes:**

- Directive that local areas must establish incumbent worker training policies and minimum requirements for such policies
- Incumbent worker training defined
- Employer size defined

**Background:**

The Workforce Innovation and Opportunity Act (WIOA) specifically allows local boards to use up to 20 percent of certain funding dollars to address incumbent worker training. These funds allow local boards to help area employers through the training of their current workforce in order to obtain the skills necessary to retain employment and prevent job loss. Implementation of incumbent worker training may be included in the description of strategies that will be used in a local area as required by the local plan.

**Action:**

After a 10 day review period, this Policy will be considered final. Questions and comments should be submitted in writing to the WIOA Policy Mailbox: [ndol.wioa\\_policy@nebraska.gov](mailto:ndol.wioa_policy@nebraska.gov).

Local areas, in conjunction with their local board, must establish a local incumbent worker training policy that, at a minimum, outlines the following:

- Criteria for determining employer eligibility;
- How the employers' share of incumbent worker training cost will be established;
- Agreement or contracting process with providers of incumbent worker training; and
- The process for the collection and dissemination of performance information through the One-Stop system.

Local areas must also ensure their local WIOA Plan addresses the requirements set forth in this policy

**Policy:**

**Who is an Incumbent Worker?**

States and local areas must establish policies and definitions to determine which workers, or groups of workers, are eligible for incumbent worker services. To qualify as an incumbent worker, the worker needs to be employed, meet the Fair Labor Standards Act requirements for an employee-employer relationship, and have an established employment history with the employer

for 6 months or more. The training must satisfy the requirements of Section 134(d)(4) of WIOA and 20 CFR § 680.790 and increase the competitiveness of the employee and employer. An incumbent worker does not necessarily have to meet eligibility requirements for career and training services for adult and dislocated workers.<sup>1</sup>

### **Use of Funds for Incumbent Worker Training Activities**

The local board may reserve and use not more than 20 percent of the funds allocated by the governor under Section 133(b) of WIOA [Adult Employment and Training Activities and Dislocated Worker Funds] to the local area involved to pay the program cost of providing training through a training program for incumbent workers.<sup>2</sup> In determining the eligibility of an employer to receive this funding, the local board must take into account the following:

- the characteristics of the participants in the program;
- the relationship of the training to the competitiveness of a participant and the employer; and
- such other factors as the local board may determine to be appropriate, which may include the number of employees participating in the training, the wage and benefit levels of those employees (both pre- and post-participation earnings), and the existence of other training and advancement opportunities provided by the employer.<sup>3</sup>

The governor or state board may make recommendations to the local board for incumbent worker training that has a statewide impact.<sup>4</sup>

The training activities for incumbent workers shall be carried out by the local board in conjunction with the employers or groups of employers of incumbent workers (which may include employers in partnership with other entities for the purposes of delivering training) for the purpose of assisting such workers in obtaining the skills necessary to retain employment or avert layoffs.<sup>5</sup> Incumbent worker training for purposes of Section 134(d)(4)(B) of WIOA is training:

- Designed to meet the special requirements of an employer (including a group of employers) to retain a skilled workforce or avert the need to lay off employees by assisting the workers in obtaining the skills necessary to retain employment.
- Conducted with a commitment by the employer to retain or avert the layoffs of the incumbent worker(s) trained.<sup>6</sup>

The local board will utilize program funds to reimburse employers providing incumbent worker training on a graduated scale based on the size of a business. Such participating employers must pay the remaining share of the costs not covered by WIOA program funds for providing such training.<sup>7</sup> The local board shall establish the employers' share of cost, taking into consideration factors such as the number of employees participating in the training, the wage and benefit levels of the employees (at the beginning and anticipated upon completion of the training), the relationship of the training to the competitiveness of the employer and employees, and the availability of other employer-provided training and advancement opportunities.<sup>8</sup>

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<sup>1</sup> 20 CFR § 680.780

<sup>2</sup> WIOA Section 134(d)(4)(A)(i)

<sup>3</sup> WIOA Section 134(d)(4)(A)(ii), TEGL 3-15

<sup>4</sup> WIOA Section 134(d)(4)(A)(iii)

<sup>5</sup> WIOA Section 134(d)(4)(B)

<sup>6</sup> 20 CFR § 680.790

<sup>7</sup> WIOA Section 134(d)(4)(C)

<sup>8</sup> WIOA Section 134(d)(4)(D)(i)

For an employers' share of cost, a sliding scale has been established based on the employer size at a local operation (i.e., not based on nationwide employer size) where the incumbent worker training will be provided. The employers' share of cost shall not be less than:

- 10 percent of the cost for employers with not more than fifty (50) employees;
- 25 percent of the cost for employers with more than fifty (50) employees but not more than 100 employees; and
- 50 percent of the cost for employers with more than 100 employees.<sup>9</sup>

The share provided by an employer participating in the program may include the amount of wages paid by the employer to a worker while the worker is attending an incumbent worker training program under Section 134(d)(4) of WIOA. The employer may provide this share of cost in cash or in kind, fairly evaluated.<sup>10</sup> Official payroll records documenting the worker's hours and wages must be utilized to determine the amount of the employer's share of cost.

The employer size means the number of employees currently employed at the local operation where the incumbent worker training placements will be made. When substantiating the employer count, the most current Labor Market Information (LMI) may be a source to consider. LMI may be obtained from NEworks. Local employer site information, including an employee size range for each local operation, is available in NEworks through data provided by Infogroup. The employee size range from NEworks is acceptable to the extent the entire size range fits within the incumbent worker training employer reimbursement sliding scale ranges (e.g. an employee size range listed as 20-49 in NEworks falls within the 1-50 employee range found within the incumbent worker training employer reimbursement sliding scale). Employer Size is determined by the number of employees at the time of the execution of the incumbent worker training contract. This applies to all employers, including employers with seasonal or intermittent employee size fluctuations.

### Conflict of Interest

A state board member, a local board member, or a standing committee member must neither cast a vote on, nor participate in any decision-making capacity, on the provision of services by such member (or any organization which that member directly represents), nor on any matter which would provide any direct financial benefit to that member or the member's immediate family.<sup>11</sup> For example, a local board member who is also an employer who wants to use services on a fee-for-service basis would be prohibited from voting to approve the use of local area services, facilities, or equipment for employment and training activities to such board member's incumbent workers.

Neither membership on the state board, local board, or standing committee, nor receipt of WIOA funds to provide training and related services, by itself, violates these conflict of interest provisions.<sup>12</sup>

In accordance with § 200.112 of the Uniform Guidance, recipients of federal awards must disclose in writing any potential conflict of interest to the Department of Labor. Subrecipients must disclose in writing any potential conflict of interest to the recipient of grant funds.<sup>13</sup>

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<sup>9</sup> WIOA Section 134(d)(4)(D)(ii)

<sup>10</sup> WIOA Section 134(d)(4)(D)(iii)

<sup>11</sup> 20 CFR § 683.200(c)(5)(i)

<sup>12</sup> 20 CFR § 683.200(c)(5)(ii)

<sup>13</sup> 20 CFR § 683.200(c)(5)(iii)

## **Providers of Incumbent Worker Training Services**

Providers of incumbent worker training shall not be subject to the requirements of 122(a) through (f) [Eligible Training Provider requirements] regarding the governor's criteria and information requirements and application and renewal procedures in identification of eligible providers of training services.<sup>14</sup>

Training services authorized under Section 134 of WIOA [Use of Funds for Employment and Training Activities] may be provided pursuant to a contract for services in lieu of an individual training account if such services are incumbent worker training.<sup>15</sup>

A One-Stop operator must collect performance information from providers on incumbent worker training and use the information to determine whether the providers meet such performance criteria as the governor may require. The One-Stop operator must disseminate information identifying providers that meet the criteria as eligible providers, and the performance information, through the One-Stop delivery system. Providers determined to meet the criteria for incumbent worker training services shall be considered to be identified as eligible providers of such training services.<sup>16</sup>

Agreements with employers regarding incumbent worker training must be in writing and must ensure that all participants are provided a structured training opportunity by which to gain the knowledge and competencies necessary to retain employment and avoid lay-offs.

## **General Program Requirements for Incumbent Worker Training**

On a fee-for-service basis, employers may use local area services, facilities, or equipment funded under Title I of WIOA to provide employment and training activities to incumbent workers:

- When the services, facilities or equipment are not being used by eligible participants;
- If their use does not affect the ability of eligible participants to use the services, facilities, or equipment; and
- If the income derived from such fees is used to carry out the programs authorized under Title I.<sup>17</sup>

## **Restrictions**

Funds provided under WIOA cannot be used to pay the wages of incumbent employees during their participation in an economic development activity provided through a statewide workforce development system.<sup>18</sup> Additionally, when a relocation of a business results in the loss of employment of any employee of such business, no funds provided for employment training can be used for incumbent worker training until after 120 days has passed since the relocation that caused the loss of employment at an original business location in the U.S.<sup>19</sup>

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<sup>14</sup> WIOA Section 122(h)(1)

<sup>15</sup> WIOA Section 134(b)(3)(G)(ii)(II)

<sup>16</sup> WIOA Section 122(h)(2)

<sup>17</sup> 20 CFR § 683.200(c)(9)

<sup>18</sup> WIOA Section 181(b)(1)

<sup>19</sup> WIOA Section 181(d)(1)

**Disclaimer:**

This interim 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.