

Workforce Innovation and Opportunity Act

Nebraska Department of Labor
Office of Employment & Training

Preliminary Policy on On-The-Job Training

Reference:

Workforce Innovation and Opportunity Act Sections 3, 108, 122, 134, 181, 194; [Workforce Innovation and Opportunity Act – Notice of Proposed Rulemaking](#), 20 CFR §§ 681.590, 680.700, 680.710, 680.720, 680.730, 680.740; 29 CFR § 37.

Background:

On-the-Job training (OJT) under the Workforce Innovation and Opportunity Act (WIOA) is provided under a contract with an employer in the public, private non-profit, or private sector. This training arrangement is an exception to the Individual Training Account (ITA) requirement specified in Section 134. 20 CFR § 680.720(b) allows employers to be reimbursed up to 50% of the wage rate of an OJT participant for the extraordinary costs of providing the training and additional supervision related to the OJT. As described later in the policy, employers that meet the criteria listed in 20 CFR § 680.730 may be reimbursed up to 75% of the wage rate for extraordinary costs of providing the training and additional supervision related to OJT.

Action:

This policy becomes effective July 1, 2015.

Policy:

WIOA and implementing regulations establish minimal requirements for on-the-job training contracts. Agreements for on-the-job training services must be in writing and must ensure that participants are provided a structured training opportunity in which to gain the knowledge and competencies necessary to be successful in the occupation in which they receive training. The training services shall be provided in a manner that maximizes consumer choice in the selection of an eligible provider of such services.¹

Definition

The term “on-the-job training” means training by an employer that is provided to a paid participant while engaged in productive work in a job that:

- a. Provides knowledge or skills essential to the full and adequate performance of the job;
- b. Is made available through a program that provides reimbursement to the employer of up to 50 percent of the wage rate of the participant, except as provided in WIOA Section 134(c)(3)(H), for the extraordinary costs of providing the training and additional supervision related to the training; and
- c. Is limited in duration as appropriate to the occupation for which the participant is being trained, taking into account the content of the training, the prior work experience of the participant, and the service strategy of the participant, as appropriate.²

¹ WIOA Section 134(c)(3)(F)

² WIOA Section 3(44)

Youth

Local youth programs must expend not less than 20 percent of the funds allocated to them to provide in-school youth and out-of-school youth with paid and unpaid work experiences.³ These work experiences may include OJT opportunities.

Adult Programs

Training services for adults and dislocated workers may include on-the-job training opportunities.⁴ OJT may be provided pursuant to a contract for services in lieu of an individual training account.⁵

General Restrictions and Guidelines

OJT contracts should not be entered into with employers who received payments under WIOA or the Workforce Investment Act and have exhibited a pattern of failing to provide on-the-job training participants with continued long-term employment as regular employees with wages and employment benefits and working conditions on the same level and to the same extent as other employees working a similar length of time and doing the same type of work.⁶

Each program under WIOA shall provide employment and training opportunities to those who can benefit from, and who are most in need of, such opportunities.⁷ WIOA Section 134(c)(3)(E) requires that priority for OJT must be given to recipients of public assistance, other low-income individuals,⁸ and individuals who are basic skills deficient.⁹

Funds for Registered Apprenticeship Programs

OJT contracts may be written with registered apprenticeship programs or participating employers in registered apprenticeship programs for the OJT portion of the registered apprenticeship program consistent with 20 CFR § 680.700. Depending on the length of the registered apprenticeship and State and local OJT policies, these funds may cover some or all of the registered apprenticeship training.¹⁰

Pre-Award Reviews

It is essential to conduct pre-award reviews or employer evaluations prior to executing an on-the-job training contract. Service deliverers shall determine if the employer/training provider is qualified and capable of entering into an agreement to provide on-the-job training. Pre-award reviews

³ 20 CFR § 681.590 and WIOA Section 129(c)(4)

⁴ WIOA Section 134(c)(3)(D)(ii)

⁵ WIOA Section 134(c)(3)(G)(ii)

⁶ WIOA Section 194(4)

⁷ WIOA Section 194(1)

⁸ The term “**low-income individual**” means an individual who— (i) receives, or in the past 6 months has received, or is a member of a family that is receiving or in the past 6 months has received, assistance through the supplemental nutrition assistance program established under the Food and Nutrition Act of 2008 (7 U.S.C. 2011 et seq.), the program of block grants to States for temporary assistance for needy families program under part A of title IV of the Social Security Act, or the supplemental security income program established under title XVI of the Social Security Act, or State or local income-based public assistance; (ii) is in a family with total family income that does not exceed the higher of— (I) the poverty line; or (II) 70 percent of the lower living standard income level; (iii) is a homeless individual – WIOA Section 3(36)

⁹ The term “**basic skills deficient**” means, with respect to an individual— (A) who is a youth, that the individual has English reading, writing, or computing skills at or below the 8th grade level on a generally accepted standardized test; or (B) who is a youth or adult, that the individual is unable to compute or solve problems, or read, write, or speak English, at a level necessary to function on the job, in the individual’s family, or in society – WIOA Section 3(5)

¹⁰ 20 CFR § 680.740

should be in written form and part of the OJT contract. Criteria that must be established through the pre-award process includes the following [also, refer to the “Written Assurances” beginning on page 5 of this policy]:

- Whether the employer is a new or established business. If the company has operated at the current location less than 120 days and the business relocated from another area in the U.S., verify that employees were not laid off at the previous location as a result of the relocation. *[See Written Assurance #14 and WIOA Section 181(d)(2).]*
- The Employer Size, meaning number of employees currently employed at the local operation where the OJT 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. Employer Size is determined by the number of employees at the time of the pre-award review. This applies to all employers, including employers with seasonal or intermittent employee size fluctuations.
- If the applicant has worked for the employer at any time in the past, and if so, the dates and circumstances. Individuals shall not be considered eligible for services with the same employer in the same occupation.
- The hiring practices of this employer in general, and for this position in particular. *[Note WIOA Section 194(4).]*
- If the applicant is related to the employer, or an employee who works for the employer in an administrative or supervisory capacity. *[See Written Assurance #4.]*
- The employer’s rate of employee turnover, and the turnover for this particular position. Contracting with employers who have high employee turnover rates should be avoided.
- If the employer has incurred any layoffs in the past 12 months. Check to be sure no Worker Adjustment and Retraining Notification Act (WARN) notices have been filed. *[See Written Assurance #13.]*
- If the position is full- or part-time, and if permanent, temporary, or seasonal. Contracts shall not be established for positions that do not or cannot have a trainer or supervisor present, or for temporary positions that are supplied to employers by temporary employment contractors.
- If the position is covered by a collective bargaining agreement, and if the training is consistent with such agreement. *[See Written Assurance #15.]*
- If there have been any OSHA, wage and hour, or child labor law violations in the past year. *[See Written Assurance #5.]*
- If there have been any substantiated Equal Opportunity complaints. *[See Written Assurance #7.]*
- If there are minimum qualifications for the position, and a written job description is available.

- If the pay and benefits are equivalent to similar positions in the local labor market and/or similar positions with the employer. *[See Written Assurance #2.]*
- If the employer provides worker's compensation or accident insurance. *[See Written Assurance #5.]*
- If the employer's accounting system (especially payroll), personnel system, grievance system, etc., is adequate to administer the contract agreement?
- If the employer is presently disbarred or suspended from receiving federal contracts. *[See Written Assurance #8.]*
- Recontracting is allowable with the same employer and certainly desirable when an employer/training provider has a high success rate of training and placement. However, recontracting should not be entered into with employers who have received payments under previous contracts and have exhibited a pattern of failing to provide on-the-job training participants with continued long-term employment as regular employees with wages and employment benefits (including health benefits) and working conditions at the same level and to the same extent as other employees working a similar length of time and doing the same type of work.
- Reverse referrals are allowed, however, all of the conditions of this OJT policy must be met. A reverse referral occurs when an employer with a hiring need refers an individual to the Career Center for an eligibility determination, and then hires the individual under an OJT training contract.

Service deliverers who initiate multiple or follow-on contracts with the same employer need not conduct a complete pre-award review of subsequent contracts if a review has been conducted within the past six months.

On-the-Job Training Contract Requirements

OJT contracts shall be procured in accordance with all federal, state and local procurement policies and at a minimum shall contain or address the following information:

- A. **Occupation(s) For Which Training Is To Be Provided** – Training will be provided only for those occupations for which there is a demand in the area served, or in another area to which the trainee is willing to relocate.¹¹
- B. **Length Of Time The Training Will Be Provided** – The length of OJT in Nebraska shall be based on the skill gap assessment, and is limited to a maximum of **six months or 1040 hours of work, whichever comes first**. Skill gap occurs where there is a gap between the skills of the individual and the skills needed for the targeted job. The skill gap is measured (and should be documented) by taking into consideration:
 - the initial skills of the participant as determined by recognized skill assessment tools (not just educational attainment)
 - skill level needed to perform the job

¹¹ WIOA Section 134(c)(3)(G)(iii)

There are several recognized skill assessment tools that are useful in determining the skills necessary for specific occupations and industries. Some of these include:

- **Industries:** Competency Model Clearinghouse www.CareerOneStop.org/CompetencyModel. Includes competency models for bioscience, construction, automation, and more
- **Occupations:** O*NET OnLine <http://online.onetcenter.org>. Occupational Competency Profiles contain: tasks, knowledge, skills, abilities, detailed work activities
- **Certification Finder:** www.careerinfonet.org/certifications_new/default.aspx. Includes certifications for hundreds of occupations.

In most instances in Nebraska, the O*NET assessment shall be used, but the other tools listed above are acceptable.

The duration must be limited to the period of time required for a participant to become proficient in the occupation for which the training is being provided. In determining the appropriate length of the contract, consideration should be given to the skill requirements of the occupation, the academic and occupational skill level of the participant, prior work experience, and the participant's individual employment plan¹². Local policies for determining duration must be documented in the local policies or plans.¹³

- C. **Wage Rate To Be Paid To The Trainee** – Individuals participating in on-the-job training must be compensated at the same rates, including periodic increases, as trainees or employees who are similarly situated in similar occupations by the same employer and who have similar training, experience, and skills. The rates may not be lower than the higher of the federal or state minimum wage.¹⁴ Currently, the minimum wage is \$8.00 per hour in Nebraska until January 1, 2016.¹⁵

D. **Reimbursement for On-the-Job Training**

OJT payments to employers are deemed to be compensation for the extraordinary costs associated with training participants and potentially lower productivity of the participants while in the OJT.¹⁶ Typically, the reimbursement rate may be up to 50 percent of extraordinary costs.

The Governor or local board may increase the amount of the reimbursement from 50 percent up to 75 percent of the wage rate of a participant for a program if:

1. The Governor approves the increase with respect to a program carried out with funds reserved by the state; or
2. The local board approves the increase with respect to a program carried out with funds allocated to a local area.¹⁷

In making the determination of whether to increase the reimbursement amount, the Governor or the local board must take into account factors consisting of

¹² 20 CFR § 680.700(c)

¹³ WIOA Section 108(b)(4)(B)

¹⁴ WIOA Section 181(a)(1)

¹⁵ Neb. Rev. Stat. § 48-1203.

¹⁶ 20 CFR § 680.720

¹⁷ WIOA Section 134(c)(3)(H)(i)

1. The characteristics of the participants taking into consideration whether they are “individuals with barriers to employment” as defined by WIOA Section 3(24);¹⁸
2. The size of the employer;
3. The quality of the employer-provided training and advancement opportunities; and
4. Such other factors as the Governor or local board, respectively, may determine to be appropriate, which may include
 - i. The number of employees participating in the training;
 - ii. Wage and benefit levels of those employees (at present and anticipated upon completion of the training); and
 - iii. Relation of the training to the competitiveness of a participant.¹⁹

The Governor or local board must document the factors used when deciding to increase the wage reimbursement levels above 50 percent.²⁰

- E. Training Outline Listing Work Skills To Be Learned In the Position –** A comprehensive list of work skills the trainee will learn during the contract period is a required part of the contract. Efforts should be made to develop programs which contribute to occupational development, upward mobility, development of new careers, and opportunities for nontraditional employment.
- F. Other Classroom Training –** An outline of any other separate classroom training may be provided by the employer.
- G. Employer’s Agreement To Maintain And Make Available Accurate And Complete Time And Attendance, Payroll And Other Records To Support Amounts Claimed By The Employer For Reimbursement Under The Contract –** The employer must preserve all trainee payroll, fringe benefit, and personnel records (including time and attendance sheets normally kept by the employer for employees) for three years from the close of the applicable program year or longer if any litigation or audit has begun or any claim is instituted which involves these records. In that case, the employer shall retain the records beyond the three year period until the litigation, audit findings or claim has been resolved.
- H. OJT Contracts for Employed Workers –** OJT contracts may be written for eligible employed workers when:
- a. The employee is not earning a self-sufficient wage as determined by local board policy;
 - b. The requirements of 20 CFR § 680.700 are met; and

¹⁸ The term “individual with a barrier to employment” means a member of 1 or more of the following populations: (A) Displaced homemakers. (B) Low-income individuals. (C) Indians, Alaska Natives, and Native Hawaiians, as such terms are defined in section 166. (D) Individuals with disabilities, including youth who are individuals with disabilities. (E) Older individuals. (F) Ex-offenders. (G) Homeless individuals or homeless children and youths. (H) Youth who are in or have aged out of the foster care system. (I) Individuals who are English language learners, individuals who have low levels of literacy, and individuals facing substantial cultural barriers. (J) Eligible migrant and seasonal farmworkers, as defined in section 167(i). (K) Individuals within 2 years of exhausting lifetime eligibility under part A of title IV of the Social Security Act (42 U.S.C. 601 et seq.). (L) Single parents (including single pregnant women). (M) Long-term unemployed individuals. (N) Such other groups as the Governor involved determines to have barriers to employment.

¹⁹ WIOA Section 134(c)(3)(H)(ii); 20 CFR § 680.730

²⁰ 20 CFR § 680.730

- c. The OJT relates to the introduction of new technologies, introduction to new production or service procedures, upgrading to new jobs that require additional skills, workplace literacy, or other appropriate purposes identified by the local board.²¹

I. **Written Assurances** – OJT contracts must include several standard assurances that are designed to acknowledge a contractor's responsibilities in accepting public funds for training. The assurances should address these issues:

1. At the end of the training period, the employer intends to retain the trainee in the occupation and compensate the trainee for at least the hourly wage rate specified in the contract agreement. Retention will be subject to the employer's right to terminate the trainee for normal business or personnel reasons.
2. Individuals in on-the-job training must be provided benefits and working conditions at the same level and to the same extent as other trainees or employees working a similar length of time and doing the same type of work.²²
3. Funds provided to employers for OJT must not be used to directly or indirectly assist, promote or deter union organizing.²³
4. No individual in a decision making capacity including workforce development board members shall engage in any activity, including participation in the selection, award, or administration of a contract supported by WIOA funds if a conflict of interest would be involved.²⁴
5. The employer will provide worker's compensation coverage for the trainee and abide by health and safety standards established under State and Federal law.²⁵
6. The trainee will not conduct political or sectarian activities at work while under the provisions of the OJT contract.²⁶
7. The employer will not discriminate against any trainee on the basis of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and against beneficiaries on the basis of either citizenship/status as a lawfully admitted immigrant authorized to work in the United States or participation in any Workforce Investment Act Title I-financially assisted program or activity.²⁷
8. The employer certifies that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this contract by any Federal department or agency.

²¹ 20 CFR § 710

²² WIOA Section 181(b)(5)

²³ WIOA Section 181(b)(7)

²⁴ 20 CFR § 679.430

²⁵ WIOA Section 181(b)(4)

²⁶ WIOA Section 194(6)

²⁷ WIOA Section 188(a)(1)

9. The employer certifies that it will provide a drug-free workplace as defined by the Drug-Free Workplace Act of 1988.²⁸
10. The employer is in compliance with all State and local laws regarding taxation and licensing.
11. Trainees who are working as laborers/mechanics in any construction, alteration or repair (including painting and decorating) of public buildings or works must be compensated in compliance with the Davis-Bacon Act.²⁹
12. A trainee in an OJT program shall not displace (including a partial displacement, such as a reduction in the hours of non-overtime work, wages, or employment benefits) any currently employed employee (as of the date of the participation).³⁰
13. The employer agrees that no trainee shall be hired into or remain working in any position when any other individual is on layoff from the same or any substantially equivalent job. An OJT trainee may not be employed in a job if the employer has terminated the employment of any regular, unsubsidized employee or otherwise caused an involuntary reduction in its workforce with the intention of filling the vacancy with the WIOA participant. It is not allowable for an OJT job to be created in a promotional line that infringes in any way on the promotional opportunities of currently employed workers.³¹
14. The contract will not encourage or induce the relocation, or an establishment or part thereof, that results in a loss of employment for any employee of such establishment at the original location.³²
15. Nothing in the OJT contract shall impair existing contracts for services or existing collective bargaining agreements unless the employer and the labor organization concur in writing.³³
16. The Contractor certifies that it has registered with and is using a federal immigration verification system as defined in section 7 of Nebraska Laws 2009, LB 403 to determine the work eligibility status of all new employees physically performing services within the State of Nebraska.³⁴

Performance Information

Providers of on-the-job training will not be subject to the eligible provider requirements.³⁵

However, American Job Centers in a local area must collect performance information on providers of on-the-job training. At a minimum, this performance information should include:

- Data on placement of trainee at end of the contract
- Six-month employment retention rate
- Rate of successful completion of On-the-Job Training

²⁸ 41 U.S.C. § 8102

²⁹ 40 U.S.C. § 3142

³⁰ WIOA Section 181(b)(1)

³¹ 20 CFR § 683.270(c)

³² WIOA Section 181(d)(2)

³³ 20 CFR § 683.270(b)

³⁴ Neb. Rev. Stat. § 4-114

³⁵ WIOA Section 122(h)(1)

- Average Wage of OJT Training Recipients and Wage after his/her training ends (increase or decrease)

The American Job Center will determine whether providers meet acceptable performance levels for the above criteria. If a provider meets the performance criteria, it is considered an eligible provider of training services. The American Job Center will include the provider on the list of eligible providers, with accompanying performance information, and disseminate this information through the American Job Center delivery system.³⁶

Monitoring and Oversight

Subrecipients³⁷ in each local area must monitor training, invoice and reimbursement systems on a pre-determined systematic and documented basis.³⁸ The employer must preserve all trainee payroll, fringe benefit, and personnel records (including time and attendance sheets normally kept by the employer for employees) for three years from the close of the applicable program year or longer if any litigation or audit has begun or any claim is instituted which involves these records. In that case, the employer shall retain the records beyond the three year period until the litigation, audit findings or claim has been resolved. The employer must allow access to those records by authorized entities.

Monitoring of OJT contracts must include review of selection patterns to ensure compliance with WIOA Section 188 regarding nondiscrimination.³⁹

Eligible Training Provider List

Employers participating in the OJT Program will be listed on the State's Eligible Training Provider list. NEworks will be the source for employer information.

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 TEGs 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.

³⁶ WIOA Section 122(h)(2); 20 CFR § 680.530.

³⁷ City of Omaha, City of Lincoln, State of Nebraska, Heartland Workforce Solutions (HWS), and Goodwill Industries are subrecipients.

³⁸ 20 CFR § 683.410 provides that each subrecipient must conduct oversight and monitoring of its WIOA program(s) and those of its subrecipients and contractors.

³⁹ 29 CFR § 37