

**Nevada Department of Employment, Training and Rehabilitation
(DETR)
Workforce Innovation and Opportunity Act
State Compliance Policy (SCP)**

Policy Number: 1.19

Originating Office: DETR; Workforce Investment Support Services (WISS)

Subject: Incumbent Worker

Issued: NEW; replacing WIA State Compliance Policy 1.19, Approved GWDB Executive Committee, 3-15-17; Ratified GWDB, 04-20-17

Purpose: To provide the Workforce Innovation and Opportunity Act (WIOA) requirements for Work-based Training program of Incumbent Worker.

State Imposed Requirements: This directive contains some state-imposed requirements. These requirements are printed in **bold, italic type**.

Authorities/References: Workforce Innovation and Opportunity Act P.L. 113-128; 20 CFR 680.780-820; Final Rule & Narrative; TEGL 3-15;TEGL 22-15; TEGL 02-16; TEGL 11-11

ACTION REQUIRED:

Upon issuance bring this guidance to the attention of all WIOA service providers, local workforce development board (LWDB) members and any other concerned parties. Any LWIB's policies, procedures, and or contracts affected by this guidance are required to be updated accordingly.

Background:

Work-based training is employer-driven with the goal of unsubsidized employment after participation. Generally, work-based training involves a commitment by an employer or employers to fully employ successful participants after they have completed the program. Work-based training can be an effective training strategy that can provide additional opportunities for participants and employers in both finding high quality work and in developing a high quality workforce. Each of these work-based models can be effectively used to target different job seeker and employer needs. Providers of Work-based training must be providing the highest quality training to participants and are subject to performance and dissemination requirements of WIOA Sec. 134(a)(2)(B)(v) and 122(h), separate from that of the Eligible Training Provider List (ETPL).

Incumbent Worker

WIOA introduces incumbent worker training as an allowable type of training for a local area to provide. It is intended for adult/dislocated workers with an established work history with a current employer, and who have the knowledge, skills, and abilities needed by their current employer but because of changes in the necessary skills to remain in their positions, to advance in the company, or to avoid layoff, the employee needs additional training. Incumbent worker training is designed to either assist workers in obtaining the skills necessary to retain employment or to avert layoffs and must increase both a participant's and a company's competitiveness. Program funds will be used to reimburse employers providing incumbent worker training on a graduated basis. Participating employers must pay the remaining share of the cost not covered by the WIOA program funds.

Local areas may use up to 20 percent of their combined total of their local adult and dislocated worker allotments for incumbent worker training. The training should, wherever possible, allow the participant to gain industry-recognized training experience, and ultimately should lead to an increase in wages. To receive incumbent worker funding under WIOA, an incumbent worker must have an employer-employee relationship, meet the Fair Labor Standards Act requirements for an employer-employee relationship and have an established employment history with the employer for six months or more. Incumbent workers are employed at the time of their participation, and the contract funds are paid to the employer for training provided to the incumbent worker either to avert a lay-off or otherwise retain employment per 134(d)(4) of WIOA and 20 CFR 680.790.

An incumbent worker does not necessarily have to meet eligibility requirements for career and training services for adult and dislocated workers (20 CFR 680.780).

Policy and Procedure:

WIOA sec. 122(h)

ON-THE-JOB TRAINING, CUSTOMIZED TRAINING, INCUMBENT WORKER TRAINING, AND OTHER TRAINING EXCEPTIONS.—

(1) IN GENERAL.—Providers of on-the-job training, customized training, incumbent worker training, internships, and paid or unpaid work experience opportunities, or transitional employment shall not be subject to the requirements of subsections (a) through (f).

(2) COLLECTION AND DISSEMINATION OF INFORMATION.—A one-stop operator in a local area shall collect such performance information from providers of on-the-job training, customized training, incumbent worker training, internships, paid or unpaid work experience opportunities, and transitional employment as the Governor may require, and use the information to determine whether the providers meet such performance criteria as the Governor may require. The one-stop operator shall disseminate information identifying such providers that meet the criteria as eligible providers, and the performance information, through the one-stop delivery system. Providers determined to meet the criteria shall be considered to be identified as eligible providers of training services.

WIOA sec. 134(d)(4)

(A) IN GENERAL.—

(i) **STANDARD RESERVATION OF FUNDS.**—The local board may reserve and use not more than 20 percent of the funds allocated to the local area involved under section 133(b) to pay for the Federal share of the cost of providing training through a training program for incumbent workers, carried out in accordance with this paragraph.

(ii) **DETERMINATION OF ELIGIBILITY.**—For the purpose of determining the eligibility of an employer to receive funding under clause (i), the local board shall take into account factors consisting of—

(I) the characteristics of the participants in the program;

(II) the relationship of the training to the competitiveness of a participant and the employer; and

(III) 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 (at present and anticipated upon completion of the training), and the existence of other training and advancement opportunities provided by the employer.

(iii) **STATEWIDE IMPACT.**—The Governor or State board involved may make recommendations to the local board for providing incumbent worker training that has statewide impact.

(B) TRAINING ACTIVITIES.—The training program for incumbent workers carried out under this paragraph shall be carried out by the local board in conjunction with the employers or groups of employers of such 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.

(C) EMPLOYER PAYMENT OF NON-FEDERAL SHARE.—

Employers participating in the program carried out under this paragraph shall be required to pay for the non-Federal share of the cost of providing the training to incumbent workers of the employers.

(D) NON-FEDERAL SHARE.—

(i) **FACTORS.**—Subject to clause (ii), the local board shall establish the non-Federal share of such cost (taking into consideration such other factors 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.

(ii) **LIMITS.**—The non-Federal share shall not be less than—

(I) 10 percent of the cost, for employers with not more than 50 employees;

(II) 25 percent of the cost, for employers with more than 50 employees but not more than 100 employees; and

(III) 50 percent of the cost, for employers with more than 100 employees.

(iii) **CALCULATION OF EMPLOYER SHARE.**—The non-Federal share provided by an employer participating in the

program may include the amount of the wages paid by the employer to a worker while the worker is attending a training program under this paragraph. The employer may provide the share in cash or in kind, fairly evaluated.

Incumbent Worker Eligibility (20 CFR §680.780)

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 incumbent worker needs to be employed, meet the Fair Labor Standards Act requirements for an employer-employee relationship, and have an established employment history with the employer for 6 months or more, with the following exception: In the event that the incumbent worker training is being provided to a cohort of employees, not every employee in the cohort must have an established employment history with the employer for 6 months or more as long as a majority of those employees being trained do meet the employment history requirement. An incumbent worker does not have to meet the eligibility requirements for career and training services for adults and dislocated workers under WIOA, unless they also are enrolled as a participant in the WIOA adult or dislocated worker program.

Incumbent Worker Training (20 CFR §680.790)

Incumbent worker training must satisfy the requirements in WIOA sec. 134(d)(4) and increase the competitiveness of the employee or employer. For purposes of WIOA sec. 134(d)(4)(B), incumbent worker training is training:

- (a) 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.
- (b) Conducted with a commitment by the employer to retain or avert the layoffs of the incumbent worker(s) trained.

Incumbent Worker Funding (20 CFR §680.800)

- (a) The local area may reserve up to 20 percent of their combined total of adult and dislocated worker allocations for incumbent worker training as described in § 680.790;
- (b) The State may use their statewide activities funds (per WIOA sec. 134(a)(3)(A)(i)) and Rapid Response funds for statewide incumbent worker training activities (see §§ 682.210(b) and 682.320(b)(4) of this chapter).

Employer Eligibility (20 CFR §680.810)

The Local WDB must consider under WIOA sec. 134(d)(4)(A)(ii):

- (a) The characteristics of the individuals in the program;
- (b) The relationship of the training to the competitiveness of an individual and the employer; and
- (c) Other factors the Local WDB determines appropriate, including number of employees trained, wages and benefits including post training increases, and the existence of other training opportunities provided by the employer.

Incumbent Worker Cost Sharing Requirements (20 CFR §680.820, TEGL 3-15)

Under WIOA secs. 134(d)(4)(C) and 134(d)(4)(D)(i)-(iii), employers participating in incumbent worker training are required to pay the non-Federal share of the cost of providing training to their incumbent workers. The amount of the non-Federal share depends upon the limits established under WIOA secs. 134(d)(4)(ii)(C) and (D).

Employer share must be reported on the ETA-9130 quarterly financial report.

The wages paid to individuals, while in training, may be considered as a source of matching funds. Rules for matching funds are provided in the Uniform Guidance and DOL exceptions at 2 CFR 200.306 and 2 CFR 2900.8.

Conflict of Interest (20 CFR §683.200(c)(5)(i))

A State WDB member, Local WDB member, or WDB 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 that member's immediate family.

(ii) Neither membership on the State WDB, the Local WDB, or a WDB standing committee, nor the receipt of WIOA funds to provide training and related services, by itself, violates these conflict of interest provisions.

(iii) In accordance with the requirements at 2 CFR 200.112, recipients of Federal awards must disclose in writing any potential conflict of interest to the Department. Sub-recipients must disclose in writing any potential conflict of interest to the recipient of grant funds.

General Program Requirements for Incumbent Worker Training (20 CFR §683.200)

(a) Recipients and sub-recipients of a Federal award under title I of WIOA and the Wagner-Peyser Act must follow the Uniform Guidance at 2 CFR parts 200, 215, 225, 230, including any exceptions identified by the Department at 2 CFR part 2900.

(1) Commercial organizations, for-profit entities, and foreign entities that are recipients and sub-recipients of a Federal award must adhere to 2 CFR part 200, including any exceptions identified by the Department under 2 CFR part 2900;

(2) Commercial organizations, for-profit entities, and foreign entities that are contractors or subcontractors must adhere to the Federal Acquisition Regulations (FAR), including 48 CFR part 31.

(20 CFR §683.200(c)(9) and 20 CFR §683.200(d))

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:

(i) When the services, facilities, or equipment are not being used by eligible participants;

(ii) If their use does not affect the ability of eligible participants to use the services, facilities, or equipment; and

(iii) If the income generated from such fees is used to carry out programs authorized under this title.

All WIOA title I and Wagner-Peyser Act grant recipients and sub-recipients must comply with the government-wide requirements for debarment and suspension, and the government-wide requirements for a drug-free workplace in accordance with the Drug-Free Workplace Act of 1988, 41 U.S.C. 8103 et seq., and 2 CFR 182.

Restrictions (WIOA sec. 181(b)(1), 20 CFR §181(d)(1))

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. 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.

Grant recipients and sub recipients must adhere to procurement standards set forth by the Uniform Guidance @ 2 CFR 200.317-326.

Training Services (WIOA sec. 134(b)(3)(G)(ii)-(iii))

(ii) TRAINING CONTRACTS.—Training services authorized under this paragraph may be provided pursuant to a contract for services in lieu of an individual training account if—

- (I) the requirements of subparagraph (F) are met;
- (II) such services are on-the-job training, customized training, incumbent worker training, or transitional employment;
- (III) the local board determines there are an insufficient number of eligible providers of training services in the local area involved (such as in a rural area) to accomplish the purposes of a system of individual training accounts;
- (IV) the local board determines that there is a training services program of demonstrated effectiveness offered in the local area by a community- based organization or another private organization to serve individuals with barriers to employment;
- (V) the local board determines that—
 - (aa) it would be most appropriate to award a contract to an institution of higher education or other eligible provider of training services in order to facilitate the training of multiple individuals in in-demand industry sectors or occupations; and
 - (bb) such contract does not limit customer choice; or
- (VI) the contract is a pay-for-performance contract.

(iii) LINKAGE TO OCCUPATIONS IN DEMAND.—

Training services provided under this paragraph shall be directly linked to an in-demand industry sector or occupation in the local area or the planning region, or in another area to which an adult or dislocated worker receiving such services is willing to relocate, except that a local board may approve training services for occupations determined by the local board to be in sectors of the economy that have a high potential for sustained demand or growth in the local area.

Summary (WIOA sec. 122, 134, 181, Final Rule, 20 CFR §680.780-820, 20 CFR §683.200, TEGL 3-15)

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. In determining the eligibility of an employer to receive this funding, the local board must take into account the following:

- the characteristics of the individual 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.

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

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. 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.

The non-Federal 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.

The non-Federal 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. The employer may provide this share of cost in cash or in kind, fairly evaluated.

Agreements or contracts 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.

Official payroll records documenting the worker's hours and wages must be utilized to determine the amount of the employer's share of cost. Employer Size is determined by the number of employees at the time of the execution of the incumbent worker training contract.

Collection and dissemination of performance information from Incumbent Worker employers is required. MIS requirements follow in this policy.

Allowable Expenses

- Tuition *and registration fees*;
- *Salaries/fees required for an instructor's time that is dedicated to the training outlined in their application*;
- *Curriculum development (upon approval of application)*;
- *Textbooks, manuals, materials and supplies*;
- Employee wage while participating in Incumbent Worker training;
- *Training certifications, licenses and credentials*; and
- *Training software*.

Disallowable Expenses:

- Costs incurred prior to the approval date of the application;
- Construction or purchase of facilities or buildings;
- Business relocation expenses;
- Lobbying activities;
- Employee wages prior to or after Incumbent Worker training ;
- Computer hardware, office furniture/equipment, or other equipment or machinery;
- Indirect costs and/or general overhead;
- Profits; and
- Stipends or bonuses.

Additional Requirements

1. Employee Eligibility Requirements Include:
 - Must be 18 years or older; legal authorization to work in the U.S and comply with Selective Service provisions (TEGL 11-11).
 - Must need skills upgrading or retraining, completion of HSE or High School diploma, basic skills upgrade to retain employment, be promoted and/or be successful in their employment with the company.
2. *Employer Eligibility Requirements Include;*
 - *Must have operated in Nevada for a minimum of 3 years prior to application.*
 - *Must be compliant on all federal, state and local regulations regarding hiring practices, taxation and licensing.*
 - *Training for the incumbent Worker is based in Nevada.*
3. *A Pre-Award Employer Evaluation must be conducted, in writing, on all potential Incumbent Worker employers per LWDB written policy and available at time of program monitoring. The policy, at a minimum, should cover the requirements communicated in this policy. Reference SCP 1.14 for a complete list where applicable.*

4. Due to the requirements of WIOA Performance Report 9173, the Participant Individual Record Layout (PIRL) 9170, and TEGL 3-15 the State has deducted the need for the following;
 - MIS requirements: Registration of trainee in all required fields (green dots); A funded service in the Service's Tab as relates to Incumbent Worker; Appropriate Outcomes Tab data, at a minimum, are required in order to comply with federal reporting.Refer to Data and Performance Desk Reference Guide at;
http://detr.state.nv.us/workforce_investment_pages/NJCOS/NJCOS_Documents/WIA_Data_Performance_Desk_Reference/NJCOS_WIA_Data_Performance_Desk_Ref.pdf for current and future detailed instruction.
5. Per TEGL 2-16, LWDB must report Incumbent Worker training expenditures.

Local Board Policy Requirements Summary

- Written policy to establish the non-federal share of cost the participating employer will pay towards the training taking into consideration the limits as described in 134(d)(4)(D)(ii) and as suggested in this policy.
- Written policy as to eligibility requirements of the incumbent worker.
- Definition of “established work history with the company”.
- Written policy as to eligibility of incumbent worker employer taking into consideration items identified in 134(d)(4)(A)(ii)(I-III), the Pre-Award Employer Evaluation and the written agreement or contracting process.
- Written policy process for the collection and dissemination of employer performance information.
- Established procedure as to the requirements of MIS requirements.