

WORKFORCE INNOVATION AND OPPORTUNITY ACT (WIOA)
PROGRAM POLICY NOTICE NO. 23 Rev. 2

EFFECTIVE DATE: February 23, 2022

SUBJECT: ON—THE-JOB TRAINING (OJT)

REFERENCES.

- Title I of the Workforce Innovation and Opportunity Act (WIOA) of 2014, as amended (29 U.S.C. 2801 et seq.);
- WIOA Regulations, 20 CFR Part 652 et al, 29 CFR Part 95-97;
- Office of Management and Budget (OMB) cost principles codified in 2 CFR Part 220, Part 225 and Part 230;
- Department of Labor (DOI) Employment and Training Administration (ETA) Training and Employment Guidance Letter (TEGL) No. 1705;
- NMSA 1978, Section 50-14-1 et seq.,
- NMDWS 18-006 On-the-Job-Training Change 2;
- WIOA Section 3(44);
- Office of Management and Budget (OMB), Uniform Guidance at 2 CFR 200 et al., Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards;
- Training and Employment Guidance Letter WIOA No 19-16 Operating Guidance for the Workforce Innovation Opportunity Act;
- Fair Labor Standards ACT (FLSA) §203; US Bureau of Labor Statistics

PURPOSE.

To provide clarification for the Northern Area Local Workforce Development Board (NALWDB) WIOA sub recipients regarding NMDWS 18-006 as it relates to the execution of OJT training and to establish requirements for the delivery of on-the-job-training services under the NALWDB. In the case of a conflict between NMDWS 18-006 and this policy NMDWS 18-006 shall be the prevailing guidance.

BACKGROUND.

OJT provides financial assistance to employers who agree to train suitable WIOA eligible individuals. The financial assistance is compensation for the extraordinary costs associated with training participants and the costs associated with lower productivity of new employees and is not an employer subsidy.

On-the-Job Training (OJT) is an allowable activity for adults, dislocated workers and eligible co-enrolled youth who after an objective assessment are determined to be appropriate for this activity. The intention for OJT training is to train in the highest skill occupation appropriate to the participant. OJT is not to be

used for employment training for low-skill, low paying jobs or occupations with little or no potential for upward mobility.

ACTION.

OJT TRAINING SHALL:

- (A) be for non-seasonal, permanent full-time employment
 - (i) full-time employment is defined at a minimum of 30 hours per week
 - (ii) waivers to the 30 hours per week requirement may be requested for individuals with disabilities who need the reasonable accommodation of a shorter work week in order to become self-sufficient
- (B) be for training that pays the trainee at the Federal or State minimum wage identified in the area (whichever is higher) the participant will be employed at. Trainees making more than the NALWDB's established self-sufficiency level prior to training will not be eligible for OJT.

EMPLOYER ELIGIBILITY

Within the parameters of WIOA, One Stop Staff may engage in OJT opportunities with any public, private non-profit, or private sector employer with the following exceptions.

- A.) An employer who has been convicted of violating federal laws and regulations within the last two years of requesting and OJT regarding: submission of worker adjustment and retraining notification (WARN) notices, occupational safety and health administration (OSHA) and Americans with Disabilities Act (ADA) standards, equal employment opportunity (EEO) and wage and hour requirements, state unemployment insurance (UI) laws, and fair labor standards and collective bargaining agreements.
- B.) An employer who has exhibited a pattern of not retaining OJT participants in permanent positions upon satisfactory completion of training. For the purposes of this policy "pattern of not retaining OJT participants is defined as three trainees in any twelve-month period".
- C.) An establishment which is presently suspended or barred from doing procurement business with any branch of government.
- D.) An employer providing workers on a temporary basis to employers for which they receive compensation from the employer.
- E.) An employer who has exhibited a pattern of failing to provide OJT participants with continued long-term employment (retaining less than 3 OJT participants in a calendar year establishes a pattern of failure) with wages, benefits, and working conditions that are equal to those provided to regular employees who have worked a similar length of time and are doing the same type of work.
- F.) An establishment that plans to use the WIOA to relocate from another area, or locate new branches, subsidiaries, or affiliates.
- G.) A business which has relocated within the last 120 days and dislocated workers at its previous location.
- H.) Business in which the participants will be employed to carry out the construction, operation or maintenance of any part of a facility that is used or to be used for sectarian instruction or as a place of religious worship. 29 CFR 37.6(F).

If an employer is established as ineligible for OJT funding by the office then the employer can submit a written request for reconsideration to the NALWDB Administrative Office, 525 Camino de los Marquez, Suite 250, Santa Fe, New Mexico 87505.

Pattern of Failure

The NALWDB states that any business that has demonstrated a pattern of failure be barred from continued access to WIOA funding in regards to continued OJT contracts for one year. If the pattern is met during active programming the contract will be terminated at the discretion of the Executive director.

Pattern of Failure Constitutes:

- 1.) If a business does not retain employees after completion of the OJT contract (up to 3) in a program year they have demonstrated a pattern of failure. they can no longer have OJT contracts for the remainder of the program year and can reapply as a business the following program year

- 2.) New Mexico Department of Workforce Solutions requires that all employers receiving a work-based training contract must be registered and current on unemployment insurance taxes, penalties and interest or related payment plan. Verification requests can be emailed to UITax.Support@state.nm.us
 - This email is monitored throughout regular business hour Monday through Friday 8 AM to 5PM
 - Email Subject Title: 'VOSS REG Zip Code'
 - Email contents will contain only the Federal Employer Identification Number (FEIN) and employer name
 - If the employer is using their SSN as a FEIN number, do not include the SSN in the email. Only list the employer's name, include the fact that the SSN is being utilized, provide a name and phone number so the information can be provided telephonically. UI Tax unit will conduct the employer UI Tax Status check

It is the responsibility of the subgrant recipient to verify that all business that are eligible for an OJT are also registered and current with the UI tax unit. The State UI department has a de minimis rule for leans of \$50. For the UI Tax verifications that have an overdue amount under \$50 they can still be serviced. If the amount is over 50\$ the lean must be rectified before starting or continuing service of an OJT contract.

Restrictions:

- A. WIOA funds cannot be used to pay the wages of employees during their participation in an economic development activity provided through a statewide workforce development system.

- B. WIOA work-based training funds may not be used to directly or indirectly assist, promote or deter union organizing.

- C. WIOA work-based training funds may not be used to directly or indirectly aid in the filling of a job opening which is vacant because the former occupant is on strike or is being locked out in the course of a labor dispute, or the filling of which is otherwise an issue in a labor dispute involving a work stoppage.

- D. WIOA work-based training funds must not be used to directly or indirectly provided supportive services described in §680.900 or §681.570.

- E. WIOA funds may not be used to help employers to fill positions that promote or support the use, possession, or distribution of marijuana.

OCCUPATIONAL ELIGIBILITY

OJT may not be utilized for any of the following occupations:

- A.) Occupations dependent on commission or draw as a primary source of income.
- B.) Intermittent seasonal occupations.
- 1. Part-time occupations except as noted when in conjunction with Apprenticeships or Occupational Skills training.
- C.) Occupations temporary in design.
- D.) Occupations which have not traditionally required specific occupational training as a prerequisite for performance, such as porters, janitors, stackers, laborers, restaurant workers, etc. (entry level). (F) Occupations whose prior training, certification or license make the individual qualified to perform the occupation, such as schoolteacher, cosmetologist, LPN, RN, etc., unless they are unable to enter employment without additional on-the-job-training due to occupational skill gaps.
- E.) Any occupation whose training time is less than 160 hours.
- F.) When an employer has laid off workers in substantially equivalent positions or where the OJT will impair any existing labor agreements, contracts for services or promotional opportunities for current employees. For the purposes of the OJT, "substantially equivalent position" is one in which the job responsibilities and skill, experience, and performance requirements have remained unchanged since the time of the layoff. To provide evidence that the position has "substantially changed", there should be a new and different job description for the position.

EMPLOYER ORIENTATION

1. An official employer orientation must be provided and documented before the OJT contract period begins. Orientation should begin at recruitment when the potential employer is informed about the responsibilities of providing structured on-the-job-training at the worksite as described in this section under "employer recruitment".
2. A pre-award review must be completed to determine employer eligibility. This provides an additional opportunity to share information about OJT and learn about the needs of the employer. Pre-award checklist must be submitted with the review (refer to Pre-Award Checklist)
3. The orientation must include a review of the OJT Contract, OJT Training Plan, OJT Progress Report and Invoice Forms and contact information for the case manager and administration of the WIOA programs.
4. Employers will be informed about the role they play in developing a structured training plan based on the skill gaps possessed by the OJT participant. Employers are informed of the importance of having experienced employees act as trainers for optimum results with predictable training outcomes.
5. Benefits of OJT are explained including OJT provider assurances, contract terms and conditions including terms and conditions of employer reimbursement.

6. Employers are informed about the requirements for local, state and possibly federal monitoring of the program and records maintenance requirements.

PARTICIPANT ELIGIBILITY

On-the-job training is available to adults, co-enrolled eligible youth and dislocated workers as defined by the WIOA, who are unemployed or underemployed and meet all of the following requirements.

1. Participant meets all eligibility requirements for WIOA and Training services
2. Participant is enrolled into WIOA prior to beginning training under an OJT contract
3. Participant was determined to be in need of training in order to become employed in a job which leads to a self-sufficient level of income
4. Participant was determined to be a good candidate for the particular vocation and position for which they are to receive OJT as evidenced in their individual employment plan or comparable document
5. OJT contracts may be written for an employed worker as long as they meet all the requirements above and are not earning a self-sufficient wage at time of enrollment as defined by state and local board policy
6. If the OJT is with the individual's current employer, employer must verify that the on-the-job training will relate to the introduction of new technologies, introduction to new production or service procedures, or is an upgrade to a new job that requires additional skills
7. OJT is an allowable activity for youth
8. Priority of service must be given as defined in federal and state policy

REVERSE REFERRAL

Any individual referred to a center by an employer (commonly referred to as a "reverse referral") shall go through the system in the same manner as other job seekers and be determined to be eligible and in need of training in order to participate in OJT. This process shall be completed prior to the start date of the OJT training. A referral by an employer for an OJT position does not disqualify an individual, but neither shall it be considered to give higher priority to the individuals over other eligible candidates. The final selection of an eligible individual for OJT should be a joint decision of the employer and the local service provider.

PARTICIPANT ORIENTATION

An official participant orientation must be provided and documented before the OJT contract period begins. At a minimum the orientation should include the following:

1. OJT Training Plan review.
2. Participation requirements including workplace safety.
3. Timesheet tracking and payroll verification requirements including the OJT Progress Report and Invoice Form.

4. Provision of information regarding additional services and/or activities, including support services, available through the workforce system.

OJT PARTICIPANTS ALLOWED WITH AN EMPLOYER:

No more than 50% of the number of the employer's full-time work force at the location where training is to take place may be trained under OJT at any one time. Once a participant has been trained and retained by the employer, he/she is counted in the regular full-time work force number and additional individuals may be trained. An employer having a regular full-time work force of one may train one individual under OJT. A projected work force number may be used for new or expanding business. The projected number shall be attained within twelve months. If the projected number is not attained, appropriate adjustments in the number of OJT trainees allowed in further training should be made.

OJT WAGES AND GENERAL WORKING CONDITIONS

(A) Wage reimbursement. New employees hired under OJT shall at a minimum be paid the employer's usual entrance wage rate for the occupation in which they are to be trained and employed, which shall not be lower than the Federal or State minimum wage identified in the area (whichever is higher) the participant will be employed at. Participants shall be paid the same entry wage rate as non-WIOA funded employees in the same occupation. The reimbursement for training cost will be based on the number of hours worked and will not include overtime, shift differential, premium pay, and other non-regular wages paid by the employer. Reimbursement shall not be claimed for time which the OJT trainee is absent from training, including illness, holiday, plant downtime, or other events during which no training occurs.

(B) Workers' compensation. Where state workers' compensation law is applicable, workers' compensation benefits in accordance with such law shall be available to all participants on the same basis as the compensation is provided to other individuals in the same employment.

OJT CONTRACT

An OJT contract shall include the sections outlined below. The OJT pre-award review, training contract, and training plan shall be signed by all required parties prior to any participant's training start date. Providers may use the OJT forms included in the state technical assistance guide or may create their own as long as all the information referenced herein is included.

(A) OJT requirements

- (1) OJT employer contract.
- (2) OJT training plan.
- (3) OJT pre-award review.
- (4) Progress report and invoice form.
- (5) OJT training plan modification (if applicable).
- (6) OJT contract assurances.

(B) OJT training plan

The OJT training plan shall be included in the OJT training contract. An OJT training plan shall be modified if a change is needed in any part of the original OJT training plan.

- (1) The OJT training plan will be developed with the employer to establish training outcomes.

- (2) The gap between the skills of a participant and the skills needed for the job will determine the number of training hours for which an employer will be reimbursed.
- (3) An analysis of the OJT position will be conducted based on information from the employer combined with occupational information network (ONET) details or comparable information regarding specific qualifications and skill required for the OJT position.
- (4) The training plan shall reflect the results of individual skill assessment and an analysis of employer job performance requirements to determine what training is needed. (5) The training plan shall be maintained and updated as needed.
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(C) OJT training duration.

- (1) The basis for contract training duration shall clearly be documented.
- (2) The maximum duration for an OJT contract is six months. (1040 training hours)
- (3) Determining length of training should include the following.
 - (a) Skill gap is defined as the gap between the skills of an individual participant and the skills needed for a job. The skill gap will determine the number of training hours for which an employer will be reimbursed. The skill gap shall be clearly defined and incorporate the use of recognized skill assessment tools and occupational evaluation tools. An individual training plan shall be developed consistent with the duration of the contract. For example, a contract written for six months shall include a training plan that outlines six months of specific training to be provided by the employer which in turn should be consistent with the documented skill gap for the individual.
 - (b) Specific vocational preparation (SVP) is defined as the amount of time required by a typical worker to learn the techniques, acquire the information, and develop the expertise needed for average performance in a specific job. A table reflecting SVP levels is included below.

SVP	Number of Training Hours
2	160
3	480
4	640
5	800
6	960
7	1040

(D) OJT reimbursement rate.

Employers will be reimbursed for the extraordinary cost of training OJT participants in an amount up to 75% of the applicable wage consistent with WIOA. The NALWDB will utilize the following scale for employer reimbursement based on employer size:

- 1) up to 75% for employers with 50 or fewer employees; and
 - 2) up to 50% for employers with 51 or more employees.
- Payroll records shall be used to determine employer size.

The reimbursement frequency should be negotiated with individual employers to ensure greatest benefit to the employer and the OJT participant.

- (1) Participants shall be paid the Federal or State minimum wage identified in the area (whichever is higher), or the prevailing rate of pay, including periodic increases, as other trainees or employees who are similarly situated in similar occupations by the same employer and who have similar training, experience, and skills, pursuant to WIOA, 29 U.S.C. 2931(a)(1)(A), and in 20 C.F.R. 667.272. Provisions for wages under the amendments to the Fair Labor Standards Act (FLSA) apply to all participants employed.
- (2) Participants may work overtime (subject to regulations of the Fair Labor Standards Act with respect to the level of compensation), provided that this is part of the training plan and consistent with other employees in comparable positions. Although overtime hours worked can be used to determine the reimbursement for a given period, an overtime wage rate cannot be used to calculate the reimbursement amount. To calculate the reimbursement, the provider would apply the standard wage rate to both the regular and the overtime hours.

(E) Progress report and invoice form.

A progress report (timesheet) and invoice form shall be completed at least monthly throughout the life of the OJT training. This provides a trainee evaluation of progress and documents hours worked and skills developed.

(F) Contract assurances summary

- (1) Employer shall provide worker's compensation coverage for the participants on the same basis as the compensation is provided to other individuals in the same employment.
- (2) When training employed workers, employer shall verify that the on-the-job training will relate to the Introduction of new technologies, introduction to new production or service procedures, or is an upgrade to a new job that requires additional skills.
- (3) Employer certifies that the company is financially solvent on the date of the contract, and the employer's best projection is that they will remain financially able to meet contract obligations at the end of the training period, including on-the-job- training participant retention.

- (4) Employer agrees that wage and labor standards will be adhered to and to pay the participants at the same rates, including increases, and benefits as trainees or employees who are situated in similar jobs. Such rates shall be in accordance with applicable law, but in no event less than the higher rate specified in section 6(a)(1) of the Fair Labor Standards Act of 1938 or the applicable state or local minimum wage law. WIOA.
- (5) Conditions of employment and training will be in full accordance with all applicable federal, state, and local laws and ordinances (including but not limited to anti-discrimination, labor and employment laws, environmental laws or health and safety laws). 29 CFR 37.38(b)
- (6) Employer certifies that the on-the-job-training will not impair existing agreements for services or collective bargaining agreements and that either it has the concurrence of the appropriate labor organization as to the design and conduct of customized training, or it has no collective bargaining agreement with a labor organization that covers the participants' position.
- (7) Employer assures that they are not debarred or suspended in regard to federal funding. 29 CFR Part 98
- (8) Employer further assures that federal funds will not be used to assist, promote or deter union organizing. 20 CFR 663.730
- (9) Employer certifies that no member of the on-the-job-training participant's immediate family will directly supervise the participant. For the purpose of this contract, immediate family is defined as spouse, children, parents, grandparents, grandchildren, brothers, sisters or person bearing the same relationship to the participant's spouse. 20 CFR 667.200(g)
- (10) Employer assures that the participants will not be employed to carry out the construction, operation or maintenance of any part of a facility that is used or to be used for sectarian instruction or as a place for religious worship. 29 CFR 37.6(F)
- (11) Employer assures that the participant(s) has not been hired into or will remain working in any position when any other person is on layoff from the same or a substantially equivalent job within the same organizational unit or has been bumped and has recall rights to that position, nor if the on-the-job-training is created in a promotional line that infringes on opportunities of current employees. 20 CFR 667.270.

Supporting documentation.

- (A) OJT pre-award checklist
- (B) OJT employer contract
- (C) OJT training plan
- (D) OJT Training plan modification as needed
- (E) OJT Progress report and invoice forms
- (F) Case notes (recorded in NM WCOS or other state designated system)

Coordination With Registered Apprenticeships

An OJT contract may be developed with an Apprenticeship Pathway or model, Pre-Apprenticeship and Registered Apprenticeship program for training participants. OJT contracts are made with the employer and apprenticeships generally involve both classroom and on-the-job instruction. The

OJT contract may be made to support some, or all of the OJT portions of the apprenticeship is allowed, hours per week may be lower than 30 hours but no less than 10 hours. If the apprentice is employed at the time of the program enrollment, the requirements for employed workers must be followed.

Conflict of Interest

State and local board members and members of standing committees may not vote or nor participate in any decisions regarding the provision of services by such members or any organization they directly represent, nor on any matter that would provide any direct financial benefits to that member or the member's immediate family. For example, a NALWDB 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 workers. Neither membership on the state board, local board or standing committee, nor recipient of WIOA funds to provided training and related services, by itself, violates these conflict-of-interest provisions. In accordance with 200.112 of the Uniform Guidance, recipients of the federal awards must disclose in writing any potential conflicts of interest. Sub-recipients must disclose in writing any potential conflict of interest to the recipient of grant funds

Job Orders

Every OJT Contract must be communicated to DWS staff (title II) in order for a job order to be entered into NMWCOS. The area manager for DWS needs to be alerted to the request at which point they will delegate the task to the appropriate party. Subgrant recipient (title I) staff will report on a weekly basis to DWS (title III) all job orders based on current OJT contracts. All communications will take place over email in order to maintain documentation. Once an individual at DWS has been assigned a job order they will follow up with the provider staff that the information has been put into WCOS along with the job order number.

OJT Outreach

Local areas must demonstrate that a variety of employer outreach strategies were utilized to ensure that area employers are aware of Off opportunities, selected equitably and that a variety of employers were given sufficient opportunity to participate in OJTs.

These strategies should include but not be limited to:

- 1.) The local sector strategy plan
- 2.) The Labor Market Information and identified needs within the community
- 3.) Working with other agencies to target high growth industries for regional outreach
- 4.) Educating employers about how the OJT model can enhance their business, cut waste, help train employees, reduce turnover and increase profits

The subgrant recipient staff should ensure that both the Business Services function and the Job Seeker Services functions include information about OJT with objectives for outreach defined regionally and suited to the area employment conditions with the main focus being on the jobs in high-growth/in-demand sectors or

occupations.

This policy rescinds any previous NALWDB policy regarding subject.

INQUIRIES: Contact WIOA Program Manager at 505-986-0363.



NALWDB CHAIR

DATE 2/23/22