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| EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210 | CLASSIFICATION Waivers |
| | CORRESPONDENCE SYMBOL OWI |
| | DATE August 16, 2012 |

ADVISORY: **TRAINING AND EMPLOYMENT GUIDANCE LETTER
NO. 26-09, Change 1**

TO: STATE WORKFORCE AGENCIES
STATE WORKFORCE ADMINISTRATORS
STATE WORKFORCE LIAISONS
STATE AND LOCAL WORKFORCE BOARD CHAIRS AND
DIRECTORS
STATE LABOR COMMISSIONERS

FROM: JANE OATES /s/
Assistant Secretary

SUBJECT: Workforce Investment Act (WIA) Waiver Policy and Waiver Decisions for
PY 2009 and 2010, Change 1

1. **Purpose.** This Training and Employment Guidance Letter (TEGL) has two purposes:
- a. To provide updates and clarifications on waiver policies including those originally articulated in TEGL 26-09; and
 - b. To provide information on work-flex quarterly reports, and to announce renewal of Office of Management and Budget (OMB) approval for work-flex plan submission and quarterly reports.

2. **References.**

- The Workforce Investment Act of 1998; WIA Sections 189(i)(4) and 192;
- WIA Regulations at 20 CFR 661.420-430 and 663.600;
- TEGL No. 21-11, “*Requirements for 2012 State Workforce Plans*”;
- TEGL No. 17-09, “*Quarterly Submission of Workforce Investment Act Standardized Record Data (WIASRD)*”: Training and Employment Notice (TEN) No. 33-11, “*Partnering with Temporary Assistance for Needy Families (TANF) Jurisdictions, State Community Services Block Grant (CSBG) Offices, and local CSBG Entities to Create or Expand Summer Youth Employment Opportunities*”;
- TEGL No. 12-10, “*Supporting Entrepreneurial and Self-Employment Training through the Workforce Investment Act*”;

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| RESCISSIONS None | EXPIRATION DATE Continuing |
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- *State Integrated Workforce Plan Requirements for Workforce Investment Act Title I/Wagner-Peyser Act and Department of Labor Workforce Programs* (OMB No. 1205-0398);
- *Planning Guidance for State Unified Plans and Unified Plan Modifications Submitted under Section 501 of the Workforce Investment Act (WIA)* (OMB No. 1205-0398));
- TEGl No. 09-11, “*Revised Fiscal Year (FY) 2012 “Advance” Funding Levels Available October 2011 for Workforce Investment Act (WIA) Programs and Clarification on the Level of Governor’s Reserve*”;
- TEGl No. 29-11, “*Workforce Investment Act (WIA) Program Year (PY) 2011 Annual Report Narrative*”;
- TEN No. 17-11, “*Workforce Investment Act/Wagner-Peyser Act (WIA/W-P) Waiver Database*”; and
- ETA Workforce Investment Act Waiver Database, Accessed June 13, 2012, www.waivers.doleta.gov.

3. **Waiver Clarifications and Decisions Since Program Year 2009.** The section below provides clarification on waiver policy decisions that have evolved since PY 2009 and information about waivers that are new to the public workforce system. Attachment A summarizes waiver decisions for PY 2011. States may also request waivers that are not listed in Attachment A.

A. New Waiver Decisions

i. *Waivers of Required Statewide Activities*

TEGL No. 09-11 clarified that Congress decreased the level of PY 2011 base funds and FY 2012 advance funds that governors may reserve for statewide activities by 10 percentage points, from 15 percent to 5 percent. The governor’s reserve will remain at five percent for PY 2012. ETA realizes that some states may be unable to fund all required activities due to a lack of funding. As a temporary measure and in order to help states prioritize the activities that are more essential to the functioning of their workforce systems, states may request waivers to exempt them from the requirements to carry out some of the required statewide activities described at 20 CFR 665.200(b)-(i) that would have been financed with PY 2011 or PY 2012 funds.

ETA will review and consider waiver requests on a case-by-case basis and in the context of each state’s unique circumstances. These requests must also include a justification that describes estimated costs to carry out the required activity for which the waiver is needed, how statewide funds are being used (for both required and allowable statewide activities), how funds are being prioritized across activities, and the extent to which the funding levels are insufficient to cover the activity for which a waiver is requested. The request must also address the anticipated impact of not funding the activity, and whether it may directly affect WIA participant services. ETA encourages states to explore less expensive methods for conducting statewide activities where possible, such as posting training provider information on the Internet.

ETA is unlikely to approve a waiver of the following activities that are central to state management of funds. These include:

- operating fiscal and management accountability information systems (WIA Section 134(a)(2)(B)(vi) and 20 CFR 665.200(b)(1),
- submitting required reports (WIA Section 136(f)),
- disseminating the list of eligible training providers for adults and dislocated workers (WIA Section 134(a)(2)(B)(i) and 20 CFR 665.200(b)(1), and youth activities (20 CFR 665.200(b)(4)), and
- providing technical assistance to poor performing local areas (WIA Section 134(a)(2)(B)(iv) and 20 CFR 665.200(f)).

ii. *Reallocation of recaptured funds*

In PY 2010, ETA approved a waiver of the reallocation provisions at WIA Sections 128(c)(3) and 133(c)(3), and 20 CFR 667.160(c) to permit a state to reallocate recaptured funds according to state-developed criteria. Under the waiver, a state has the discretion to consider additional factors in determining local area eligibility for a reallocation of recaptured funds. States must make public their reallocation procedure and policy, as well as any future changes to that policy.

ETA will approve this waiver on a case-by-case basis. A state requesting this waiver must provide justification that the state cannot fulfill the statutory requirement to reallocate recaptured funds based on the prescribed WIA formula without undue burden. States must propose an alternative policy for reallocation that is based on objective criteria, and demonstrate that the alternative policy was created in a transparent manner with adequate opportunity for comments from local boards, stakeholders, and the general public. States should describe in their request the actions that have been taken to ensure local areas promptly obligate and expend funds within required timeframes, and reduce as much as possible the amount of local area funds subject to recapture.

This waiver only applies to reallocation provisions, and not to the recapture provisions at WIA Sections 128(c)(2) and 133(c)(2), and 20 CFR 667.160. A waiver request of the reallocation provisions will be considered on a case-by-case basis.

iii. *Excluding entrepreneurship trainees from local performance measure*

ETA does not negotiate with nor hold accountable individual local areas, and has concluded that a waiver to exclude entrepreneurship trainees from local performance measures is not necessary. States are responsible for negotiating performance levels with their local areas, and must ensure that the state's targets can be achieved. A state may also wish to consider renegotiating performance goals with the ETA regional office.

If a state chooses to allow a local area to exclude a certain group of participants from their local performance, outcomes for all individuals must still be reported through the WIASRD system. Such information is essential for effective program management and performance accountability. Note that the State has the authority to report additional alternative performance measures that may reflect the outcomes of entrepreneurial

trainees, and is encouraged to do so if it believes such a change would incentivize greater participation in such programs.

B. Waiver Policy Clarifications

i. *Waivers related to use of funds for on-the-job training (OJT) and customized training*

The waiver of WIA Section 101(31)(B) allows flexibility regarding the 50 percent limit on reimbursement to employers for OJT to permit local areas to use a sliding scale to increase the reimbursement rate based on the size of the business. The waiver of WIA Section 101(8)(C) provides flexibility regarding the requirement for a 50 percent employer contribution rate for customized training to permit local areas to use a sliding scale to reduce the contribution based on the size of the business. States may use Adult and Dislocated Worker funds under these two waivers to serve WIA eligible participants for the respective funding stream being used. States should appropriately apply WIA low-income priority of service requirements when funds are limited (20 CFR 663.600).

ii. *Waiver permitting use of the common performance measures*

This waiver permits states to negotiate and report WIA outcomes against the common performance measures only, rather than the performance measures described at WIA Section 136(b). WIASRD item 619, Type of Recognized Credential, should be completed for each individual as appropriate, regardless of this waiver to report on common performance measure outcomes only. States approved to use this waiver should still administer customer satisfaction surveys, although there is no requirement to report those results to ETA. States must also continue to report older and younger youth participant and exiter counts on a quarterly basis in WIASRD (ETA 9090). Generally, ETA does not intend to approve a common measures waiver request for a program year when a state submits their request after December 31 of that program year. Such requests will be considered for the following program year.

iii. *Waivers to promote subsidized employment opportunities for low-income youth*

As referenced in TEN No. 33-11, ETA encourages state and local areas to develop and strengthen partnerships with state and local human services agencies and Community Action Agencies (as defined under the Community Services Block Grant of 1981 as amended) to further support both systems' shared youth populations. In an effort to support increased subsidized employment opportunities for low-income youth, ETA is willing to consider state requests for two types of waivers where Temporary Assistance to Needy Families (TANF) and WIA Youth Program co-enrollment occurs for summer youth employment activities and/or where WIA Youth participate in summer employment activities funded by Community Services Block Grant (CSBG) funds. The following waivers would be effective from May 1 through September 30, if approved:

- 1) Flexibility to use the work readiness indicator as the only performance measure for such co-enrolled youth; and
- 2) Ability to apply the program design flexibility for summer youth articulated in TEGL No. 14-08 Section 16.A for such co-enrolled youth, specifically to provide follow-up services as deemed appropriate for such youth participants and to provide

an assessment and Individual Service Strategy as deemed appropriate for such youth.

These waivers apply to WIA-enrolled youth who participate in summer employment only or summer employment and supportive services only. If WIA Youth participate in program elements other than summer employment and supportive services, they would not be eligible to be a part of these waivers. ETA recognizes the importance of summer employment only for low income youth at a time of extremely high youth unemployment. This flexibility will allow for more appropriate performance measurement of this short-term intervention for such co-enrolled youth.

The use of TANF and CSBG funds must be consistent with the TANF and CSBG statute and regulations, as well as state rules and regulations. WIA waiver authority does not apply to TANF or CSBG funds. Requests should include the following information, in addition to requirements discussed in Section 4:

- An estimate of the number of youth who will be co-enrolled in the WIA Youth program and in TANF summer youth employment activities during Summer 2012 (May 1 to September 30) and/or an estimate of the number of WIA Youth who will participate in summer employment activities funded by CSBG funds;
- An estimate of the percent of Summer 2012 WIA Youth program enrollees who will be co-enrolled TANF summer youth employment participants only, and not participate in the WIA Youth program beyond summer and/or the percent of WIA Youth program enrollees who will participate in summer employment activities funded by CSBG funds;
- A description of how the state plans to use WIA Youth funds to support WIA/TANF co-enrolled summer youth participants and/or summer youth participants funded by CSBG funds; and
- A description of continued service plans for WIA/TANF co-enrolled participants and/or summer youth participants funded by CSBG funds served under the waiver, such as transition to the WIA Adult program or further education and training under WIA funded youth services.

iv. *State Board as Local Board Waiver*

The WIA regulations at 20 CFR 661.300(f) allow the State Board to carry out the roles of a Local Board. This regulation normally applies to the states that were single service delivery areas under the Job Training Partnership Act, and were designated as single local areas at the onset of WIA. This waiver does not, on its own, alter or eliminate a state's local areas. Furthermore, this waiver does not create a single state planning area; however, certain aspects of it have the practical effect of allowing the state to operate similar to a single state area, in cases where the state is acting for all local boards in the state. If approved, states must continue to allocate funds to local areas.

The following elements must be included in requests for this waiver, in addition to requirements discussed in Section 4:

- Description of the compelling reasons for the proposed governance structure and why a local Workforce Investment Board cannot or should not perform its functions;
- Discussion of how the state will ensure that local interests of the following stakeholders continue to be represented and engaged if the waiver is granted and the steps the state will take to ensure fair and equitable treatment of these stakeholders: geographic diversity across local areas (e.g. urban vs. rural), local businesses, including small business, vulnerable populations, local community based organizations, education and training providers, organized labor, and one-stop partners;
- Discussion of how resources will be distributed in a fair and equitable way;
- An explanation of the procurement policy for One-Stops;
- Inclusion of the state policy for ensuring that the functions of the local board are met by the state board, for instance, the establishment of Youth Councils;
- Documentation of the governor's consultation with the state board and local chief elected officials and other stakeholders, and consideration of any comments received through the public comment process;
- Discussion of how the state intends to monitor the state board acting in the capacity of the local board; and
- Discussion of all transition costs associated with the state assuming the functions of the local board or boards.

v. *Waivers for National Emergency Grants (NEGs)*

Grantees that wish to utilize waivers approved for their State's Adult and/or Dislocated Worker formula program for NEG projects must submit a request to apply the waiver to the NEG, either in the initial application, or in a subsequent grant modification. These waivers are not automatically applied.

4. **Waiver Requests.** States wishing to request waivers must submit full waiver plans to ETA. The waiver plan must include all of the required elements listed in the WIA regulations at 20 CFR 661.420(c) and discussed in TEGl 26-09, Section 9, *Waiver and Work-Flex Request Elements and Process*. States may use the submission template available at <http://www.doleta.gov/waivers/pdf/waiver-template.doc> (Attachment B) which provides a description of each element and submittal instructions. States wishing to include waiver requests in their PY 2012 State Plan should reference ETA's published guidance in TEGl No. 21-11.

While ETA intends, in general, to approve waivers in alignment with the decisions provided in Attachment A, ETA will consider all requests. The unique circumstances in a particular state may result in the approval of a waiver request that ETA has disapproved in another state.

5. **Waiver Portal.** To improve transparency regarding waiver options, and provide the public workforce system and other stakeholders with information about the waiver request process and waiver decisions, ETA recently enhanced information available on its waiver Web site and developed new tools. The “waiver portal” provides menu-driven access to a variety of waiver resources. The portal provides a summary of the waiver request process and the applicable statute, regulations, and TEGLs, as well as other tools and information. The waiver portal includes access to a WIA/W-P waiver database which features a number of interactive menu and tools, and provides information on waivers requested since PY 2009. Users of the database can review their own and other state waiver requests, the current status of waiver decisions, and ETA waiver response letters. Users may also search waivers by category and type, and can easily generate and customize reports to meet their particular review or research requirements. The database is available at www.waivers.doleta.gov.

6. **Work-Flex Quarterly Reports.** WIA Section 192 permits states to request Work-Flex designation. Under this authority, a state may grant waivers of WIA provisions applicable to local areas in accordance with 20 CFR 661.430(a). Work-Flex WIA regulations at 20 CFR 661.440(b) require a state to demonstrate that it has met agreed-upon outcomes contained in its Work-Flex plan. This can be demonstrated by describing how waivers and Work-Flex are used in the WIA Annual Report, as described in TEGL No. 29-11. Additionally, in order to fulfill a state’s responsibility to demonstrate that it is meeting agreed-upon outcomes, states that have an approved Work-Flex plan in place should submit quarterly reports to the ETA containing the following information:
 - Waiver
 - Date received
 - Date granted
 - Local Area(s) requesting waiver
 - Purpose (brief statement)
 - Regulation/statute affected
 - State-imposed conditions of waiver use, as appropriate.

States that have an approved Work-Flex plan in place should submit the quarterly report to WIA.PLAN@dol.gov with a copy to the appropriate Regional Administrator within 30 days of the end of the quarter, e.g. by April 30 for the quarter ending March 31.

7. **OMB Approval of Work-Flex Plans and Quarterly Reports.** The requirements for submitting a Work-Flex plan (described in TEGL No. 26-09 Section 9.B.) and the requirements for submitting quarterly reports (described in Section 6 of this TEGL) are approved by OMB (OMB approval number 1205-0432), pursuant to the Paperwork Reduction Act of 1995, expiration date October 31, 2014, and were published in the Federal Register on October 31, 2011. The requirements for submitting a waiver plan were approved by OMB (OMB approval number 1205-0398) as part of the OMB approval for State Workforce Plan Requirements and expire February 28, 2015.

8. **Inquiries.** States should address their inquiries to their ETA Regional Office.

9. Attachments.

- Attachment A: Waiver Decisions: PY 2009 – PY 2011
- Attachment B: General Workforce Investment Act Waiver Request Template