

# **DATA COLLECTION AND MAINTENANCE POLICIES AND PROCEDURES**

Implementing Section 188 of the Workforce Innovation and Opportunity Act of 2014

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## **I. Purpose**

To inform recipients, as defined at 29 C.F.R. § 38.4(zz), of collection, use, storage, and disclosure of medical and other data in compliance with the nondiscrimination and equal opportunity provisions of Section 188 of the Workforce Innovation and Opportunity Act (WIOA).

## **II. Background**

29 C.F.R. § 38.41-38.45 set forth specific requirements for data collection, maintenance, and confidentiality. Data is used by the U.S. Department of Labor Civil Rights Center (CRC) to verify a recipient's compliance with WIOA Section 188 requirements and, therefore, data must be maintained in a system and format designed to allow the State EO Officer and CRC to conduct statistical and other quantifiable data analysis related. 29 C.F.R. § 38.41(b)(1).

## **III. Data collection, generally**

### **A. Applicability of data collection requirements**

Pursuant to 29 C.F.R. § 38.41(b)(2), data collection must include, but is not limited to, the following categories of individuals:

- Applicants
- Registrants
- Eligible Applicants/Registrants
- Participants
- Terminees
- Employees
- Applicants for employment

Under the regulations, the definition of “applicant” at 29 C.F.R. § 38.4(c) is “an individual who is interested in being considered for any WIOA Title-I-financially assisted aid, benefit, service, or training by a recipient, and who has signified that interest by submitting personal information in response to a request by the recipient.” The term “registrant” is defined the same as “applicant.”

“Eligible applicant/registrator” is defined at 29 C.F.R. § 38.4(r) is defined as “an individual who has been determined eligible to participate in one or more WIOA Title I-financially assisted programs or activities.”

“Participant” is defined at 29 C.F.R. § 38.4(oo) as “an individual who has been determined to be eligible to participate in, and who is receiving any aid, benefit, service, or training under, a

program or activity financially assisted in whole or in part under Title I of WIOA.” Moreover, “Participant includes individuals receiving any services under State Employment service programs, and individuals receiving any services or benefits under State Unemployment Insurance programs.”

“Terminee” is defined at 29 C.F.R. § 38.4(nnn) as a “participant whose participation in the program or employee whose employment with the program ends voluntarily or involuntarily during the applicable program year.”

“Applicants for employment” is defined at 29 C.F.R. § 38.4(d) as “a person or persons who make(s) an application for employment with a recipient of Federal financial assistance under WIOA Title I.”

## **B. Demographic information collected**

Pursuant to 29 C.F.R. § 38.41(b)(2), recipients must collect the following demographic data:

- Race/Ethnicity;
- Sex;
- Age;
- Disability status (where known); and
- Commencing January 3, 2019, for each applicant, registrant, participant, and terminee, the recipient must record the limited English proficiency and preferred language.

Regarding disability or medical data, the recipient must inform the individual that (1) the response about his/her disability status is voluntary on any forms or other documents, and (2) disability or medical related information will be stored separately from other information maintained on the individual.

See DC-WIGL-2017-005-R1 for more details on the procedures of data collection, maintenance, and retention.

## **C. Retention period for data**

### **1. Generally**

Recipients must retain records for applicants, registrants, eligible applicants/registrants, participants, terminees, employees, and applicants for employment, whether in electronic or hard copy format, for a period of not less than three years from the close of the applicable program year. 29 C.F.R. § 38.43(a).

### **2. Protecting Personally Identifiable Information**

Recipients shall comply with data collection, use, disclosure, and storage requirements at 29 C.F.R. §§ 38.41-38.45 as well as the current U.S. Department of Labor’s Training and Employment

Letters, such as the *Guidance on the Handling and Protection of Personally Identifiable Information (PII)*.

### **3. Discrimination complaints and compliance reviews**

Where a discrimination complaint is filed or compliance review is initiated, all records associated with the complaint or compliance review must be maintained for a period of not less than three years from the date of final action related to the resolution of the complaint or compliance review. 29 C.F.R. § 38.43(b).

#### **D. CRC and EO Officer access to data**

Pursuant to 29 C.F.R. §§ 38.44, 38.50-38.55, the CRC, State Equal Opportunity Officer, and DOES Equal Opportunity Officer, or their designees, must be permitted access, during the recipient’s hours of operation, to the recipient’s premises, and its employees and participants “to the extent that such individuals are on the premises during the course of the investigation or compliance or monitoring event, for the purpose of conducting complaint investigations, compliance reviews, or monitoring activities” under WIOA Section 188. This includes, but is not limited to, access to books, records, databases, and other materials related to the complaint investigation, compliance review, or monitoring.

Recipients do not have authority to assert considerations of privacy or confidentiality to withhold records or other information from the CRC, State EO Officer, or DOES EO Officer conducting a discrimination complaint investigation, monitoring, or compliance review. 29 C.F.R. § 38.44(b).

## **IV. Medical or disability information**

Pursuant to 29 C.F.R. § 38.41(b)(3), medical or disability information, “including information that could lead to the disclosure of a disability, must be collected on separate forms.” Guidance set forth in this policy for collecting disability or medical data stems from the following statutes:

<b>Employment-related activities</b>	<b>Service-related activities (the provision of services, aid, and benefits)</b>
Title I of the ADA  Select parts of Section 504 of the Rehabilitation Act ( <i>see</i> 29 C.F.R. Part 32, subparts B and C)	Title II of the ADA  Section 504 of the Rehabilitation Act

**A. Collecting medical or disability information**

While operating WIOA Title I-financially assisted programs and activities, a recipient may become privy to medical information of individuals, such as to determine whether an individual meets the essential eligibility requirements to participate in a program or activity, or to assess an individual’s disability-related accommodation request. See DC WIC WIOA Reasonable Accommodations in the DC Nondiscrimination Plan.

To ensure compliance with WIOA Section 188, this policy sets forth requirements to properly gather, disclose, use, and store medical and disability-related information. The policy is designed to respect an individual’s privacy and to deter disability-related discrimination.

**1. Distinction between service and employment activities**

The first step in determining what, if any, medical or disability information may be collected as well as the circumstances under which this information may be used or disclosed, is to know the nature of the program or activity at issue. Importantly, the rules for employment-related activities differ from the rules applicable to service-related activities. The following chart defines these two categories of activities:

<b>Employment-related activities</b>	<b>Service-related activities (the provision of services, aid, and benefits)</b>
<p>This category includes activities of employment-related training, job placement, and job referral. Employment-related training is “training that allows or enables an individual to obtain employment” such as occupational skills training, on-the-job training, or job-readiness training.</p> <p>The category also includes employment-related activities of any entity acting as an “employment agency” (such as American Job Centers) to the extent that the entity regularly has a principal function of either (1) procuring employees for at least one employer, or (2) procuring work opportunities for customers.</p>	<p>This category of activities involves the provision of services, aid, and/or benefits to qualified members of the public (<i>i.e.</i>, persons who meet the essential eligibility requirements for the services, aid, or benefits at issue).</p> <p>Some examples include determining eligibility for WIOA Title I financially assisted programs in the areas of childcare, transportation, and housing assistance.</p> <p>Also included would be benefits counseling services, such as assisting a customer in applying for unemployment insurance benefits.</p> <p>And, this category includes assessing the skills, prior work experience, and employability of a customer as well as creating a service strategy for that individual.</p>

So, for example, job referrals are employment-related activities. On the other hand, determining eligibility for unemployment insurance is a service-related activity.

**2. What we can ask and how we ask it**

*Prior to asking any medical or disability-related questions (whether engaged in employment-related or service-related activities), notify the customer of the following:*

- Providing the information is voluntary;
- The information will be kept confidential, as provided by law;
- Refusal to provide the information will not subject the customer to any adverse treatment; and
- The information will be used only in accordance with the law.

Once the nature of the program or activity is identified (employment-related or service-related), use the following guidance when gathering medical and disability-related information from a customer:

<b>Employment-related activities</b>	<b>Service-related activities (the provision of services, aid, and benefits)</b>
<p>Generally, medical, and disability-related inquiries are <i>illegal</i>. Some examples of circumstances under which it is illegal for you to seek to gather medical or disability-related information include (1) when you are deciding whether to refer a customer to a particular job, or (2) when you are an employer or training instructor, and a customer is not performing well.</p> <p>Instead, you may ask whether the customer can perform specific job functions, and has the needed experience, education, and/or licenses. You may also inquire about temporary, disabling conditions (such as, “How did your sprain your ankle?”). And, if the customer discloses a disability without being asked to do so, or if the customer has an obvious disability, you can ask whether the customer will need accommodation for the</p>	<p>Here, you have broad discretion in making medical and/or disability-related inquiries. Some examples of service-related activities where you may make such inquiries include (1) screening customers with employment difficulties to determine whether there are hidden disabilities (<i>e.g.</i>, cognitive), (2) determining a customer’s eligibility for “targeted” programs, and (3) determining whether, and which, reasonable accommodation would help the customer succeed in employment.</p> <p>The customer is not required to respond to your inquiries but may do so voluntarily. For this reason, it is a good practice to tell the customer why you are seeking the information so that the customer may decide whether to disclose the information.</p>

*application process* (keep in mind, you still cannot ask such questions for referral for a job). Finally, you may ask questions about the *current* illegal use of drugs (be aware that alcohol-related questions are limited).

Among the few exceptions to the foregoing prohibition are when an entity is under an affirmative action plan pursuant to Federal or DC law, or is engaged in correcting prior discriminatory practices (either voluntarily or otherwise). Under such limited circumstances, the individual must be clearly informed that: (1) the information requested is solely for purposes of the affirmative action effort and refusal to provide it will not subject the individual to any adverse treatment; (2) the information is being requested on a voluntary basis and will be used in accordance with the provisions of federal law governing the confidentiality of medical information; and (3) medical information will be kept confidentially and will be used solely for remedial efforts, an employer may ask applicants to self-identify if it is voluntarily using the information to benefit individuals with disabilities by attempting to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity. *See* 29 C.F.R. § 38.18(d) and (e), 29 C.F.R. § 32.15(b).

In addition, employers may require medical examinations if they routinely require such examinations of *all* potential employees, provided the examinations comply with the requirements of 29 CFR 32.15(c).

## **B. Disclosing medical or disability-related information.**

In the context of employment-related and service-related activities, confidentiality of an individual's medical or disability-related information is a priority. This means that disclosure of such information is extremely limited. Pursuant to 29 C.F.R. § 38.41(b)(3)(i), persons in the following categories may be informed about an individual's disability or medical condition and have access to the information in related files under the following circumstances:

- Program staff who are responsible for documenting eligibility, where disability is an eligibility criterion for a program or activity.
- First aid and safety personnel who need access to underlying documentation related to a participant's medical condition in an emergency.
- Government officials engaged in enforcing this part, any other laws as administered by the Department, or any other Federal laws (*see* 29 C.F.R. § 38.44).

The regulations also provide the supervisors, managers, and other necessary personnel “may be informed regarding restrictions on the activities of individuals with disabilities and regarding reasonable accommodations for such individuals.” 29 C.F.R. § 38.41(b)(3)(C).

**On an annual basis, in conjunction with monitoring**, each recipient as defined under 29 C.F.R. § 38.4(zz) shall provide, to the State EO Officer and DOES EO Officer (or their designees), the name and contact information of the highest-ranking individual at the recipient's location who shall be responsible for custody and control of medical and disability-related information. Access to this information will be *extremely limited* in accordance with CRC guidance. CRC, the State EO Officer, and the DOES EO Officer will have access to the information for purposes of performing legally required duties under WIOA Section 188.

In the context of employment-related activities, staff are prohibited from disclosing medical or disability-related information to an employer (1) to whom you are referring a customer, or (2) who is considering hiring a customer. The only exception to this prohibition is when: (1) the job-seeker customer made an independent decision to disclose the information to the employer, (2) the customer specifically requested you or another agency staff member to make the disclosure on his or her behalf, and (3) the disclosure request was initiated by the job-seeker customer, not by you or another staff member at the agency.

**C. Using medical or disability-related information.**

The uses of medical or disability-related information differ depending on whether employment-related activities or service-related activities are involved. The following chart provides guidance on disclosure for these types of activities:

Employment-related activities	Service-related activities (the provision of services, aid, and benefits)
<p>Uses of medical or disability-related information are <i>very narrow</i>. This information cannot be used as the <i>sole basis</i> for (1) deciding whether to refer a customer to a particular job, or (2) suggesting a career path to a customer.</p> <p>“Steering” is <i>illegal</i>. Steering means, based on a person’s disability, you refer the person to a particular job or employer, or you direct the person to a particular profession. Each person with a disability is entitled to <i>individualized</i> treatment.</p> <p>On the other hand, you may use the information to talk to the customer about (1) whether s/he needs reasonable accommodations in <i>the application process</i> (not for the job); or (2) whether s/he is interested in special employment programs for persons with disabilities.</p>	<p>Uses of medical or disability-related information are broader. Some examples include determining reasonable accommodations or modifications, auxiliary aids and services, and assistive technologies.</p>

**D. Storing medical or disability-related information.**

**1. Generally**

Regardless of the nature of the activity, medical and disability-related information must be kept in a separate, secure location with limited access. **This means that medical and disability information for a customer must be maintained in a file that is separate and apart from the customer’s participant file.** In addition, medical and disability-related information must be kept separate and apart from any discrimination complaint investigation file. Electronic

files must be encrypted, or password protected, and physical files must be kept in a locked filing cabinet, or similarly secure area.

Medical or disability information should be made available only to persons on a “need-to-know” basis as outlined under the above-stated disclosure guidance.

Medical information obtained during a post-offer medical examination or inquiry may be provided to and used by appropriate decision-makers involved in the hiring process in order to make employment decisions consistent with the ADA and WIOA Section 188. Where possible, a clear firewall must be instituted between program staff who work with employers and program staff who provide general services to job seekers to ensure that those who work with employers do not inappropriately receive information about a particular job seeker’s disability status.

## **2. “Need to know”**

The following are allowed access to confidential information on a need-to-know basis:

- Knowledge of disability status or medical condition and access to information in related files:
  - Program staff who are responsible for documenting eligibility, where disability is an eligible criterion for a program or activity.
  - First aid and safety personnel who need access to underlying documentation related to a participant’s medical condition in an emergency.
  - Government officials engaged in enforcing WIOA Section 188 (*see* subsection III.D, *supra*).