

WORKFORCE SYSTEM GUIDANCE (WSG) No. 06-PY 2015, April 1, 2016

TO: PENNSYLVANIA WORKFORCE DEVELOPMENT BOARD
BUREAU OF WORKFORCE DEVELOPMENT ADMINISTRATION
BUREAU OF WORKFORCE PARTNERSHIP AND OPERATIONS
CENTER FOR WORKFORCE INFORMATION AND ANALYSIS
LOCAL ELECTED OFFICIALS
LOCAL WORKFORCE DEVELOPMENT BOARD CHAIRS AND EXECUTIVE DIRECTORS

FROM: Robert O'Brien
Acting Deputy Secretary for Workforce Development

SUBJECT: Incumbent Worker Training Activities — Initial Implementation of Workforce Innovation and Opportunity Act (WIOA)

I. **Purpose.** The purpose of this guidance is to provide direction to workforce system stakeholders regarding the permissible use of adult and dislocated worker funds allocated to a local workforce development board for training activities associated with incumbent workers.

II. **References.**

- Workforce Innovation and Opportunity Act of 2014 (WIOA), Public Law (Pub. L.) 113-128
- Workforce Innovation and Opportunity Act - Notice of Proposed Rulemaking, 80 FR 20689
- *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*; Final Rule (a.k.a “Uniform Guidance” or “Super-Circular”), 2 CFR Chapter I, Chapter II, Part 200, et al.

III. **Background.** The Workforce Investment Act (WIA) of 1998 did not promote the use of local funds for incumbent worker training, but did allow the use of statewide funds to such training. A local area was only permitted to conduct incumbent worker training if granted a waiver. Within WIOA however, incumbent worker training is more encouraged than in WIA, and is explicitly allowable at both statewide and local levels. Local workforce development boards, in conjunction with the employers or groups of employers of incumbent workers (which may include employers in partnership with other entities for the purpose of delivering training) are permitted to assist such workers in obtaining the skills necessary to retain employment or avert layoffs; increase both a participant’s and a company’s competitiveness; and be conducted with a commitment from an employer to retain or avert the layoff(s) of the incumbent worker(s) trained.

IV. **Definitions.**

- ***High-Priority Occupation (HPO)*** is an in-demand occupation that has higher skill needs and is likely to provide a family-sustaining wage. Statistical data, regional expert and local area inputs are combined to determine whether or not an occupation meets the high-priority criteria.
- ***Incumbent Worker*** is an individual who is employed, meets Fair Labor Standards Act requirements for an employer-employee relationship, and has an established employment history with the employer for six (6) months or more.

- ***Incumbent Worker Training (IWT)*** is training provided to an incumbent worker that is designed to meet the needs of an employer(s) to retain a skilled workforce or avert the need to lay off employees; increase the competitiveness of the employer or employee; and be conducted with a commitment by the employer to retain or avert the layoffs of the incumbent worker trained. Such training may also include the up-skilling of an employer's current workforce, which may lead to additional opportunities for potential jobseekers. *Note:* IWT must lead to an in-demand occupation (as determined at the local level, but does not necessarily have to lead to a HPO. However, as all high-priority occupations are also in-demand occupations, such occupations are eligible for incumbent worker training.
- ***In-Demand Industry Sector*** is an industry sector that has a substantial current or potential impact (including through jobs that lead to economic self-sufficiency and opportunities for advancement) on the state, regional, or local economy, as appropriate, and that contributes to the growth or stability of other supporting businesses, or the growth of other industry sectors.
- ***In-Demand Occupation*** is an occupation that currently has or is projected to have a number of positions (including positions that lead to economic self-sufficiency and opportunities for advancement) in an industry sector so as to have a significant impact on the state, regional, or local economy, as appropriate.

Note: The determination of whether an industry sector or occupation is in-demand in a local area is made by the local board, as appropriate, using business and labor market projections and statistics.

- V. **Reservation and Use of Funds.** Local workforce development boards may reserve and use not more than 20 percent of the overall adult and dislocated workforce funds allocated to the local workforce development area for the federal share of the cost of providing training through a training program for incumbent workers.

Although the Department does not place any additional requirements on the use of such funds, local boards are encouraged to exercise caution as this will reduce the funds available for jobseekers, especially those experiencing barriers to employment.

If federal adult and dislocated worker funds under this provision are used to support incumbent worker training that is provided through an Industry Partnership, then this will count toward the WIOA plan's requirement that local workforce development boards support Industry Partnerships that operate within their local areas.

- A. **Employer Payment of Non-Federal Share.** Employers receiving funds for incumbent worker training are required to pay for the non-federal share of the cost of providing such training. Local boards are required to establish the non-federal share of such cost in accordance with WIOA Sec. 134(d)(4)(C-D).

The employer share is based on the size of the workforce (wages paid to the participant while in training can be included as part of that share and the share can be provided as cash or in-kind that is fairly evaluated) as follows:

- At least 10 percent of the cost for employers with 50 or fewer employees;
- At least 25 percent of the cost for employers with 51 to 100 employees; and
- At least 50 percent of the cost for employers with more than 100 employees.

Local workforce boards must track and document employer cost share contributions. Official payroll records documenting the worker's hours and wages must be utilized to determine the amount of the employer's share of cost.

The employer size means the number of employees currently employed at the local operation where the incumbent worker training placements will be made. Employer size is determined by the number of employees at the time of the execution of the incumbent worker training contract. This applies to all employers, including employers with seasonal or intermittent employee size fluctuations.

When substantiating the employee count, information provided by the Pennsylvania Department of Labor & Industry's Center for Workforce Information and Analysis (CWIA) may be a source to consider. Such information as the most current Labor Market Information (LMI) and local employer site information, including an employee size range for each local operation is available through data provided by CWIA.

Note: The employee size range as provided by CWIA is acceptable to the extent the entire size range fits within the incumbent worker training employer reimbursement sliding scale ranges (e.g. an employee size range listed as 20- 49 as defined by CWIA falls within the 1-50 employee range found within the incumbent worker training employer reimbursement sliding scale).

B. Restrictions. Local boards must be familiar with the limitation and prohibitions with regard to the use of funds allocated to the local area under WIOA title I-B [Sec. 181].

VI. Eligibility Criteria.

A. Incumbent Worker. An incumbent worker must be:

1. Employed;
2. Meet the Fair Labor Standards Act requirements for an employer-employee relationship¹; and
3. Have an established employment history with the employer for six (6) months or more.

Note: Incumbent worker eligibility requirements differ from career and training services requirements for adults and dislocated workers.

B. Employer. Local boards must consider the following factors when determining the eligibility of employers to receive the WIOA incumbent worker funds:

1. The strategy of the local board in fulfilling the vision and goals established for the local area (i.e., the local plan);
2. The characteristics of the incumbent workers to be trained (i.e., the extent to which these individuals historically represent individuals with barriers to employment as defined in WIOA Section 3(24), and how such individuals would benefit from a skills gain that results in retention or advancement);

¹ On July 15, 2015, Administrator David Weil of the U.S. Department of Labor Wage and Hour Division, wrote, *Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors*. That document can be found at http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf. The Department recommends using this document in conjunction with the Fair Labor Standards Act (FLSA) §§ 203(r) and 203(g) for determining eligibility.

3. The quality of the training (e.g., industry-recognized credentials, advancement opportunities, etc.);
4. The number of participants the employer plans to train or retrain;
5. The wage and benefit levels of participants (before and after training);
6. The occupation(s) for which incumbent worker training is being provided must be in-demand as defined by WIOA Section 3(23) and as determined by workforce development area-specific labor market information produced by CWIA;
7. Employer's industry status. Is the employer in:
 - An in-demand industry as defined by WIOA Section 3(23) and determined by CWIA labor market information; or
 - A stable industry as determined by CWIA labor market information; or
 - A declining industry, but there are compelling reasons (e.g., evidence of long-term viability of the employer) justifying investment in incumbent worker training.
8. Recent lay-offs and relocations. The employer must not have laid off workers within 120 days to relocate to Pennsylvania from another state; and
9. Employer's unemployment insurance and workers' compensation status. The employer must be current in unemployment insurance and workers' compensation taxes, penalties, and/or interest or related payment plan.

Note: These are local adult and/or dislocated worker formula funds or WIOA statewide discretionary funds provided by the governor. Local boards must document the factors that were considered in approving an incumbent worker training project with an employer.

VII. Conflict of Interest. A state board member, a local board member, or a 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 the member's immediate family. For example, a local board 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 incumbent workers.

Neither membership on the state board, local board, or standing committee, nor receipt of WIOA funds to provide training and related services, by itself, violates these conflict of interest provisions.

In accordance with §200.112 of the Uniform Guidance, recipients of federal awards must disclose in writing any potential conflict of interest. Sub-recipients must disclose in writing any potential conflict of interest to the recipient of grant funds.

VIII. Action(s) Required. Local areas, in conjunction with their local board, must establish a local incumbent worker training policy that, at a minimum, outlines the following:

- Criteria for determining employer eligibility;
- How the employers' share of incumbent worker training cost will be established;
- Agreement or contracting process with providers of incumbent worker training; and
- The process for the collection and dissemination of performance information through the local workforce system.

IX. Technical Assistance/Inquiries. Requests for technical assistance and/or inquiries regarding this guidance should be directed to the Pennsylvania Department of Labor & Industry, Director of the Bureau of Workforce Development Administration, 651 Boas Street, 12th Floor, Harrisburg, PA 17121.

Any such requests may be submitted to the following resource account: RA-LI-BWDA-Policy@pa.gov

X. Rescissions. None.

XI. Accessibility. Workforce system directives are available on the PA Department of Labor & Industry website at <http://www.dli.pa.gov> for downloading.