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Operational Policy NO. OP- 433, Change 1

Subject: Incumbent Worker Training  
Effective: PY20, effective date 2/22/2021

**PURPOSE**

The purpose of this policy is to provide direction to Central Region's Service Provider regarding the permissible use of adult and dislocated worker funds for training activities associated with incumbent workers.

**REFERENCES**

Workforce Innovation and Opportunity Act (WIOA), July 22, 2014, 108, 122, §134, §5181 and §5194.

WIOA Final Rules - U.S. Department of Labor (Title 1): 20 CFR §680.760, §680.830, and §680.840.

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 and Opportunity Act. • Fair Labor Standards Act (FLSA) §203.

**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 for such training. Under WIA a LWDB was only permitted to conduct incumbent worker training if a waiver had been granted. Unlike WIA, the Workforce Innovation and Opportunity Act (WIOA) of 2014 explicitly allows for and encourages the use of incumbent worker training as a workforce strategy. This training strategy is designed to meet the special requirements of an employer (including groups 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. In addition, incumbent worker training must be focused on increasing

the competitiveness of the employee or employer, and be conducted with a commitment by the employer to retain or avert the layoffs of the incumbent worker(s) trained.

## **DEFINITIONS**

- High-Priority Occupation (HPO) is an in-demand occupation that has higher skill needs and is likely to provide a self-sufficient 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 upskilling of an employer's current workforce, which may lead to additional opportunities for potential jobseekers.
- In-Demand Industry Sector is an industry sector that has a substantial current or potential impact (including 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. Incumbent Worker Training must lead to an in-demand occupation, but does not necessarily have to lead to an HPO. However, all HPOs are considered in-demand occupations, and therefore, eligible for incumbent worker training.

## **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 LWDB for the federal

share of the cost of an incumbent worker training program. For example, if a Local WDB receives \$1.5 million in Adult funds and \$1.0 million in DW funds; it may use up to \$500,000 (20 percent of the total) for Incumbent Worker Training. This 20 percent can be used for incumbent worker training activities that are programmatic in nature, as administrative activities must be paid out of the board's administrative funds. Neither USDOL, nor the SAE places any additional requirements on the use of such funds; however, LWDBs are encouraged to exercise caution as this will reduce the funds available for other jobseekers, especially those experiencing barriers to employment.

WCCNM may immediately implement any such Waivers and Other Flexibilities\* as approved or defined by NMDW to expand the allowable amount of funds used on incumbent workers.

If implemented, specific NMDWS Guidance and affiliated references will be included in the Operational Procedures as approved by the AE.

## **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. WCCNM will comply with the requirement to establish the non-federal share of such cost in accordance with WIOA Sec. 134(d)(4)(C-D) prior to the delivery of services.

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.

Employer contributions may be done through both cash payments and fairly evaluated in-kind contributions. The employer contribution may include the wages the employer pays to the incumbent worker trainee while the worker is attending training. Official payroll records documenting the worker's hours and wages must be used to determine the amount of the employer's share of cost. LWDBs 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.

## **RESTRICTIONS**

WCCNM will comply with the limitations and prohibitions on the use of funds allocated to the local area under WIOA title I-B \*181 and Part 680 of federal regulations, as follows.

- 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.
- 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 customized training until after 120 days has passed since the relocation that caused the loss of employment at an original business location in the United States.
- WIOA work-based training funds must not be used to directly or indirectly assist, promote, or deter union organizing.
- 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.

## **ELIGIBILITY CRITERIA**

### **Incumbent Worker Eligibility**

WCCNM Service Provider must consider the following factors when determining incumbent worker eligibility. An Incumbent worker must be:

1. Employed;
2. Meet Fair Labor Standards Act requirements for an employer-employee relationship; and
3. Have an established employment history with the employer for six (6) months or more. In the event that the incumbent worker training is being provided to a group of employees, only a majority of the employees in the group being trained must establish such employment history.

Incumbent worker training can also be used for underemployed workers, such as for workers who would prefer full-time work but are working part-time for economic reasons. While these workers are employed, they may have accepted reduced hours to gain or maintain employment or a previous dislocation has led them to accept reduced employment and often lower wages that may have a permanent effect on their careers. The use of these strategies may focus on increasing skills for underemployed frontline workers in an effort to advance these workers to more skilled positions with the same employer or industry sector leading to an increase in earnings through more work hours or an increase in pay.

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 are also enrolled as a participant in the WIOA adult or dislocated worker program.

### **Employer Eligibility**

WCCNM will consider the following factors when determining the eligibility of employers to receive the WIOA incumbent worker funds;

1. The strategy of the WCCNM 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 skill gain that results in retention or advancement).
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.
7. Employer's industry status. Is the employer in:
  1. An in-demand industry as defined by WIOA Section 3(23) and determined by labor market information; or
  2. A stable industry as determined by labor market information; or
  3. A declining industry, but there are compelling reasons (e.g., evidence of long-term viability of the employer) justifying investment in customized training?
8. Recent lay-offs and relocations. The employer must not have laid off workers within 120 days to relocate from another state.
9. Employer's unemployment insurance and workers' compensation status. The employer must be current on unemployment insurance and workers' compensation taxes, penalties, and/or interest or related payment plan (including timely Quarterly Reports).
10. Be located in and have operations in the Central Workforce Region.
11. Employ at least one full-time employee.
12. Keep accurate records of the project's implementation process for audit purposes for a minimum of five years.

WCCNM will document the factors that were considered in approving an incumbent worker training contract with an employer (or group of employers).

## **PERFORMANCE ACCOUNTABILITY**

Due to WIOA sec. 134's unique eligibility requirements, individuals who receive only incumbent worker training are reportable individuals and not participants required for inclusion in the WIOA performance accountability calculations. As a result, an individual who only receives incumbent worker training and does not become a core program participant will not be included in the calculation of the primary indicators of performance for negotiations and accountability purposes. However, Local WDBs are required to collect and report the outcomes of individuals in receipt of incumbent worker training on the primary indicators of performance, among other required elements.

## **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 benefit to that member or the member's immediate family. For example, a Central Region 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 conflicts of interest. Sub-recipients must disclose in writing any potential conflict of interest to the recipient of grant funds.

## **PROCESS FOR CONTRACTING**

### **PROCESS**

While incumbent worker training is a service that focuses on the needs of business, it shall still follow all the regular requirements for providing individual participant training. All required incumbent worker training documentation shall be kept on file with the service provider, business and Workforce Connection Online System (WCOS). Service providers shall make all files and documentation available for monitoring, audits and date validation as required.

1. Eligibility shall be determined and eligibility documents shall be compiled and kept on file with the service provider and business.
2. An individual employment plan shall be completed for each participant identifying the need for incumbent worker training and kept on file with the service provider and business.
3. Incumbent worker training processes can include the following:

- a. Service providers may work with an employer to provide the eligibility documentation on potential trainees (staff-assisted service without significant staff involvement). Special attention shall be paid to eligibility documentation requirements to ensure all data validation requirements are met.
- b. Once eligibility is determined, the service provider may work with the employer to complete an individual employment plan for each participant, identifying the need for incumbent worker training. For purposes of the incumbent worker training activity, an individual employment plan may consist of the employment goal, achievement objective and services to achieve the employment goals.
- c. Service providers do not have to maintain individual file folders for each participant as long as all required information and documentation is kept on file collectively for each incumbent worker training contract by the service provider and business.

## **INCUMBENT WORKER TRAINING AGREEMENT PROVISIONS**

Incumbent worker training agreements shall at a minimum include the following elements:

- 1. The occupation for which training will be provided; the skills and competencies to be achieved and the length of time for the training.
- 2. The name of each employee to be trained, social security number, date of birth, gender, selective service registration, 1-9 on file with employer, hourly pay, hours per week, and employee start date.
- 3. The employer's assurance that incumbent worker training is needed based upon the individual skill sets of trainees.
- 4. Training outline.
- 5. Method and maximum amount of reimbursement.
- 6. The cost and documented description of any ancillary items or supportive services that may be needed.
- 7. Other appropriate training outcomes related to the training (includes obtainment of veteran status, highest grade completed, household/family size and increases in earnings after training if applicable).
- 8. Appropriate assurances and certifications as defined in the agreement:
  - a. 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. 20 CFR 680.700 (b).
  - b. Employer shall verify that the 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, work place literacy, or other appropriate identified by the local WDB. 20 CFR 680.710 (C).

- c. 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 training participant retention.
- d. 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 (and as amended in 1996) or the applicable state or local minimum wage law and WIOA 20 CFR Part 683.275.
- e. 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 part 38.
- f. Employer certifies that the 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 training, or it has no collective bargaining agreement with a labor organization that covers the participants' position.
- g. Employer assures that they are not debarred or suspended in regard to federal funding. 29CFR 180 Sub Part H, (Verifiable at <https://www.sam.gov/portal/SAM/#1#1>).
- h. Employer further assures that federal funds will not be used to assist, promote or deter union organizing, 20 CFR 663.730.
- i. Employer certifies that no member of the 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 683.200 (a).
- j. 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 part 2, Subpart D.
- k. 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 training is created in a promotional line that infringes on opportunities of current employees, 20 CFR 680.710.

1. Employer is committed to employ and/or retain the individual upon successful completion of the training for a minimum of twelve months as specified in section 680.760 (b), WIOA July 22, 2014.

## **INCUMBENT WORKER TRAINING DOCUMENTATION**

The Incumbent Worker Training Agreement and its related information and documentation may be kept by the service provider and business. The local board and service provider are responsible for ensuring the information and documentation is available for monitoring and review as required:

1. Incumbent Worker Training Agreement and supporting documentation.
2. Incumbent Worker Training Plan.
3. Incumbent Worker Training Modification(s), if applicable.
4. Incumbent Worker Training Progress Report and Invoice.
5. All Provider and Participant Files required documentation submitted in the Workforce Connection Online System (WCOS).

## **ACTIONS REQUIRED**

LWDBs must establish a local customized training policy that outlines the following;

1. Criteria for determining employer eligibility.
2. How the employers' share of incumbent worker training cost will be established;
3. Define what constitutes an appropriate commitment to hire the individual on behalf of the employer.
4. The process for collecting, from the employer, performance information and data entry into the Workforce Connection Online System.
5. Contracting process with employers providing incumbent worker training.

## **LIMITATIONS**

For employers identified as being a first-tier industry, funding for any first-year project may not exceed \$150,000. Subsequent year(s) funding may not exceed an additional \$75,000 per year with a maximum funding amount of \$300,000. However, the WCCNM, on a case-by-case basis, may review and approve subsequent contracts which exceed the \$300,000 maximum. Following the \$300,000 maximum, should the employer request an amount that exceeds the maximum, they will be required to make a presentation to the WCCNM for consideration of such request.

For employers identified as being a second-tier industry, funding for any first-year project may not exceed \$75,000. Subsequent year(s) funding may not exceed an additional \$25,000 per year with a maximum funding amount of \$125,000. However, the WCCNM, on a case-by-case basis, may review and approve subsequent contracts which exceed

the \$125,000 maximum. The company will be required to make a presentation to the WCCNM. Following the \$125,000 maximum, should the employer request an amount that exceeds the maximum, they will be required to make a presentation to the WCCNM for consideration of such request.

APPLICABILITY:

All WCCNM — initiated incumbent worker training contracts and all service provider-initiated incumbent worker training contracts.

INQUIRIES:

WIOA Manager 505-247-1750

This Policy has received approval by the Workforce Connection of Central New Mexico Board and rescinds any policy previously in effect.

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WCCNM Board Chair