



January 20, 2016

Ms. Adele Gagliardi, Administrator
Office of Policy Development and Research
Employment and Training Administration
U.S. Department of Labor Room N-5641
200 Constitution Avenue, NW
Washington, DC 20210

Re: RIN 1205-AB59—Proposed Rulemaking on Apprenticeship Programs; Equal Employment Opportunity Regulations

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Dear Ms. Gagliardi:

We write to express our strong support for the U.S. Department of Labor's (DOL) proposal to update the Apprenticeship Program's Equal Employment Opportunity (EEO) regulations after nearly forty years. We applaud DOL's commitment to ensuring that marginalized and economically vulnerable groups – namely women, people of color, lesbian, gay, bisexual, and transgender (LGBT) individuals, and people with disabilities – have equal access to apprenticeship programs. Apprenticeships offer critical pathways to economic mobility and financial security, but these groups still face persistent barriers in accessing them.

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, national origin, religion, gender, gender identity, sexual orientation, or disability.

Background

As DOL observes in the Notice of Proposed Rulemaking (NPRM), in the almost four decades since the EEO regulations were last updated, women and people of color not only have remained underrepresented in apprenticeships overall, but are concentrated in lower-paying fields. While women make up 47% of the workforce, in the past decade they accounted for only 7.1% of new apprentices, and just 2.3% of new construction

apprentices.¹ African Americans, Latinos, and Asian Americans reflect similar numbers, particularly in certain industries; for instance, blacks comprise 8.9% of utility workers, but are only 5.9% of apprentices in those fields, Latinos are 15.8% of the manufacturing workforce but just 6.5% of manufacturing apprentices, and Asian Americans make up 4.8% of the public administration and homeland security industries but a mere 1% of apprentices.²

Less is known about how LGBT workers fare in apprenticeships. DOL unquestionably has taken critical steps to improve their participation in the workforce, such as through OFCCP's enforcement of 2014's Executive Order banning discrimination by federal contractors against LGBT individuals.³ But what is known is that LGBT individuals experience higher levels of unemployment, and of poverty, than their heterosexual counterparts – and these rates are even worse for LBT women, particularly LBT women of color.⁴

Although federal contractors have been subject to a 7% hiring goal for workers with disabilities since 2013, no concomitant affirmative action goal for apprenticeship admission has been in place. We applaud DOL for incorporating such a benchmark into the apprenticeship regulations.⁵ As noted in the NPRM, workers with disabilities in the U.S. experience far higher unemployment rates than those who are not disabled. The Bureau of Labor Statistics in 2012 found that a paltry 17.8% of working age individuals with disabilities were in the workforce, while 63.9% of their non-disabled counterparts were.⁶

Through strengthening and effectively implementing the proposed regulations, DOL can help to ensure progress toward parity in apprenticeships that is reflective of the broader workforce – and take enormous strides toward providing a critical means for economic security to wide swaths of Americans. As far as the current proposals go, however, we believe they can do even better. We urge DOL to maximize the regulations' effectiveness in the following ways:

1. Include Equal Employment Opportunity and Affirmative Action Standards for Pre-Apprenticeship Training Programs

We commend DOL for acknowledging that pre-apprenticeship training is a key tool for addressing continued disparities in the apprentice population. We propose that DOL's definition

¹ Equal Employment Opportunity in Apprenticeship, 80 Fed. Reg. 68905, 68911, 68912 (proposed Nov. 6, 2015) (to be codified at 29 C.F.R. pts. 29 & 30).

² *Id.* at 68914.

³ Exec. Order No. 13672, 41 CFR Parts 60–1, 60–2, 60–4, & 60– 50 (2015).

⁴ *See, e.g.,* Center for American Progress, *et al., Paying an Unfair Price: The Financial Penalty for Being LGBT in America* (Sept. 2014; updated Nov. 2014).

⁵ Indeed, we believe that a 10% goal is more appropriate. The 7% figure derives from data collected by the U.S. Census Bureau's American Community Survey (ACS), which utilized a far narrower definition of disability than either the ADA or the Rehabilitation Act. *See, e.g.,* U.S. Department of Labor, Office of Federal Contract Compliance Programs, "Frequently Asked Questions: New Section 503 Regulations," *available at* http://www.dol.gov/ofccp/regs/compliance/faqs/503_faq.htm. Indeed, the EEOC has estimated that as many as 64% of the individuals covered by the ADA, as amended, participate in the labor force. *See* 76 Fed. Reg. 16991 (March 25, 2011). Given the number of people considered by federal statute to be deserving of protection from bias, and given apprenticeships' distinct purpose of increasing the pipeline of skilled workers, we urge the DOL to aim higher than 7%.

⁶ Equal Employment Opportunity in Apprenticeship, 80 Fed. Reg. at 68915.

of “pre-apprenticeship program” in proposed § 30.2 incorporates elements specifically addressing barriers unique to women, people of color, LGBT individuals, and individuals with disabilities, and include standards for Equal Employment Opportunity/Affirmative Action (EEO/AA) in technical instruction, selection procedures, and direct entry into apprenticeship programs.

2. Require all Sponsors to Create Affirmative Action Programs, Not Just Sponsors with Five or More Apprentices

We do not support the proposed exemption of apprenticeship programs with fewer than five apprentices from having to adopt an affirmative action program. Such an exemption would exclude a significant percentage of apprenticeship programs from the promises of equal opportunity offered by the regulations. This exemption would also exclude a large number of new apprenticeship programs in their early years of growth when the adoption of an affirmative action program would have the greatest long-term, positive impact.

3. Ensure that the Affirmative Action Regulations Actually Increase Participation of Women, People of Color, LGBT Individuals, and People with Disabilities in Apprenticeships and the Trades

a. Clarify the Meaning and Scope of Individuals Who Are “Qualified”/“With the Present or Potential Capacity for Apprenticeship”

We support DOL’s requirement that sponsors compare their “utilization” of apprentices with the “availability” of the targeted groups who have the “present or potential capacity for apprenticeship” to determine whether they must set a utilization goal and engage in targeted outreach, recruitment, and retention as part of their affirmative action program. However, we strongly urge DOL to clarify and offer guidance as to these important terms. Without such clarification, sponsors might inappropriately or inaccurately determine that the minority populations are not underutilized in their programs and thus not engage in needed affirmative action efforts.

Specifically, we urge DOL to clarify that individuals who are “qualified” or “with the present or potential capacity” for apprenticeship are individuals who meet the generally-accepted industry standards for apprenticeships. DOL should explicitly clarify that apprenticeships are entry-level positions, generally requiring no previous experience or minimal requirements other than being at least eighteen years of age and holding a high school diploma or equivalent. Importantly, DOL should explicitly affirm its longstanding understanding that, given the minimal requirements for apprenticeship, the population of women and people of color who are “qualified” or have the “present or potential capacity” for apprenticeship will largely correspond with that group’s share of the civilian labor force in the relevant recruitment area. These clarifications will greatly ease the burden on sponsors in conducting this analysis and ensure that the final regulations are applied by sponsors in a manner consistent with DOL’s longstanding treatment of apprenticeship qualifications. The clarifications will also ensure that the proposed utilization goal for sponsors, which must be “at least equal to the availability figure,” remains a robust goal that moves apprenticeship programs towards the gender parity reflected in the overall civilian labor force.

b. Clarify that Sponsors Must Calculate the Availability and Utilization of Women Overall and Women of Historically Excluded Racial and Ethnic Groups

We support the regulations’ proposal to move away from the current requirement that sponsors analyze “availability” and “utilization” for women and then for racial minorities as an aggregate group, and instead require sponsors to disaggregate the “availability” and “utilization” of individuals for apprenticeship by race, sex, and ethnicity. We urge DOL to further strengthen this analysis by clarifying that these data must also be cross-tabulated by race, sex, and ethnicity to ensure that a sponsor’s analysis does not mask the barriers to apprenticeship faced by key subgroups of individuals, such as African American women or Latinas, and to ensure that a sponsor’s outreach and recruitment is appropriately targeted.

c. Ensure Sponsors Make Actual Progress in Affirmative Action Programs and Utilization Goals Through the Use of Interim Goals and Timetables

We support DOL’s requirement that all sponsors internally review all elements of their affirmative action programs on an annual basis or biannually, if the sponsor finds there is no underutilization in their program. However, it is imperative that external review mechanisms also exist to ensure that less diligent sponsors make progress toward their goals, even if their efforts do not fall so short as to qualify as underutilization. Accordingly, we urge DOL to designate an agency representative in each Office of Apprenticeship region to engage each sponsor which has fewer than 50% of the proportion of women, Hispanics or Latinos, and/or individuals of a particular racial minority group available in the sponsor’s relevant recruitment area on an annual basis in developing and attaining interim goals and timetables, and further, to require periodic review of such sponsors’ efforts to meet those goals.

Additionally, we commend DOL for proposing sponsors be required to adopt a strong utilization goal for women and people of color where underutilization, pursuant to proposed § 30.5, has been identified. We urge DOL to go further by requiring all sponsors with utilization goals to include in their plans interim percentage goals and timetables, and to subject those goals to the same periodic review as the affirmative action measures for less successful sponsors, described above.

4. Require Robust Measures for Targeted Outreach, Recruitment, and Retention

We strongly commend DOL for addressing, in proposed § 30.6 and § 30.7 the retention of women, people of color, and individuals with disabilities in apprenticeship programs, given the glaringly high number of apprentices who never complete their apprenticeship program. Women apprentices are particularly susceptible to non-completion given the unique barriers they face throughout their apprenticeships, including isolation, micro-inequities, harassment, discrimination, and lack of on-the-job training.⁷ We urge DOL to strengthen the regulations as they relate to retention by creating a separate “retention” section outlining the efforts sponsors must undertake to increase retention rates. Among the provisions in the “retention” section, we

⁷ See, e.g., National Women’s Law Center, *Women in Construction: Still Breaking Ground* (2014), 2-4, 7-8.

recommend that DOL to include, at the very least, a requirement that sponsors: (1) analyze their apprentice retention rates for women, people of color, and individuals with disabilities; (2) set forth in their written affirmative action plans the specific retention activities they plan to take for the upcoming program year, as appropriate; (3) conduct exit interviews of each apprentice leaving the sponsor's apprenticeship program prior to completion; and (4) implement policy and professional development practices designed to build staff capacity to support and serve traditionally underrepresented groups, including the LGBT community.

5. Ensure that Applicants and Apprentices Affected by Pregnancy and Related Conditions Are Not Discriminated Against, Pushed Out of Their Apprenticeships, or Forced to Choose Between the Health of Their Pregnancy and Their Apprenticeship

We urge DOL to clarify in § 30.3(a)(2), as it did with other protected categories, that, with respect to pregnancy, the Registration Agency will apply the same legal standards and defenses as those applied under the Pregnancy Discrimination Act (PDA) and the Americans with Disabilities Act Amendments Act (ADAAA). We further urge DOL to note that these legal standards include, among other things, the standards governing reasonable accommodations under the ADAAA as well as the standards governing employers' obligation, under the PDA, to make accommodations for workers with limitations arising out of pregnancy when employers make or are obligated to make accommodations for a substantial percentage of others similar in their ability to work. Finally, DOL should address the need to provide reasonable accommodations for pregnancy and related conditions, including lactation, not only to the extent required to avoid discrimination on the basis of pregnancy under *Young v. United Parcel Service*,⁸ but also as an affirmative measure aimed at breaking down barriers to women's acceptance and advancement in apprenticeship programs.

6. Discrimination on the Basis of Gender Identity Must be Explicitly Prohibited

While we appreciate the inclusion of discrimination on the basis of gender identity as a form of prohibited sex discrimination in the preamble, gender identity must also be enumerated within the list of protected characteristics. Discrimination based on gender identity in apprenticeship and training programs may take many forms. Individuals may be turned away because they are deemed to be dressed "inappropriately" when presenting themselves in a manner consistent with their gender identity; deemed not to have appropriate identification when a document lists a former name or outdated gender designation different from the individual's outward presentation; ejected from offices for using public restrooms consistent with their gender identity; or subject to inappropriate personal questions or other verbal or physical harassment. Given the potential severity of this discrimination, clarity is essential to both program participants and sponsors. Although including a reference to gender identity in the preamble is important, this level of nuance is insufficient to fully protect all transgender workers from discrimination in this program.

⁸ 135 S. Ct. 1338 (2015).

7. Revise § 30.3(c) to Include Protection from Sexual Orientation and Sex Stereotyping Discrimination as Unlawful Sex Discrimination

We applaud the Department’s revisions, which include explicit protections for individuals on the basis of sexual orientation alongside age, genetic information, and disability. Discrimination against LGB people undermines the mission of these critical federal programs and places an additional burden on LGB workers. However, while these explicit protections are essential, we also urge the Department to clarify both in the final rule and any accompanying guidance that sexual orientation discrimination and sex stereotyping discrimination are also prohibited forms of sex discrimination. The Department explicitly cites both the landmark case *Price Waterhouse v. Hopkins*,⁹ which held that discrimination on the basis of sex stereotyping was unlawful sex discrimination under Title VII, as well as the recent EEOC decision *Baldwin v. Fox*,¹⁰ which explicitly stated that sexual orientation discrimination is a form of sex discrimination under Title VII. *Baldwin* also clarified that discrimination against an individual on the basis of sexual orientation is inherently intertwined with an understanding of sex-based characteristics. As the proposed rule recognizes, the legal landscape involving sexual orientation discrimination has evolved significantly, and a growing number of courts have recognized that discrimination against gay people because of their sexual orientation is a form of sex discrimination.¹¹ Providing this additional clarification within the final rule will provide the most robust protection for program participants in the coming years.

8. Ensure Access to Gender-Appropriate Facilities for Transgender Workers

Section 30.3(b)(4) of the proposed rule includes a provision aimed at eliminating harassment, intimidation, and retaliation in the workplace. The ACLU appreciates the inclusion of this new provision. Directly addressing these issues specifically in the context of the protected categories included in the proposed rule is an important step toward improving workplace climate for all workers – including those who are marginalized. However, we urge the Department to add clarifying language both in the final rule and any accompanying guidance regarding implementation of proposed 30.3(b)(4)(iii) which requires that, “if the sponsor provides

⁹ 490 U.S. 228, 250 (1989).

¹⁰ EEOC Doc. 0120133080, 2015 WL 4397641, at *4-10 (EEOC July 15, 2015).

¹¹ See, e.g., *Videckis v. Pepperdine Univ.*, No. CV 15-00298 DDP (JCx), 2015 WL 8916764, at *5 (C.D. Cal. Dec. 15, 2015) (holding that “claims of sexual orientation discrimination are gender stereotype or sex discrimination claims”); *Isaacs v. Felder Servs., LLC*, No. 2:13cv693-MHT, 2015 WL 6560655, at *3 (M.D. Ala. Oct. 29, 2015) (holding that “claims of sexual orientation-based discrimination are cognizable under Title VII”); *Deneffe v. SkyWest, Inc.*, No. 14-cv-00348-MEH, 2015 WL 2265373, at *6 (D. Colo. May 11, 2015) (denying motion to dismiss where plaintiff alleged that he failed to conform to male stereotypes by designating his same-sex partner as beneficiary); *Hall v. BNSF Ry. Co.*, No. C13-2160, 2014 WL 4719007, at *3 (W.D. Wash. Sept. 22, 2014) (denying motion to dismiss where plaintiff alleged that “he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males”); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (denying motion to dismiss where “Plaintiff has alleged that he is ‘a homosexual male whose sexual orientation is not consistent with the Defendant’s perception of acceptable gender roles’”); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) (finding genuine issue of material fact under sex stereotyping theory where plaintiff failed to conform by taking his same-sex spouse’s surname after marriage); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (finding genuine issue of material fact under sex stereotyping theory where plaintiff failed to conform by being attracted to and dating other women and not only men).

restrooms or changing facilities, the sponsor must provide separate or single-user rest rooms and changing facilities to assure privacy between the sexes.” The Department must make clear to program sponsors that if sex-segregated facilities are available, they must provide access to gender-appropriate facilities for individuals in accordance with their gender identity.

9. Implement Inclusive Apprenticeship Selection Procedures

We commend DOL for requiring sponsors’ selection method(s) be facially neutral in terms of race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, and disability, and for requiring sponsors to evaluate the impact of their selection procedure(s) on race, sex, and ethnic groups (Hispanic or Latino/non-Hispanic). We urge DOL to clarify that these requirements also apply to pregnancy, sexual orientation, and gender identity. We further urge DOL to explicitly state that sponsors are permitted and encouraged to implement a different selection procedure(s) or extend or reopen selection periods if the initial selection procedure or period was not effective in complying with EEO requirements and/or making progress toward affirmative action goals. Finally, we recommend that DOL establish guidelines for standardizing direct entry into apprenticeships for graduates of pre-apprenticeship programs that adhere to the quality framework to be set out in § 30.2.

10. Include Robust Measures for Ensuring Sponsor Compliance with All Antidiscrimination and Affirmative Action Requirements

While we support the self-monitoring mechanisms proposed in the regulations, such mechanisms alone will be insufficient to ensure sponsor compliance with the regulations’ antidiscrimination and affirmative action requirements. Accordingly, we urge DOL to establish external review mechanisms for all sponsors, including requiring annual or biannual sponsor reports to the Registration Agency and the public detailing the sponsor’s antidiscrimination and affirmative action efforts and progress; requiring the Registration Agency to regularly conduct compliance reviews of sponsors’ antidiscrimination and affirmative action efforts; and requiring compliance review findings and any resulting compliance action plans be made accessible to the public. We further urge DOL to require the Registration Agency to regularly evaluate a sponsor’s compliance action plan for effectiveness until the sponsor attains the plan goals. Importantly, DOL should establish opportunities for stakeholder participation in compliance reviews and in the filing and review of EEO/AA complaints.

Finally, we urge DOL to further strengthen the technical assistance provided to sponsors and ease the burden on sponsors by requiring them to include a standing seat on their advisory committee from an external party that supports underrepresented populations in the workforce development arena. We also urge DOL to require regular and ongoing professional development on cultural competency and antidiscrimination and affirmative action requirements for apprenticeship training staff, instructors, administrators, and support staff.

We thank you for the opportunity to provide comments on these important regulations.

Sincerely,

A handwritten signature in black ink that reads "Karin Johanson". The signature is written in a cursive style with a long horizontal flourish at the end.

Karin Johanson
Director, Washington Legislative Office