



Virginia Employment Commission
Revised: January 1, 2018

DISCRIMINATION PROCEDURES FOR COMPLAINT INVESTIGATION¹

PURPOSE

This procedure shall be used for the investigation of any equal opportunity and equal employment opportunity discrimination complaint against a recipient of U.S. Department of Labor (USDOL) funds, for which a written and signed complaint of discrimination has been received².

GENERAL PRINCIPLES

Any person alleging discrimination under 29CFR Part §38.5 through §38.19, and Section 188 of the Workforce Investment Act has the option of filing his or her complaint with the recipient or with the Civil Rights Center (CRC). The recipient's EO officer has the obligation to inform the complainant of the option. Should the complainant elect to file with CRC, the recipient's EO Officer should log the complaint and provide the contact information for the CRC.

I. TYPES OF COMPLAINTS

A complaint falls into one of three categories, depending on its source:

- **Individual** – a complaint that alleges discrimination against the person filing the complaint.
- **Third party** – a complaint filed by a group or an individual that alleges discrimination against another group or individual. The recipient's EO Officer accepts such complaints if the complainant:
 - can provide the name and telephone number (or other means of contact) of the injured party and the injured party is willing to file a complaint, or
 - is an organization or special interest group, and they can provide names and telephone numbers of the injured parties, or
 - is an authorized representative of an injured party.

¹ 29CFR Part 38-§38.69

² Complaint against private sector employers should be referred to the US Equal Employment Opportunity Commission.



- **Class action** – a complaint filed by one or more individuals that alleges discrimination, not only against themselves, but also against a group of similarly situated individuals. To file such a complaint, the complainant must have standing in the class, that is:
 - be a member of the class, and
 - be adversely affected by the alleged discrimination.

Note: the purpose of a class action is to secure a remedy that eliminates:

- the discrimination against the person(s) named in the complaint,
- the discrimination against other injured parties, regardless of whether they have been individually named in the complaint, and
- the practice of policy that caused the discrimination.

II. LEGAL THEORIES OF DISCRIMINATION

There are three major legal theories of discrimination that can be used to prove illegal discrimination under WIOA and other civil rights laws. These are:

- **Disparate treatment** - means treating someone differently because of his or her race, color, religion, sex (including pregnancy, childbirth, related medical conditions, transgender status, and gender identity), national origin (including limited English proficiency), age, political affiliation and belief, beneficiaries, applicants, participants only, citizenship and participation in any WIOA Title I- financially assisted program or activity or other bias prohibited by law. To prove a case of discrimination under this theory, it is necessary to examine why the person was treated differently and whether a prohibited factor was involved.
- **Disparate impact** - is based on the premise that discrimination can occur even if no one is treated differently. The use of a specific requirement in the decision making process (*for purposes of eligibility, selection, or placement decisions; monetary and nonmonetary determination; disciplinary actions, etc.*) can be discriminatory if the requirement has an adverse effect and if the requirement is not necessary to determine qualifications for the job or training in question. The case will turn on whether the policy or practice in question is a legitimate “*business necessity*”.
- **Failure to provide a reasonable accommodation**- applies where there is a legal obligation to provide reasonable accommodation, as in the case of a disability or religious belief. Failure to provide a qualified individual with a disability a reasonable accommodation that is legally required – whether by WIOA, the Americans with Disabilities Act (ADA) and Americans with Disability Act as Amended (2008), or Section 504 of the Rehabilitation Act – can be constructed as discrimination on the basis of disability, unless providing the accommodation would cause “undue hardship”.



In general, “undue hardship” means significant difficulty or expense incurred by a recipient. Factors to be considered in determining whether an accommodation would impose an undue hardship on a recipient as outlined in 43CFR §17.211.

III. DETERMINING JURISDICTION

The first step in processing a complaint is to determine if it is within the recipient’s jurisdiction³ that is, if the recipient has the legal authority to accept the complaint for investigation. The three things to consider in determining jurisdiction is basis, timeliness, and whether the respondent is a recipient of federal funds.

- **Basis:** The recipient can accept and investigate only those complaints that allege discrimination on the basis of: race, color, religion, sex (including pregnancy, childbirth, and related medical conditions, transgender status, and gender identity), national origin (including limited English proficiency), age, disability, or political affiliation or belief, or, for beneficiaries, applicants, and participants only, on the basis of citizenship or participation in any WIOA Title I-financially assisted program or activity, or be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration of or in connection with any WIOA Title I-financially assisted program or activity.
- **Timeliness:** The recipient will ordinarily accept and investigate a complaint only if it is filed within 180-calendar days of the alleged violation. This time limit can be waived by the Director of CRC if the complainant: shows that he or she was not notified of the time limit and was not otherwise aware of it, was prevented by circumstances beyond his or her control from filing a complaint, or has some other reason considered sufficient by CRC.
- **Recipient of DOL Funds:** The recipient can accept and investigate only those complaints associated with the respondent’s program or activity, against which the complaint is filed, is a program or activity funded in whole or in part by DOL funds. All programs and activities funded in whole or in part by WIOA are recipients of DOL funds and are, therefore, within the recipient’s jurisdiction.

IV. NOTIFYING THE RESPONDENT AND THE COMPLAINANT

Once it is determined that a complaint is within the recipient’s jurisdiction, the complainant is investigated by the recipient’s EO Officer (*or designee*). The EO Officer sends the respondent (*the administrator or manager of the program/activity receiving funds*) notice, which informs him or her that the recipient has accepted the complaint and includes:

³ A complaint against a One-Stop partner agency that alleges discrimination on a basis that is prohibited by Section 188 and by a civil rights law enforced by the partner agency should be referred to the partner agency for processing. In such circumstances, the partner agency’s regulations will govern the processing of the complaint.



- the complainant's name
- a brief description of the allegation,
- a description of the information or documentation needed for the investigation and the time in which it is to be submitted,
- a reminder to the respondent that any form of retaliation or intimidation against the complainant because he or she has filed a discrimination complaint is prohibited, and
- the name and telephone number of the recipient's EO Officer assigned to the case.

Note: A copy of the complaint may be provided to the respondent if it is requested. The EO Officer also sends the complainant a similar notification letter. The respondent and the complainant are encouraged to informally resolve the complaint prior to the issuance of a determination. The agency has selected mediation⁴ as the inform forum to resolve complaint of discrimination.

V. DATA COLLECTION

A complaint can be investigated in two ways: through analyses of data relevant to the investigation and/or through an on-site investigation.

- all data needs to be identified to determine the merits of the allegations in the complaint;
- a written list of questions developed and forwarded to the respondent, complainant, and other parties such as witnesses;
- some questions may require a written response; others ask for records or other documentation;
- the EO Officer will analyzes the data, and if it is sufficient, a determination as to whether or not discrimination occurred may be issued without an on-site investigation.

VI. THE ON-SITE INVESTIGATION

The EO Officer conducts the complaint investigation at the site of the alleged violation (*or other pre-determined location*) when:

- The issues are complicated or sensitive, or
- After reviewing the data collected, it is determined that several witnesses must be interviewed or many records reviewed, or
- The recipient's EO Officer has received several complaints against the same respondent.

⁴ VEC Mediation Program Guidelines



VII. PRIOR TO ON-SITE VISIT

The EO Officer should:

- contact the respondent to establish a date and time for the on-site investigation,
- contact the complainant to establish a date and time for the on-site investigation,
- identify a person responsible for coordinating the on-site investigation,
- identify records and other documents to be made available for review (*This should be regarded as an initial information request*), and
- contact identify individuals to be interviewed, to establish a date and time for the on-site investigation.

Note: Remember that as the investigation proceeds, the EO Officer may identify additional information requirements or interviewees.

VIII. ON-SITE INVESTIGATION

The EO Officer⁵ should:

- Once on-site, and before meeting with the respondent, the EO Officer (or *designated representative*) meets with the complainant to review the complaint and to obtain any additional information not contained in the complaint or case file.
- The opening conference is held at the respondent's facility (or *other pre-determined location*), the EO Officer meets with the respondent and/or respondent's representatives to:
 - Describe the complaint being investigated, including the specific allegation(s) and issue(s) under investigation and the recipient's authority to investigate them
 - Confirm arrangements made by the respondent to assure the EO Officer privacy, including setting aside a private area for the EO Officer to conduct interviews and review documents
 - Confirm the interview schedule of individuals named in the complaint, as well as other witnesses
 - Schedule other meetings, such as the orientation meeting for information collection and the exit interview.

Note: Normally, the EO Officer does not discuss the merits of the complaint during the opening conference.

⁵ EO Officer or designated representative



XI. GATHERING EVIDENCE

In an on-site investigation, the EO Officer gathers evidence by interviewing and by reviewing records. Initially, the EO Officer interviews the official(s) representing the respondent and the person(s) named in the complaint. Information obtained includes:

- the respondent's account of the facts,
- additional persons the respondent wishes interviewed and the matters on which each witness can be expected to provide information, and
- documentation the respondent wishes reviewed.

The EO Officer also interviews witnesses, all individuals named either by the complainant or the respondent as witnesses. As the investigation progresses, the EO Officer may identify additional individuals who should be interviewed. In addition to conducting interviews, the EO Officer gathers information by reviewing records and other documents, beginning with those initially requested. As the investigation progresses, the EO Officer may require additional records.

Note: When the records required are voluminous or complex, the EO Officer may hold a meeting with the staff responsible for keeping records to:

- acquaint the EO Officer with the respondent's information system
- acquaint the respondent with the EO Officer's information needs, and
- assign specific document or information requests to the appropriate person.

X. THE TYPES OF EVIDENCE

In general, evidence falls into four categories:

Direct evidence – is evidence of the actual, subjective intent of the person(s) charged with discrimination. It may take the form of an admission of discriminatory purpose, although this will rarely occur. You will most often find such an admission during an interview, when a person is explaining or justifying his or her actions. Direct evidence encompasses more than admissions; it also includes any facts tending to establish the subjective motives of persons involved in the alleged discrimination.

Circumstantial evidence – includes facts from which one may infer intent or discriminatory motive. Circumstantial evidence proves intent by using objectively observable data. It does not, however, prove anything directly about actual subjective intent. For example, historical information on how members of the protected group, have been treated by the respondent and similar complaints.



Comparative evidence – is that which identifies difference(s) in treatment accorded similarly situated individuals based on their race, sex, or their protected basis. For example, this might involve comparing the quality and quantity of services provided a group of the same race with services a group of a different race. If there is no adequate non-racial explanation for the differences, it is reasonable to infer that race may be a factor.

Statistical evidence – is most often used to demonstrate the adverse effect of a procedure, policy, rule, or selection criteria. The evidence will have to show that a substantial disparate impact exists, and that it is not due to change. Such evidence may include EO data reports and monitoring reports.

XI. THE EXIT CONFERENCE

When the on-site investigation has been completed, the EO Officer may hold an exit conference with the respondent to clarify information obtained during the on-site investigating, and to request additional information. The EO Officer expresses no opinions about information collected during the on-site investigation and makes no analysis or conclusions about the issues.

XII. ADMINISTRATIVE CLOSURES

Pre-investigative administrative closures occur prior to the initiation of the investigation. A pre-determination administrative closure is one, which occurs between the initiation of an investigation and before an investigative report is drafted.

Investigations may not be administratively closed if they imply or involve class issues, which have not been corrected for all members of the class. Investigations that are not class involved may be administratively closed if one or more of the following conditions exists:

- The complainant refuses to cooperate in the investigation;
- The complainant cannot be located;
- The complainant is deceased;
- The complainant withdraws the complaint in writing; or
- The complaint was fully resolved through mediation or conciliation.

If the complainant can be located, notify him or her in writing that the complaint is being administratively closed and explain the reason for the decision. The closure letter should also advise the complainant of the right to file a complaint with CRC within 30-calendar days of receipt of the letter of closure.



XIII. ANALYSIS OF EVIDENCE

Disparate treatment – To determine if it is reasonable to believe that discrimination based on disparate treatment occurred; a three-phase analytical process will be used. This process is as follows:

- **Phase 1: Prima facie**

This phase is a determination as to whether there is sufficient evidence to raise an inference of discrimination. An inference does not prove discrimination. Rather, it allows you to go on to the next analytical step(s) determining whether the inference is correct.

An inference of discrimination based on disparate treatment can be established when an eligible/qualified **individual** shows that he or she was treated differently because of a prohibited factor.

In the case of **systemic** or pattern-or-practice discrimination, an inference of discrimination may be established by showing that individuals or groups are treated differently based on race, sex, or some other prohibited factor.

The elements of a prima facie case may vary depending on the facts of the complaint, but such elements often include the following:

- The aggrieved person was a member of a protected class;
- This person applied for and was eligible for a federally assisted program or applied and was qualified for employment;
- Was denied services or employment despite being eligible/qualified; and
- After this denial, the respondent selected applicants for services or provided employment to persons not in the complainant's group with similar eligibility or qualifications.

- **Phase II: Rebuttal**

The second phase is the respondent's opportunity to defend itself. If there is sufficient evidence to establish a prima facie case, the investigator must determine if the respondent can articulate a "legitimate, nondiscriminatory reason" for the challenged action. For example, in a case of individual discrimination, the respondent might explain that the complainant was not as qualified as the applicant selected for employment or that the complainant applied for training at a time when there were no vacancies.



In the case of systemic discrimination based on disparate treatment, the respondent might explain the low placement of women in auto mechanics by showing that the women who applied were not as qualified as the male applicants.

- **Phase III: Pretext**

Once the respondent has articulated a reason for the disparate treatment, the investigator must examine the respondent's reasons and evidence relevant to the complaint. Where facts are in dispute, the investigator should attempt to corroborate the facts independently. If the respondent's defense is not based on a legitimate requirement, the investigator may show that the rebuttal evidence presented by the respondent was a "**pretext**" for discrimination. Types of evidence that may be helpful in proving pretext are:

- The respondent failed to follow its own rules, policies, and procedures;
- The respondent acted inconsistently with its own stated legitimate nondiscriminatory reason;
- Evidence obtained in the investigation contradicts the nondiscriminatory reason; or
- The reason offered now was not offered to support the challenged decision at the time it occurred, suggesting the reason was offered as an afterthought.

Disparate Impact – the model for proving discrimination based on disparate impact is different from the disparate treatment model because the underlying theory is different. Rather than seeking to prove that the recipient had a discriminatory motive, you are seeking to prove that a policy, requirement or practice has a disproportionate effect on a particular group or groups. Indications of disparate impact are most likely to arise in the context of a compliance review.

- **Phase I: Determining Adverse Impact**

The investigator will need to develop evidence that can be tested for adverse impact by making a comparison of the effects of the policy, requirement, or practice in question on members of the complainant's protected class with persons not in the protected class. The evidence in an investigation of a case involving disparate impact will likely include both *statistical and comparative* evidence.

The first step is determining whether there is disproportionate representation of protected class members participating in the program in question. (For example, four percent of participants in a training program are female, while fifty percent of the applicants are female.) In this case, the investigator will want to look at the application process and other aspects of program administration to determine if there is evidence that a policy or practice is causing the disparity. If there is a statistically significant disparity between the representation of protected class members remaining after application of the challenged



policy or requirement when compared with the representation of persons not in the protected class, a prima facie case has been established.

- ***Phase II: Identifying the Cause of the Adverse Impact***

After determining that the numbers show significant differences, the next step is to determine what caused the disparities. The investigator must identify which policy, requirement or practice accounts for the adverse impact. This requires focus on the points in the decision making process where some applicants become participants and others do not. For example, identifying which requirements or practices have the result of screening out more women applicants than you would expect to be screened out, given the number of women applicants.

- ***Phase III: Business Necessity***

Identifying the requirements or practices that have the adverse impact does not prove disparate impact discrimination. A determination must be made as to whether the requirement that has the adverse impact is job related and necessary. For example, a requirement that a firefighter trainee weigh at least 150 pounds could disproportionately screen out women as a group (even if some women and men cannot).

In this scenario, the recipient would have to provide evidence that the weight requirement is necessary for a job related reason. For example, evidence that the weight test is an accurate predictor of a person's ability to handle firefighting equipment.

- ***Phase IV: Identifying alternative practice***

Even if the weight test accurately predicts success in firefighting, if it has an adverse impact, the recipient must first try to devise a standard that does not have adverse impact to determine whether an applicant can handle the equipment.

XIV. POST INVESTIGATION

Investigative Report

An investigative report is a written document that sets out in a detailed and logical fashion:

- all facts pertinent to the case,
- analyzes those facts in light of the complainant's allegations, and
- recommends a determination as to the validity of the allegations based on the analysis.



The following is a suggested format:

- Introduction
- Allegations
- Analysis
- Conclusions
- Recommendations

The investigative report should be a document separate from the formal letter of findings. Generally, the investigative report is not released to the complainant or the recipient except in the case of a Freedom of Information Act request or Privacy Act request.

Ideally, an investigative report should be prepared whenever a full investigation is completed. If an investigative report is not done in every case, it should be prepared for complex cases that involve extensive analysis. An investigative report should also be prepared for **all** cases resulting in a violation.

If the case is straightforward, raises only limited issues, does not involve significant rebuttal by either party, and results in a no violation finding, an investigative report may not be necessary.

Report or Letter of findings

The purpose of the report or letter of findings is to notify the parties in writing of the determination made on each issue. Letters of findings must be prepared for all investigations, regardless of whether a violation is found. A written notice of final action must be sent within 90-calendar days after the filing date of the complaint. Complainants must be notified of their right to file a complaint with CRC if he or she believes the determination is unsatisfactory.

Each report or letter of findings must:

- State the jurisdictional authority including the basis for the investigation;
- Address all issues covered in the investigation, and for each issue reach conclusions which are supported by an explanation or analysis; and
- State the determination for each issue investigated.

