

disability, religion, and political affiliation or belief. Additionally, Section 188 prohibits discrimination against beneficiaries on the basis of participation in a program or activity that is financially assisted under Title I of WIA, and against certain non-citizen beneficiaries who are lawfully admitted to and authorized to work in the United States, on the basis of citizenship.

DOL published an Interim Final Rule (IFR) to implement WIA Section 188 on November 12, 1999, entitled "Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Investment Act of 1998," 64 FR 61692, codified at 29 CFR part 37. That IFR, which generally carried over the nondiscrimination- and equal opportunity-related policies and procedures in place under JTPA, remains in effect. Because Congress is scheduled to reauthorize WIA, DOL has elected to wait until that reauthorization is completed before publishing a final rule to implement the nondiscrimination and equal opportunity provisions of WIA.

However, it has come to DOL's attention that some of the regulatory restrictions that were in place under JTPA are no longer required under WIA. For this reason, and to permit recipients of DOL financial assistance more choice and greater freedom while obtaining essential employment and training skills, the Department seeks to amend the WIA nondiscrimination IFR. The specific restrictions that are the subject of this NPRM are no longer necessary because the way in which financial assistance for training activities was provided under JTPA was different, in some instances, from the way in which such assistance is provided under WIA. The WIA nondiscrimination IFR bars the use of all types of WIA Title I financial assistance to employ or train participants in religious activities. This broad prohibition is inconsistent with current law, which permits the use of such financial assistance to provide religious training in cases in which participants are given a genuine and independent private choice among training providers, and freely elect to receive training in religious activities, provided the training offered otherwise satisfies the requirements of the program. As a result, the Department believes that 29 CFR part 37 should be amended.

In addition, the regulations promulgated by the Employment and Training Administration (ETA) and codified at 20 CFR part 667, which implement the general provisions of WIA, refer to the provision in 29 CFR

part 37 that restricts the use of WIA financial assistance for training in religious activities. Accordingly, ETA's regulations should be revised as well, to conform to the amended language of part 37.

The current language of the regulatory provisions mentioned above may preclude religious organizations that are eligible training providers from receiving indirect Federal financial assistance in exchange for providing religious training, even in those situations in which participants exercise true private choice in selecting the training providers. The current regulatory language may also preclude participants from using WIA financial assistance for religious training in a manner consistent with Federal law. Therefore, the Department is proposing to amend the provisions at issue. *Cf.* Executive Order 13279, 67 FR 77139, 77141 (December 16, 2002) ("Equal Protection of the Laws for Faith-Based and Community Organizations").

The NPRM would not change the underlying requirements for WIA financially assisted training. For example, participants must qualify as eligible for training, and training services must demonstrate certain linkages to occupations in demand. *See* WIA sec. 134(d)(4).

The Secretary of Labor has rulemaking authority for the parts of the Code of Federal Regulations that would be amended by this proposed rule. The remaining sections of this preamble will explain the reasoning underlying the proposed amendments.

The Department seeks comments on all issues concerning the proposed amendments to 29 CFR part 37 and the concurrent proposed revisions to 20 CFR 667. The Department is interested in comments from current and potential recipients of WIA title I financial assistance as to the effect of participating in the program as permitted in the revised paragraph 37.6(f)(2) on their programs and operations in light of the existing rules and regulations imposed on recipients in 29 CFR Part 37 including paragraph 37.6(c).

## II. Overview of the Proposed Amendments

### 29 CFR Part 37

#### Proposed Paragraph 37.6(f)(1)

The existing language of paragraph 37.6(f)(1) bars recipients from permitting participants "to be employed or trained in sectarian activities." The provision was not based on any specific statutory authority conferred by WIA or JTPA; rather, as discussed in more detail

below, it was a regulatory provision promulgated under JTPA because of the manner in which financial assistance was provided under that program. Because some of the methods used to provide financial assistance under WIA are different from those used under JTPA, the proposal would revise paragraph 37.6(f)(1) to allow for more flexibility based on those differences.

Under JTPA, training institutions received financial assistance, channeled to training providers through State or local governments or private industry councils. The providers that participated under JTPA were selected pursuant to the job training plan established by each service delivery area. Pub. L. 97-300, §§ 104(b)(5), 107(a), (d), 96 Stat. 1322, 1331, 1355-56 (1982). Nothing in the language of JTPA indicates that beneficiaries or participants were provided any opportunity to choose which training providers would receive financial assistance, and the Department did not administer JTPA in a way that allowed participants to exercise true private choice in selecting training providers. *See* Pub. L. No. 97-300, *passim*.

Therefore, consistent with constitutional requirements that in certain circumstances restrict direct Federal financial assistance for inherently religious activities in the absence of true private choice, *see, e.g., Bowen v. Kendrick*, 487 U.S. 589, 611-12 (1988); *Mitchell v. Helms*, 530 U.S. 793, 815-16 (2002) (plurality opinion); *Zelman v. Simmons-Harris*, 536 U.S. 639, 649-55 (2002), the prohibition on the use of JTPA financial assistance for "employment or training in sectarian activities" was codified in the JTPA regulations promulgated by ETA, in a specific provision that stated that "the employment or training of participants in sectarian activities is prohibited." 59 FR 45760, 45822, § 627.210(b) (September 2, 1994) (final rule).

Under WIA, there are grant programs for which the financial assistance is provided directly to certain programs or activities, as under JTPA. However, much of the financial assistance available under WIA for training of individual beneficiaries is provided as a result of beneficiaries' genuine and independent private choice. The constitutional restrictions on the use of Federal financial assistance to support training in religious activities do not apply where the assistance is provided to religious organizations as a result of such genuine and independent private choices, provided the training otherwise satisfies the requirements of the program. *See Zelman v. Simmons-Harris*, 536 U.S. at 652; *see also Witters*