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**AGC of America**  
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA  
**Quality People. Quality Projects.**



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VIA ELECTRONIC SUBMISSION: <http://www.regulations.gov>

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

**Re: Notice of Proposed Rulemaking Pertaining to Apprenticeship Programs; Equal Employment Opportunity (RIN 1205-AB59)**

Dear Ms. Gagliardi:

On behalf of the Associated General Contractors of America (hereinafter "AGC"), thank you for the opportunity to submit the following comments on the U.S. Department of Labor's Notice of Proposed Rulemaking (NPRM) to update the equal opportunity regulations that implement the National Apprenticeship Act of 1937. The NPRM is soliciting public input to the Employment and Training Administration on apprenticeship programs and equal employment opportunity that was published in the Federal Register on November 6, 2015.

AGC is the leading association for the non-residential construction industry, representing more than 25,000 firms, including over 6,500 of America's leading general contractors and over 8,800 specialty contracting firms. In addition, more than 10,400 service providers and suppliers are associated with AGC through a nationwide network of chapters. These firms, both union and open shop, engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property. Most are small and closely held businesses.

AGC members and chapters administer and/or partner with numerous apprenticeship programs around the country and provide training across all trades involved in the construction industry. Many groups sponsor open shop training programs in some regions of the country and union apprenticeship programs in others. The NPRM will impact all training programs regardless of their affiliation with organized union labor groups.

If implemented as proposed, AGC believes the NPRM will increase paperwork and staff time in order for program sponsors to remain compliant. Should the agency decide to move forward with the implementation of a final rule, based on the sections provided in the NPRM, AGC would like to make the following recommendations.

### § 30.3 Equal Opportunity Standards Applicable to All Sponsors

Currently, program sponsors have a general duty in operating their Registered Apprenticeship program to engage in affirmative steps to ensure equal opportunity. There are no specific requirements for sponsors, only suggestions. However, the proposed rule creates specific steps that sponsors must undertake to ensure equal opportunity. If implemented, AGC recommends that the agency:

- **Eliminate the requirement of program sponsors to conduct training and orientation for journeyworkers who supervise apprentices.** Requiring apprenticeship program sponsors to provide training orientation to journeyworkers would result in additional costs and be logistically problematic. Any workforce training should be conducted by an individual's employer along with other EEO training, not the apprenticeship program sponsor.
- **Change the language in the rule so that plan sponsors will not be held accountable if recruitment and referral sources do not refer qualified applicants.** A plan sponsor can only make a good faith effort to recruit applicants from all demographic groups and as a result cannot control the number or quality of referrals from referral partners. Therefore, AGC recommends that language in the final rule be changed from "sources that *will* generate referrals" to "sources *likely* to generate referrals."
- **Eliminate the requirement to provide advance notice of openings thirty (30) days in advance.** In construction, employers are penalized when projects are not completed according to the expected timeline of the contract. This is largely because the owner of the project incurs additional costs when projects are not completed on time. As a result, when an opening occurs in an apprenticeship program, it may not always be feasible for a plan sponsor to provide referral sources with an advanced notice of 30 days, particularly when new openings occur as a result of a new project or when someone suddenly discontinues participation in the program.
- **Maintain the provision that permits plan sponsors with fewer than five (5) apprentices or those that are already subjected to an approved EEO program to be exempted from the written Affirmative Action Plan and selection requirements that exist in the current and proposed rules.** For the sake of small construction employers, it is imperative that this exemption remain in place.
- **Clarify how penalties will be assessed in the event of non-compliance.** The proposed rule requires that an Equal Employment Office be designated and held "responsible" and "accountable" for overseeing equal opportunity and developing and implementing an Affirmative Action Plan, among other responsibilities. The term "accountable" suggests that there will be a penalty for non-compliance. AGC questions whether a penalty would be assessed only against the entity or if the individual EEO officer would be subject to any such penalty.

### § 30.4 Affirmative Action Programs

- **Replace the phrase "Affirmative Action Plan" throughout the final rule with the phrase "Equal Opportunity Program."** The phrase "Affirmative Action Plan" seems contrary to the entire policy being "goals" and "objectives" versus mandates. The term "Equal Opportunity Program" used elsewhere in the NPRM is a preferable term.

### § 30.5 Utilization Analysis for Race, Sex and Ethnicity/§ 30.6 Establishment of Utilization Goals for Race, Sex, and Ethnicity

- **The term "labor market" should recognize the unique nature of the construction industry.** In the construction industry a market may be different than is typically associated with other industries.

- **The data used to generate the “labor market” and its parameters shall consider the unique aspects of the construction industry.** The skill-set between the trades varies significantly so a “construction” labor market would set an accurate percentage based on each trade’s requirements.

### § 30.7 Utilization Goals for Individuals with Disabilities

- **Eliminate the requirement to set a utilization goal of 7 percent for employment of qualified individuals with disabilities as apprentices.** AGC has historically identified concerns with utilization goals for individuals with disabilities. The construction industry is a unique industry that is filled with safety-sensitive jobs that are very physical in nature. Because of this, the decision to accept an apprentice should be made on a case-by-case basis based on the individual’s ability to perform the essential functions of a particular job safely, with or without a reasonable accommodation.
- **Eliminate the requirement for program sponsors to provide an invitation to self-identify as an individual with a disability both pre- and post-acceptance.** Laws that involve individuals with disabilities are very complex and from a legal perspective, this issue provides some of the greatest concern for program sponsors who aren’t sure what questions can and cannot be asked of those who self-identify or whether an accommodation should be offered.
- **Safety is a major component of construction work, resulting in fewer qualified individuals with disabilities in construction.** A sponsor has the obligation to protect both its workers and the public while working on construction projects. As a result of the physical tasks required, dangers presented, and safety regulations that must be followed in many construction craft positions, many disabled individuals are not qualified to perform the essential functions of the job with or without a reasonable accommodation. This results in fewer qualified individuals with disabilities in construction.
- **The agency should not treat the goals as quotas.** Historically, goals are often misunderstood by the industry to be quotas, leaving sponsors to feel the need to meet such data requirements by hiring individuals with disabilities who may not be as qualified as other applicants in order to meet the goal. Pushing sponsors to meet a utilization goal for hiring individuals with disabilities may have adverse consequences and may put too much pressure on applicants to feel they must disclose a disability that they would prefer to remain private.

### § 30.8 Targeted Outreach, Recruitment, and Retention

- **Add military affiliated groups as a source that may be pursued for outreach and recruitment.**
- **Recognize and accept additional activities for recruitment and recognize the most successful methods currently in use.** Some sponsors depend on applicants outside of the four specific activities. During economic downturns many sponsors depend on “word-of-mouth” as recruitment because there are few job opportunities and sponsors are not actively recruiting. This is not an issue today as the industry is expanding, but could again become a challenge in the future. These requirements could also have an impact on small sponsors that don’t currently have the resources to comply.

### § 30.9 Review of Personnel Processes

- **Eliminate the requirement for program sponsors to review personnel processes annually, and instead, require reviews as needed or no less than every three years.**

- **Clarify how penalties will be assessed in the event of non-compliance.** The proposed rule requires that an Equal Employment Office be designated and held “responsible” and “accountable” for overseeing equal opportunity and developing and implementing an Affirmative Action Plan, among other responsibilities. The term “accountable” suggests that there will be a penalty for non-compliance. AGC questions whether a penalty would be assessed only against the entity or if the individual EEO officer would be subject to any such penalty. An “as needed” review of personnel procedures will match the review requirements as enforced by the Office of Federal Contract Compliance Programs.

### § 30.10 Selection of Apprentices

- **Provide clarification and/or additional guidance regarding the methods used to select apprentices for program participation.** Currently sponsors have four methods of selecting apprentices. The NPRM changes the qualifications that a sponsor can use to select apprentices. Offering additional flexibility by allowing any method that follows the Uniform Guidelines on Employee Selection Procedures (UGESP) and the Americans with Disabilities Act is appreciated, but clear guidance is still needed. The UGESP is overly complicated and lacks guidance on how it can be used.

### § 30.11 Invitation to Self-Identify as an Individual with a Disability—(a) Pre-offer

- **Eliminate the requirement for program sponsors to provide an invitation to self-identify as an individual with a disability pre-acceptance.** Laws that involve individuals with disabilities are very complex and from a legal perspective, this issue provides some of the greatest concern for program sponsors who aren’t sure what questions can and cannot be asked of those who self-identify or whether an accommodation should be offered.
- **Self-identifying information is unreliable.** If applicants choose not to self-identify, the data may become unreliable because it would be provided inconsistently and therefore may erroneously look like non-compliance.
- **Requirement to obtain disability status pre-offer is contradictory to the cause for which it is being required.** For example, how can a person’s status as an individual with a disability be used for affirmative action purposes if it cannot be used by hiring managers in the decision-making process? Also how is the hiring manager supposed to determine which of the qualified applicants has the disability for affirmative action purposes? If an individual who has self-identified as having a disability has been denied a position, how is the hiring manager to know which applicant requires a consideration for a reasonable accommodation?

### § 30.12 Recordkeeping

- **Further reduce the number of years required to retain documents from three years to two years.** The NPRM decreases the time from five to three years to keep documents. A reduction to three years is a movement in the right direction. However, it would be more helpful if the proposed rule specified the type of records to be retained. Joint apprenticeship programs will need to develop safeguards, if they do not already exist, to protect the confidentiality of any medical records it obtains. Also, most labor laws require retaining these types of records for only two years.

### § 30.15 Enforcement Actions

- **New data being collected should not be the sole determining factor in enforcement.** The new data collected could be flawed as highlighted earlier.
- **Enforcement should take good faith efforts into consideration in cases of non-compliance.** Enforcement should be similar to outreach requirements for women and minorities where a program must only show a good faith effort.

### Cost of Compliance

AGC believes the cost estimate of the cost to comply is grossly underestimated. Complying with these proposed requirements will have a large impact on the administrative costs of the plan sponsors.

- **Cost to states to comply.** There will also be additional costs levied on the states and will take valuable resources from the states as they try and comply.
- **Eliminate the requirement of program sponsors to conduct training and orientation for journeyworkers who supervise apprentices.** As mentioned earlier, requiring apprenticeship program sponsors to provide training orientation to journeyworkers would result in additional costs and be logistically problematic. Any workforce training should be conducted by an individual's employer along with other EEO training, not the apprenticeship program sponsor.

### Conclusion

AGC appreciates the DOL's efforts for equal opportunity employment, but AGC believes that the proposed rule would fail to meet those objectives. AGC recommends that the Employment and Training Administration make hiring applicants easier for sponsors in order to help alleviate the workforce shortage, not make hiring more difficult, costly and burdensome.

Sincerely,



Jeffrey D. Shoaf  
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Government Affairs