

# NELP

ADVOCATING for the working poor and the unemployed

**National  
Employment  
Law  
Project**

June 30, 2003

Annabelle T. Lockhart, Director,  
Civil Rights Center  
U.S. Department of Labor  
200 Constitution Ave., NW, Room N-4123  
Washington DC 20210

Via Telefax to 202 693-6505, e-mail to [civilrightscenter@dol.gov](mailto:civilrightscenter@dol.gov).

Re: Comments on Civil Rights Centers' Policy Guidance to Federal Financial Assistance Recipients Regarding the Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 32290 (May 29, 2003)

Dear Ms. Lockhart:

The National Employment Law Project (NELP), the National Immigration Law Center (NILC) and the New York Immigration Coalition submit these comments in response to the Department of Labor's (DOL) request for public comment on the Title VI's prohibition against national origin discrimination as it affects limited English proficient (LEP) persons.

NELP is a non-profit organization advocating for the rights of low-wage workers, immigrant workers and the unemployed. We have been advocating for the Title VI rights of low-wage immigrant workers under Department of Labor programs for at least fifteen years, and provide advice and support to state groups seeking to expand access to DOL programs and services for those immigrant workers who are not yet proficient in English. We have provided extensive comments to the Department of Labor and the Office of Management and Budget and to the Department of Labor, which we incorporate here.

NILC is a non-profit national legal advocacy organization whose sole mission is to protect and promote the rights and opportunities of low-income immigrants and their family members by specializing in the intersection of immigration law and the employment and public benefit rights of low-income immigrants. We provide policy analysis and advocacy on these issues as well as litigation support, training, publications, and technical

assistance to immigrant rights coalitions and community groups as well as national advocacy groups, policymakers, attorneys, worker advocates, unions, government agency staff, and the media.

The New York Immigration Coalition (NYIC) is an umbrella policy and advocacy Organization of approximately 150 groups serving New York's diverse newcomer population, one of the largest in the United States. Created in 1987 in response to the Immigration Reform and Control Act of 1986, it is a powerful and highly regarded advocacy voice for immigrants and refugee communities. NYIC has long advocated for New York's LEP residents in access to government benefits, health care, and education.

We applaud the Department of Labor's release of its Guidance, which will increase access to vital programs on which immigrant workers rely on a daily basis. We provide these comments in order to promote the Guidance's consistency with the model Guidance issued by the Department of Justice, published at 67 Fed. Reg. 41455 (June 18, 2002) and to ensure its utility to both recipients of federal funds and to immigrant workers.

Over twenty two million residents of the United States speak English less than "very well." One in four low-wage workers in the United States is an immigrant. These immigrant workers are concentrated in low-wage and/or dangerous occupations such as agriculture (including poultry processing and forestry), domestic service, food processing services, hotel and restaurant employment, manufacturing, and construction and other building trades and transportation services. Seventy-five percent of US agricultural workers are immigrant workers. Half of the 800,000 garment workers in the United States are immigrants. And although the foreign-born constitute 10% of our nation's population, they constitute 12.8% of our workforce. Despite their higher rates of workforce participation, immigrants are more likely to be poor than are non-immigrant workers. As of March 2000, the poverty rate for immigrants and their U.S. born children was 18.3%, compared to 10.7% for the native-born population. These vulnerable low-wage workers need the protections and services provided by DOL.

Every day, thousands of immigrant workers turn to state and federally funded labor agencies to access critical wage and hour enforcement programs, health and safety protections, job training, unemployment insurance benefits and workers' compensation benefits. Every day, they are denied access to these programs because services are provided in "English only." Because DOL-funded programs are vital to the economic and health and safety needs of immigrant and LEP workers, it is critical that DOL programs serve this population. A national, bipartisan task force recently concluded that how we respond as a nation to the large and growing presence of immigrants in the U.S. and their critical role in meeting our workforce needs will be key for determining both our future economic growth and how well prosperity is shared among workers.<sup>1</sup>

The DOJ model Guidance sets out a four-factor test for determining the extent of a recipient's responsibility to provide language assistance. The third of the four factors is the nature and importance of the program, activity or service provided by the program. As the DOJ Guidance explains, "The more important the activity, information, service, or

program, or the greater the possible consequences of the contact to LEP individuals, the more likely language services are needed.” 67 Fed. Reg. 41460. Many of the programs operated and/or funded by DOL involve either worker safety, (including OSHA and Mine Safety programs and automobile safety under the Migrant and Seasonal Agricultural Worker Protection Act, as well as worker compensation laws), or basic family income (such as Wage and Hour, unemployment insurance, job training programs and state worker compensation). These programs are of such a high level of importance that recipients should have the highest level of responsibility to provide language assistance. For these reasons, DOL should not retreat from its former Guidance.

Nonetheless, the Guidance retreats in a number of ways from the Guidance first published by the Department of Labor in January of 2001, at 66 Fed. Reg. 4595. These areas include deletion of much clearer, stronger language on the preference for use of bilingual staff, that formal arrangements with community volunteers must be made, that training must be provided to community volunteers, that telephone interpretation services are appropriate only where other options are unavailable and that recipients must ensure competency of interpreters. Additionally, that earlier Guidance indicated that DOL’s MOA regulations require a written LEP plan, but that section has been relegated to a footnote in this Guidance. We urge you to restore the protections that were clearly stated in that earlier version. The substitution in many instances of “should” for the many instances in which the former Guidance uses “must” can only result in fewer services to LEP individuals and confusion for recipients.

The use of examples in the Guidance is appreciated in that it can create specific direction to the recipient and clear examples to LEP individuals and their communities. However, we found that a number of the examples were not sufficiently clear or did not appear to be in compliance with the guidelines expressed in the Guidance itself or in the DOJ Guidance that is to serve as a model. These are noted in the specific comments that follow.

#### **Lack of “safe harbor” language, 68 Fed. Reg. at 32290-91.**

DOL has omitted “safe harbor” provisions that provide a common starting point for measuring compliance with the written translation provisions. The Department of Justice standard is that vital documents are translated into the languages of each eligible LEP language group that constitutes 5% or 1,000 (whichever is less) of the population eligible to be served or likely to be affected. If there are fewer than 50 persons in a group that reaches the 5% trigger, the standard is that a written notice in the primary language of the LEP person will be provided notifying them of the right to receive oral interpretation at no cost. DOL should include safeguards so that recipients of federal funds have a clear guideline, and because the omission of “safe harbor” provisions puts DOL out of step with other federal agencies interpreting the very same provisions of Title VI. Moreover, DOL’s initial Guidance included “safe harbor” provisions. These should be retained.

In addition, DOL inserts a section explaining that “safe harbor” provisions do not apply where oral language assistance is “needed” and is “reasonable.” DOL also indicates only that oral interpretation should “generally” be offered “free of cost.” Oral language

assistance must be provided without cost to all groups at all times in a way that does not burden LEP individuals, not just where it is “reasonable.” We urge DOL to clarify this.

### **Introduction: Who is considered “LEP?” 68 Fed. Reg. 32291.**

At times, DOL's Guidance seems to indicate that it considers LEP individuals to include only those who are counted in the Census as speaking English “not well” or “not at all.” . Because many government documents require a high reading level, and the penalties for inaccurate information can be so severe in the DOL programs, individuals who identify themselves to the Census as speaking English ‘well’ may still require language assistance in order to have meaningful access to DOL programs. 68 Fed. Reg. at 32291.

### **Who is Covered? 68 Fed. Reg. 32293.**

The examples in this introductory section are too narrow a range of programs and may mislead some recipients into thinking they need to read no further. DOL's examples should clearly state that workers' compensation systems that receive federal financial assistance from DOL are covered by its Guidance. No example refers to these programs, which are crucial to immigrant workers and in which the level of compliance with Title VI is exceedingly low. The examples should also include occupational safety and health programs, wage-hour enforcement activities, and other programs likely to have contact with LEP and immigrant workers.

### **How does a Recipient Determine the Extent of Its Obligation to Provide LEP Services? 68 Fed. Reg. 32293.**

We appreciate the many references to community agencies, including faith-based organizations and legal aid entities as resources that can help identify LEP communities. These organizations can often supply a wealth of knowledge to agencies committed to serving LEP individuals.

### **Creation of LEP/Job Training Programs.**

Footnote 8 indicates that recipients would NEVER be required to create a new job training program to serve LEP individuals while teaching English. We strongly urge you to strike this statement. Many states have failed to serve LEP individuals in their job training programs because they do not offer bilingual training or may only offer English as a Second Language (ESL) classes. Evaluations of numerous welfare-to-work programs have consistently shown that a “mixed strategy” – one that provides education and training as part of a program whose central focus is employment – have been the most effective in increasing employment and earnings, reducing welfare receipt, and sustaining that success over time.<sup>ii</sup> In fact, programs that integrated language acquisition and job training also performed better than programs that primarily provided basic education, such as “stand-alone” academically-oriented ESL classes.<sup>iii</sup>

## **Selecting Language Assistance Services. 68 Fed. Reg. 32295.**

**Oral Language Services (Interpretation)** DOL's Guidance should be clear that there are no "safe harbors" for oral language services and that oral interpretation should be available to LEP individuals free of charge and during all hours of operation.

**Competency to Interpret.** The use of competent professional interpreters or trained bilingual staff should be REQUIRED, rather than "strongly encouraged" in administrative hearings. 68 Fed. Reg. 32296. In languages and jurisdictions where formal accreditation or certification exists, interpreters should be required to have certification. The Guidance rightly points out the quality and accuracy of language services in a UI appeals hearing or safety and health training must be "extraordinarily high." The best way to ensure that it is high is to employ competent, and where available, certified interpreters. Administrative hearings for DOL recipients can be a matter of hunger and health risk to a working family, since they affect vital issues such as wages owed, UI to be received, and health and safety violations in the workplace.

**Use of Community Volunteers.** DOL's former Guidance was very clear that recipients must ensure that community volunteers are under contract with the recipient, that they are competent, that they are available during all hours of service, and that they are appropriately trained. 66 Fed. Reg. 4602. That section is significantly diluted in the present Guidance.

The lack of a formal agreement hinders the recipient's ability to assess interpreter competency, and burdens community organizations. It is not unusual for community organizations to be contacted, without prior arrangement, and asked to interpret without compensation. Such requests pressure community organizations to stretch their scarce resources to help important agencies or fellow immigrants, to the detriment of the charitable missions for which they are funded. In addition, such ad hoc requests prevent the recipient's assessment of interpreter competence. It would be inappropriate for a recipient to simply rely on the use of community volunteers without the safeguards included in the prior Guidance. They should be restored.

**Use of family and friends.** The Department of Justice Guidance contains stronger preamble language on reliance on informal interpreters. 67 Fed. Reg. 41456. DOL's former Guidance was clear that a recipient who requires, suggests, or encourages use of family and friends as interpreters may expose itself to liability. 66 Fed. Reg. 4602. These provisions should be restored. Its Guidance should be clear that reliance on informal interpreters should not be part of any recipient's LEP plans. Where an LEP individual expresses a wish to provide his or her own interpreter, it is vital to ensure that the LEP person's choice of interpreter is made freely and with full information, including an awareness that an interpreter will be provided free of cost. In such cases, recipients should be required to document that the LEP individual was offered an interpreter. The use of informal interpreters should be permitted only in contexts where the accuracy, effectiveness of services or confidentiality of the interpretation is not compromised and the individual affirmatively states that he or she wishes to provide an interpreter. Whether or not LEP individuals choose to provide their own interpreters, a recipient should be

required to provide its own interpreter to verify the accuracy of the interpretation in hearings and in other contexts where the individual's rights depend on precise, complete and accurate translations.

**Children.** Children are also listed as potential interpreters. DOL should more actively discourage the use of children as interpreters. Children should be permitted to interpret only in extremely limited circumstances that do not give rise to concerns about confidentiality, accuracy and inappropriate subject matter. For example, where no other bilingual person is available, a child could interpret to advise a family member that the recipient was contacting an interpreter service. Children often lack the maturity to understand the information they are called upon to translate, as well as the vocabulary and skills necessary to provide accurate translations. Parental reliance on children as translators undermines parental authority and disrupts family dynamics. Researchers have found that children often influence the content of information they are called to interpret, acting, in effect, as decision makers for their families. The responsibility of interpreting is burdensome for children, who report feeling embarrassed, frustrated, resentful and ill equipped to deal with the added responsibilities of interpreting.

### **Written Language Services (Translation)**

DOL's former Guidance provides that: An effective language assistance program ensures that written materials that are routinely provided in English to applicants, clients and the public are available in regularly encountered languages other than English. 66 Fed. Reg 4602. Its current Guidance should be as clear.

**What are "vital documents?"** Any document that provides essential information about a service or program or that acts as a gateway to service or program access must be translated to provide meaningful access. Accordingly, applications for benefits (such as UI, Trade Adjustment Act, and job training, workers' compensation), complaint forms (such as for wage and hour or health and safety violations), and information regarding employees' rights under the various statutes enforced by DOL regarding are vital documents requiring translation. Additionally, determinations on these benefits or claims are equally vital to workers' access to programs administered by DOL or its recipients. The Guidance says they "could be considered" vital, and we urge you to clarify that these are indeed vital documents. 68 Fed. Reg. 32298.

### **Elements of an Effective Plan on Language Assistance for LEP Persons. 68 Fed. Reg. 32299.**

**Requirement of written plans.** The Department of Justice Guidance contains language in its Supplementary Information preamble indicating that written plans are the rule rather than the exception, and that it will look with disfavor on recipients (other than the smallest agency with the most limited resources), that have no written LEP language access plan. 67 Fed. Reg. 41455. DOL's former Guidance stated clearly that written plans on universal access to certain DOL programs are required by 29 CFR 37.54. Although that language appears in a footnote in the current Guidance, DOL should require recipients to develop and implement a written plan for language assistance.

As this DOL Guidance points out, written language plans demonstrate that a recipient has considered and applied the four factors. Written plans can be the basis of staff training, can be an effective reminder of process and necessary contacts, and form a basic document for budgeting. It is difficult to imagine how recipients can comply with Title VI without having developed a written plan.

Recipients should be required to review and update their plans annually. The annual review should address the recipient's progress in implementing the plan, the LEP population likely to be served by the recipient, and the availability of interpretation and translation resources in the recipient's community. Community representatives should be included in the design and review of recipients' plans.

The availability of written plans can assist DOL in determining recipients' compliance. As part of its technical assistance efforts, DOL could develop model plans for its recipients in several areas, including recipients that operate on a more or less national basis, such as the Wage and Hour Division, state unemployment insurance and one-stop agencies, and state workers' compensation agencies.

#### **Identifying LEP Individuals Who Need Language Assistance. 68 Fed. Reg. 32299.**

**Keeping logs of language requirements.** According to the Guidance, logging language requirements for applicants is something that "can be included as part of" the workers' record. Such logs should be at least strongly encouraged as evidence that the recipient is making an effort to provide services in that individual's primary language. 68 Fed. Reg. 32299.

**Adequacy of service offered by receptionists.** One example of providing meaningful services includes hiring a bilingual receptionist for a One-Stop program. 68 Fed. Reg. 32296. In order to adequately serve LEP individuals, programs need to do better than answer the phone in their language - they need to actually provide services to immigrants, including translations, oral interpretation, and services in their language.

**Training Staff.** The new Guidance suggests that staff "should be" trained, while the former Guidance contained more mandatory language. Given the complexities of the programs administered with DOL funds and the importance of these programs in the daily lives of immigrant workers, training of staff should be required in all cases in which programs have contact with LEP individuals. All staff in public contact positions should receive both initial and periodic refresher training on the recipients' plan. Staff training should address working with interpreters and culturally appropriate interactions with LEP persons, as well as policy and resource issues.

Training of staff is the only way to ensure that they know how to use interpreters, what services are available and what documents are translated into which languages.

**Providing Notice to LEP Persons.** The range of activities suggested as means for providing notice to LEP individuals has been expanded and improved from the former Guidance. We applaud DOL's efforts in this regard.

#### **Appendix – Application of LEP Guidance for Specific Types of DOL Recipients.**

**Receiving and Responding to Requests for Assistance.** The first full example of p. 32303 should delete the many references to the use of community volunteers, which should be discouraged in favor of use of bilingual staff or professional interpreters. DOL should not focus entirely on the use of volunteers to translate outreach materials without explaining that it is not appropriate to use community volunteers in a variety of other settings.

Secondly, this example does not make it clear that a menu of languages should only be considered appropriate if the menu is available without the listener having to pass through several steps in English before reaching the only language that s/he understands. The original Guidance cautioned against the special hazards created by use of telephone systems that provide instructions only in English. 67 Fed. Reg. 4601. DOL should require that instruction be provided in the languages spoken in the communities.

**Labor Exchange services.** Since many DOL recipients operate web-based services, it is important to note that these are subject to the same four-factor analysis as are other services, including the telephone and in-person services. The fourth example on p. 32303 should be rewritten as follows:

In this instance, the state translates key documents and forms on its website into the most significant languages, e.g., representing five percent or more of the total eligible population to be served, and has a language identification section with hyperlinks to language-appropriate information about its toll-free help line, which includes interpretation services, on the homepage of its website.

**Delivering UI Services.** The first example of appropriate services says that using tag lines for correspondence and notice to LEP individuals numbering from between 3,500 and 6,000 in the service area is inappropriate. 68 Fed. Reg. 32303. These numbers are far greater than would be allowed the use of a tag line under the "safe harbor" provisions promulgated by DOJ and in DOL's former Guidance. Under DOL's own Guidance, "vital" documents should be translated for this group. "Vital documents" include notices and letters. 68 Fed. Reg. 32298. This example should be rewritten to comply both with DOL and DOJ Guidance.

The same is true for the remaining examples in the UI system. The repeated reference to "tag lines" to be used on vital documents is inappropriate and contrary to the DOJ model "safe harbors" and to DOL's former "safe harbor" language.

In closing, we applaud DOL's dedication to ensuring that the civil rights of limited English speaking individuals are, at long last, respected. We agree with DOL that the key to

meaningful access for federally funded entities to undertake a systematic approach to language access and to ensure accurate, effective communication between the recipient and the LEP beneficiary.

We appreciate the opportunity to submit these comments. If we can be of further assistance, please contact Rebecca Smith at NELP at (360) 534-9160.

Sincerely,

Rebecca Smith  
Coordinator, Immigrant Workers' Rights Project  
National Employment Law Project

Tyler Moran  
National Immigration Law Center

Margie McHugh  
New York Immigration Coalition

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<sup>i</sup> Domestic Strategy Group. (2002). *Grow Faster Together. Or Grow Slowly Apart*. Washington, DC: Aspen Institute.

<sup>ii</sup> Judith M. Gueron and Gayle Hamilton, *The Role of Education and Training in Welfare Reform*. Welfare Reform and Beyond, Policy Brief #20. Washington, DC: The Brookings Institution, 2002. Available at [www.brookings.edu/wrb](http://www.brookings.edu/wrb).

<sup>iii</sup> For example, in the NEWWS evaluation, effects were smaller for the basic education-focused programs than for the employment-focused programs, with earnings gains in these programs ranging from about 4 to 13 percent (\$800 to \$2,000) and reductions in the time spent on welfare ranging from 4 to 14 percent.